

LAW TIMES REPORTS:

All The Cases Argued and Decided

IN ALL THE

COURTS OF LAW AND EQUITY, IN BANKRUPTCY, IN THE DIVORCE AND PROBATE
COURTS, IN THE ADMIRALTY COURT, AT NISI PRIUS, IN THE
CRIMINAL COURTS, IN IRELAND, &c.

FROM MARCH TO AUGUST 1870.

CHAN.]

COOPER v. COOPER.

[CHAN.]

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by T. BROOKSBANK and E. STEWART ROGGE, Esqrs.,
Barristers-at-Law.

Dec. 16, 21, and 22, 1869.

(Before the LORD CHANCELLOR (Hatherley.)

COOPER v. COOPER.

Appointment—Alleged fraud on power.

When a father agreed to appoint a share of a fund to his daughter, and to secure, by bond, an equal amount to the trustees of her marriage settlement, under which he was to have a contingent reversion to both funds:

Held (in a suit to set aside the appointment), that as the transaction was intended substantially for the benefit of the daughter, and as the father gave a high value for the contingent interest, there was no fraud on the power. There was no bargain on the father's part which could at all affect the case; he simply protected his family against the marital right.

This was an appeal from the decision of Vice-Chancellor James. By the marriage settlement of Mr. and Mrs. Daniell, dated the 8th Sept. 1806, a sum of stock was invested in trustees on trust after the death of the survivor of Mr. and Mrs. Daniell, for sons of the children of the marriage, as they jointly, or the survivor, should appoint, and in default of appointment, for the children of the marriage equally. In 1834, Sophia, one of the daughters, then a minor, was married to Capt. England. In contemplation of this marriage, the parents appointed, subject to their life interest in the fund, one-fourth part of the fund to the daughter, her executors, administrators, and assigns. Mr. Daniell covenanted to execute a bond to the trustees of the daughter's marriage settlement, for payment to them at a future date, of 4000*l.*, with interest. By

the marriage settlement, which was of even date with the deed of appointment, the appointed share of the fund and the money payable under the bond, were settled on trusts in favour of Mr. and Mrs. England, with remainder to their issue, but in default of issue, in favour of Mr. Daniell, the father himself, and his executors, administrators, and assigns.

Capt. England died before Mr. Daniell, but left issue by his marriage. By a previous settlement and appointment, in contemplation of the marriage of another daughter, Maria, to Mr. Trevanion, similar arrangements were made with respect to the reservation of a contingent interest to Mr. Daniell, in default of issue of the marriage.

Mr. Daniell was adjudicated a bankrupt in 1835, and in 1849 his assignees in bankruptcy assigned his reversionary interest under Mrs. Trevanion's settlement to the trustees of the Economic Life Assurance Company. Mr. Daniell died in 1866, his wife having died previously. Mr. Trevanion had died without issue in 1832, and Mrs. Trevanion in 1841 married the plaintiff, T. B. Cooper. He instituted the present suit for the purpose of setting aside the appointments to his wife and Mrs. England as frauds on the power, on the ground that it was a corrupt bargain to reserve an ultimate interest in the appointed shares in favour of Mr. Daniell.

James, V.C. having dismissed his bill, the plaintiff appealed. The proceedings in the court below are fully reported 21 L. T. Rep. N. S. 197.

Jessel, Q. C., Kay, Q. C., Fischer, and W. C. Druce for the appellants, contended, with respect to the appointment, that the rule of the court was absolute that there must be no bargain between the appointor and appointee. The reservation vitiated the appointment.

They cited

Goldsmith v. Goldsmith, 2 Ha. 197;

Burley v. Burley, 31 L. T. Rep. 130; 25 Beav.

Pryor v. Pryor, 10 L. T. Rep. N. S. 360; 2 De G. J. & Sm. 205;

[CHAN.]

COOPER v. COOPER.

[CHAN.]

Connolly v. MacDermott, Sugd. H. L. Cas. 513;
Palgrave v. Atkinson, 1 Coll. C. C. 190;
Palmer v. Wheeler, 2 B. & B. 18;
Askham v. Barker, 12 Beav. 499;
Daubeny v. Cockburn, 1 Mer. 626;

Sir R. Pulmer, Q. C. and *Flemming*, for the trustees of the Economic Life Assurance Society, submitted that this was entirely different from the cases cited by the appellants, as here there was no corrupt bargain. Looking at the whole transaction it was intended substantially for the benefit of the daughter, and upon that ground the appointment was perfectly good. They referred to

Jebb v. Tugwell, 26 L. T. Rep. 250; 7 De G. M. & G. 663;
Robinson v. Wheelwright, 27 L. T. Rep. 73;
 6 De G. M. & G. 535;
Topham v. Duke of Portland, 10 L. T. Rep. N. S. 360; 1 De G. J. & S. 517;
Fitzroy v. Duke of Richmond, 27 Beav. 190;
Lec v. Head, 1 K. & J. 620;
Horn v. Barton, 27 L. T. Rep. 307; 8 De G. M. & G. 587;
White v. St. Barbe, 1 Ves. & Bea. 399.

Eddis, Q. C. and *Humphreys*, for Mrs. England, also supported the settlement. They cited

Carver v. Richards, 27 Beav. 488;
Alexander v. Alexander, 2 Ves. 640;
Bristow v. Warde, 2 Ves. Jun. 336;
Sadler v. Pratt, 5 Sim. 632;
Langton v. Blackmore, 1 Ambl. 988;
Lane v. Page, 1 Ambl. 233;
Rucker v. Scholefield, 1 H. & M. 36.

Jessel, Q. C. replied.

The LORD CHANCELLOR (*Hatherley*).—This suit comes before me on appeal under very singular circumstances, but I think it will be necessary to deal mainly or almost exclusively with the case of the settlement of Mrs. England, because, unless something can be drawn from her settlement, there will be nothing for a decree to operate upon. The question arising as to the other fund, especially as to the position of Mrs. Cooper's father as a debtor in respect of the bond, cannot properly be discussed in this suit, for I cannot discuss questions which are not raised by the pleadings. As regards Mrs. England's fund, I find the case is this: She was an infant, and could not therefore enter into a bargain, and there is no pretence for saying that any bargain was made with her. If there were any bargain at all, it must have been made with her husband, and must be deduced from the instruments produced, as there is no other evidence on the subject. Let us see what was the state of circumstances at that time. The facts are shortly these. On the marriage of Mrs. England, a deed poll was executed, which, after reciting the intended marriage, and that it was agreed that an appointment should be made in accordance with the settlement, appointed one-fourth of the fund to Mrs. England. At that time there were five children who might or might not take shares, but one child was, for some reason which does not appear, placed out of the reach of any benefit from this fund; therefore four children remained. One of those children, Mrs. Trevanion, on her marriage had received one-fourth of the fund by appointment and two years afterwards this settlement takes place. This then was the natural division of the fund. The appointment was naturally made on the marriage of the children, and there is nothing whatever to lead to the idea that there was any impropriety in Mr. Daniell thus making a provision for his daughters on their marriage, and the first trusts declared are beyond question reasonable and proper. But it was contended that with those trusts must be coupled the ultimate trust in favour of Mr. Daniell,

and that this case thus falls within the cases where it has been held that the donee of the power stipulating for a benefit to himself the whole of the trusts must be treated as void. I should be sorry to say anything to break in upon a rule so well established; and if such a bargain were proved in this case, in my opinion the fact of the bond having been given by Mr. Daniell would make no difference. Here, if there be a bargain, it is with the husband. I must take all parties to have known the law, and in my opinion there was no bargain to take anything from the daughter, but there was an agreement by the husband, who said in effect, "I, the husband, will, in certain events, waive my marital rights, and the funds shall go back to your family." This is the reasonable construction of the deed, a construction I am entitled to make, no other evidence of a bargain having been brought forward. If the test applied by Knight Bruce, L.J., be applied here, and the question asked by him be put here, namely, but for this appointment in favour of the appointee, would the appointment be made at all, the answer must be "Yes." Taking that view of the case, with these documents and nothing else laid before me, it seems to me that this settlement is unimpeachable. It would require a very strong case to say that this deed must be set aside after the lapse of time, and all the dealings with the property that have taken place. True, the right did not accrue until the father's death, still the court, regarding the family arrangement, the enjoyment of the funds by the parties, the subsequent dealings with those funds in marrying daughters and establishing a son in the world; and, finally, the release to the trustees of the settlement of 1806, to which Mr. Cooper was himself a party, requires a strong case to be made out. And here I see nothing to induce the court to say that this appointment must be set aside. It is not simply that it would be a hardship to have this appointment set aside, but I hold that there was no bargain at all on the father's part which could at all affect the case; he simply protected his family against the marital right. This is the natural view to take of the transaction; and, therefore, there is nothing to do in this suit—the only fund being in court, under the Trustee Act, under which the rights of the parties can be settled; but those rights are quite different from those which arise in the present case. The only point that can be suggested is that Mr. Cooper says his rights ought to be declared, which would be, if his contention be correct, to give him the chance of taking one-eighth of the fund by survivorship. This is not a suit to meet with any favour; and it fails in its main purpose, which was to get at Mrs. England's share. I do not think it right to go into the other questions, which can be more satisfactorily settled when the fund comes to be dealt with. The decree of the Vice-Chancellor must be affirmed, and the appeal dismissed with costs.

Solicitors for the plaintiff, *Druce, Son, and Jackson*.

Solicitors for the defendants, *Johnson and Wetherall*, *Young and Jackson*; *Walters, Young, and Deverall*; *W. H. Haycock*.

ROLLS.]

MESSEENA v. CARR—FINLASON v. TATLOCK.

[ROLLS.

ROLLS COURT.

*Reported by HENRY PRAT, Esq., Barrister-at-Law.

Jan. 13 and 20.

MESSEENA v. CARR.

Will—Discretionary power to trustees to purchase annuity—Gift of part of the capital to the annuitant.

A testatrix by her will directed her trustees to invest a certain sum, and to pay the income arising therefrom to J. C. during his life, and after his death in trust for certain other persons; and she gave the trustees a discretionary power to invest the sum in the purchase of an annuity for the benefit of J. C. The trustees did not purchase the annuity, but from time to time made payments to J. C. out of the capital, in the aggregate amounting to more than the half of it.

Held, that the trustees had power to make such payments, and that the remaindermen were only entitled to the balance.

By her will, dated 26th Feb. 1848, Mary Chapelhow, after directing all her just debts, funeral, and testamentary expenses to be paid by her executors, gave, devised, and bequeathed to George Bowness Carr, and Thos. Robinson, their heirs, executors, administrators, and assigns, all and every her real and leasehold estates, and all her goods, chattels, money, and securities for money, debts, and other personal estate and effects of what kind soever upon trust, that her said trustees, or the survivor of them, or the heirs, executors, or administrators of the survivor should, as soon as conveniently might be, call in and convert into money her said personal estate, or such part thereof as should not consist of money, and sell her real and leasehold estates in manner therein mentioned. And the testatrix directed that her said trustees or trustee should stand and be possessed of the moneys to arise from such sale, calling in, and conversion. Upon trust after full payment of all her just debts, funeral and testamentary expenses, to pay two-fifth parts of the residue to the persons therein named, and as to the remaining three-fifth parts thereof upon trust to invest the same in the names of her said trustees or trustee in any of the public stocks or funds of Great Britain, or upon Government or real securities, &c. And as to one-fifth part of the annual income of the said last-mentioned trust funds, she thereby directed her said trustees or trustee for the time being, to pay or apply the same, weekly or otherwise, as they or he might deem advisable, unto or for the benefit and advantage of her son, John Chapelhow, for and during the term of his natural life, and after his death she declared that the said trustees and trustee should hold one-fifth part or share of the said last-mentioned principal moneys, stocks, funds, and securities, and the annual income thereof upon trust for her daughter, Grace Messeena and her children, in manner thereafter mentioned. Provided, nevertheless, and she thereby declared, that it should be lawful for her said trustees or trustee, if they or he thought it advisable so to do, by and with such one-fifth part or share of the said last-mentioned principal moneys, to purchase for the benefit of the said John Chapelhow, an irredeemable annuity for his life of such amount as could be thereby obtained.

The one-fifth part of the three-fifths of the residuary estate amounted to about 400*l.* Only one of the trustees, namely, Robinson, acted, and he did not purchase an annuity for John Chapelhow, but paid him from time to time several sums of money, amounting in the aggregate to 270*l.*, out of the capital of his share.

The present suit was instituted for the administration of the estate of the testatrix; it now came

on for further consideration, and the question to be decided was whether the payments to John Chapelhow out of the capital of the shares came within the power to purchase an annuity, or whether Grace Messeena and her children were entitled to the whole share. A question also arose as to whether the one trustee could exercise the power alone, it being a discretionary power.

Southgate, Q.C., and W. Barber, for the plaintiffs, the persons entitled in remainder, contended that the power could not properly be exercised by making payments from time to time, and that it could not be exercised by one of the two trustees alone. They cited

Cowper v. Mantell, 22 Beav. 231;
Brown v. Higgs, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; 2 Sug. Pow. 176, 6th edit.

Archibald Smith, for Carr, the surviving trustee, contended that the power to purchase an annuity for a person amounted to a power to pay the amount to the person entitled to the annuity, and that if the trustees were entitled to pay him the whole amount, they were entitled to pay him part of it.

Greenside, for the representatives of the deceased trustee, supported the same contention.

Jan. 20.—Lord ROMILLY.—I am of opinion that the trustees had power to pay the whole amount of the one-fifth share to John Chapelhow. They might, no doubt, have bought him an annuity and called it irredeemable, but he could have sold it the next day. That being so, they had power to pay him three-fourths, or any part of the share. I entertained some doubt, as it was a discretionary power to be exercised by two trustees, and one had declined to act, whether the other could exercise the power alone. But the passive trustee did not dissent from what had been done; in fact he approved of it. There has, therefore, been no breach of trust for which the trustees are bound to account.

Solicitor for the plaintiff, Tufnell Southgate, for T. Buckley, Rochdale.

Solicitors for the defendants, Stone, Billinghamurst, and Wood; F. C. Clarke, for W. Wilson, Appleby.

Jan. 17 and 18.

FINLASON v. TATLOCK.

Will—Construction—Gift of personalty in remainder to children "or their heirs"—Substitution.

A testator gave the residue of his personal estate to trustees upon trust to pay the interest to his wife during her life, and at her decease he directed the principal and interest to be equally divided amongst his children "or their heirs."

One of the children of the testator assigned his share and died in the lifetime of the tenant for life:

Held, that the statutory next of kin of the child took the share by substitution.

By his will John Hardcastle, after directing the payment of his debts, &c., giving certain legacies and appointing executors, gave the residue of his personal estate to his executors "in trust, the interest to be paid to my dear wife Esther Hardcastle during her natural life, and at her decease the principal and interest to be equally divided amongst my children or their heirs."

The testator died in December 1841, leaving him surviving his widow and eight children. The widow died in 1867. One of the children assigned his share and afterwards died in the lifetime of his mother. The present suit was instituted for the administra-

ROLLS.]

M'CREIGHT v. FOSTER.

[ROLLS.]

tion of the testator's estate, and the only question to be decided was whether the assignee was entitled to the child's share, or whether it went to the heirs of the child, and, if so, who the "heirs" of the child were.

Jessel, Q. C. (C. Brown with him), for the plaintiff.—A gift to one for life and then to persons "or their heirs," is clearly a case of substitution, and the property being personalty the word "heirs" means next of kin. He cited

Doddy v. Higgins, 9 Hare, App. xxiii.; on appeal, 2 K. & J. 729;

King v. Cleaveland, 26 Beav. 166; on appeal, 4 De G. & J. 477;

Jacobs v. Jacobs, 16 Beav. 557;

Re Craven, 23 Beav. 333;

Re Philips' Will, 19 L. T. Rep. N. S. 713; L. Rep. 7 Eq. 151.

Bristowe, Q. C., for the assignee, contended that the words "or their heirs" were mere words of surplusage, and that the assignee was entitled to the share in question. He cited

Hinchcliffe v. Westwood, 2 De G. & Sm. 216;

Re Walton's Estate, 25 L. J. 569, Ch.

Chapman Barber appeared for other persons interested.

Jan. 18.—Lord ROMILLY.—I have gone very carefully through all these cases, and I think they are quite clear, and that the words in the will amount to a substitution. [His Lordship read the words of the will above set out, and continued:] Mr. Bristowe, your interpretation is impossible, without converting "or" into "and;" that was the tendency of the old decisions, but the modern decisions are the other way, and proceed upon the principle of following the natural meaning of the words, without introducing lawyers' refinements. The natural meaning of the words in this will is that the child, if living, or its heirs, if it should have died, should take; otherwise there would be an intestacy, but for the 33rd section of the Wills Act, in the event of the child dying in the testator's lifetime leaving issue. In this case I have no doubt whatever that it was the intention of the testator to give the shares by substitution in the event of any of the children dying in the lifetime of the tenant for life, and that the word "heirs" means statutory next of kin as in many decided cases, and in the recent case of *Re Philips' Will* (*sup.*).

Solicitor for the plaintiff, *H. Harris*.

Solicitor for the other parties, *Robinson*.

Jan. 18 and 19.

M'CREIGHT v. FOSTER.

Vendor and purchaser—Contract for sale of leaseholds
Charge by purchaser on contract—Notice to vendor—
Liability of vendor.

F., who was mortgagee, with power of sale, of certain leasehold property, contracted with *P.* for the sale of the property to him at a certain sum payable by instalments. After having paid about half of the purchase money, *P.* assigned the benefit of his contract to a banking company to secure a sum owing by him to the company, who gave notice of their charge to *F.*

Notwithstanding the notice, *F.* completed the sale to *P.* without communicating with the company, and *P.* immediately afterwards sold the property to a purchaser for value without notice of the charge.

Held, that *F.*, having neglected the notice, was liable to make good the loss sustained by the company in consequence of the completion of the contract.

This was a suit instituted by William Henry M'Creight and Edwin Laundy, the official liquidators of the Birmingham Banking Company, to enforce a charge on a certain leasehold and messuage in Leicester-square, known as the Alhambra Palace, under the following circumstances:

In Sept. 1864 Sir William Foster, who was mortgagee with power of sale of the Alhambra Palace, advertised it for sale by public auction, and for the purposes of the sale caused to be prepared certain particulars and conditions of sale. On the 30th Sept. 1864 Sir William Foster contracted with Alexander Gopsell Pooley (who was also a defendant to the present suit) for the sale of the property to him for 22,500*l.*, and a memorandum of agreement, dated the 30th Sept. 1864, was indorsed on the particulars and conditions of sale, and signed by both parties. A deposit of 2000*l.* was paid, and it was by the memorandum agreed that the purchaser should take possession of the property within twenty-one days from the date thereof, and should pay to the vendor the further sum of 5500*l.* on taking possession, and should pay the balance of the purchase money as follows, viz.: 5000*l.* at the expiration of three calendar months from the date thereof, and the remaining 10,000*l.* at the expiration of twelve calendar months from the date thereof.

Pooley paid the sum of 5500*l.* on the 23rd Nov. 1864, and a further sum of 5000*l.* on the 19th Jan. 1865. These sums, together with the deposit of 2000*l.*, made together 12,500*l.*, and left 10,000*l.* due in respect of the purchase.

On the 28th Jan. 1865 Pooley, who was indebted to the Birmingham Banking Company in a large sum of money, secured by bills of exchange, deposited the memorandum of agreement of the 30th Sept. 1864 with the Birmingham Banking Company to secure the payment of the bills; he also executed a deed poll or memorandum of deposit, dated the same 28th Jan. 1865, and addressed to the then trustees of the Birmingham Banking Company, and thereby agreed that he would execute to the said trustees or other the trustees for the time being of the company a valid assignment of his contract with Sir William Foster for the purchase of the Alhambra Palace by way of mortgage for securing the sum of 50,000*l.* (the amount due on the bills) and interest.

On the 3rd July 1865 Mr. Beaumont, the solicitor of the banking company, sent to Sir William Foster notice in duplicate of Pooley's charge on his purchase of the Alhambra Palace in favour of the banking company, requesting Sir William Foster to accept service of the same, and to return one copy of the notice, with a memorandum of his acceptance of it indorsed thereon, which Sir William Foster accordingly did on the following day.

The notice was in the following words:

38, Bennett's Hill, 28th Jan. 1865.

I hereby, on behalf of the Birmingham Banking Company, give you notice that by a deed-poll bearing even date herewith, under the hand and seal of Alexander Gopsell Pooley (and addressed to Messrs. Joseph Ledsam, Thomas Pemberton, and John Pemberton Turner, trustees of the said company), the said Alexander Gopsell Pooley did agree with and to the said trustees that he would at any time thereafter at their request and at his own costs execute to them or other the trustees for the time being of the company a valid assignment of his contract with you, the under-mentioned Sir William Foster, for the purchase of the leasehold premises called the Alhambra Palace, Leicester-square, Middlesex, by way of mortgage for securing the principal and interest moneys therein expressed.

(Signed) J. A. BEAUMONT.

To Sir William Foster.

Notwithstanding this notice Sir W. Foster, on the 21st Nov. 1865, completed the sale to Pooley without communicating with the banking company, and received 10,000*l.*, the balance of the purchase-money. Pooley, immediately after the property was assigned to him, sold it to a purchaser for value

ROLLS.]

M'CREIGHT v. FOSTER.

[ROLLS.]

without any notice of the rights and interests of the banking company therein.

On discovering that the sale had been completed the banking company at once made application to Sir W. Foster for compensation for the loss which they had sustained by the completion of the sale; but Sir W. Foster refused to entertain the application, and repudiated all liability to make good the loss.

On the 27th July 1866, the banking company was ordered to be wound-up, and the plaintiffs were appointed official liquidators of the company.

The present bill was filed in May 1867; it prayed that an account might be taken of the amount due for principal and interest by Pooley to the banking company, on the security of the memorandum and deposit of the 28th Jan. 1865; that it might be declared that by virtue of the said deposit and memorandum, and the notice thereof given to Sir W. Foster, the banking company became entitled to an equitable charge for such principal and interest on all the estate and interest of Pooley in the said leasehold premises, and all other his rights and interests under the contract of the 30th Sept. 1864; and that it might be declared that the assignment by Sir W. Foster to Pooley of the said leasehold premises was a wrongful act and a breach of trust and of duty on the part of Sir W. Foster, and that Sir W. Foster was liable to make good to the banking company, and to the plaintiffs as official liquidators thereof, the loss occasioned to the banking company by such assignment.

It also prayed that the defendants might pay the costs of the suit, but beyond this no relief was prayed against Pooley.

The defence set up by Sir W. Foster's answer was that, as by the notice of the deposit, the banking company did not come under any liability to him and were not bound to complete or to assist Pooley in completing the purchase, the transaction as a contract was void for want of mutuality, and as a charge it was one which according to the principles of a court of equity he was not bound to regard; that if the banking company had intended to obtain a charge on the property they ought to have obtained a valid assignment of the contract from Pooley to themselves, and given Sir W. Foster formal notice thereof, and tendered or agreed to pay the purchase-money to him; that even if they were entitled to any relief against him their proper remedy was at law, and not in a court of equity; that the banking company having actual or constructive notice of the tenancy and contract of Frederick Strange (whom the answer alleged to have obtained from Pooley a lease of the property, with right of pre-emption prior to the date of the deposit), they refused to take any step to procure an assignment of the property (which from the high rent and heavy covenants reserved by and contained in the lease, and the heavy premium for fire-insurance, was of a highly speculative nature), and in fact repudiated all intention of taking the same; and moreover that Sir Wm. Foster having as far back as April 1866 repudiated all liability in respect of the matter, and the company having so long acquiesced in such repudiation, they could not now enforce their claim, having forfeited it by laches.

Southgate, Q.C., Archibald Smith and J. W. Chitty for the plaintiffs, submitted that they were clearly entitled to the relief prayed by the bill. They cited

Dearle v. Hall 3 Russ. 1;
Burrows v. Lock, 10 Ves. 470;
Denton v. Stuart, 1 Cox C. C. 258;
Hodgson v. Hodgson, 2 Kee. 704;
Rose v. Watson, 10 L. T. Rep. N. S. 106; 10 H. L. Cas. 672;
Hopkinson v. Rolt, 5 L. T. Rep. N. S. 90; 9 H. L. Cas. 514;

Hadley v. The London Bank of Scotland (Limited)
 12 L. T. Rep. N. S. 747; 3 De G. J. & S. 63;
Weston v. The Empire Assurance Corporation,
 L. Rep. 6 Eq. 23;
Sugden's V. & P. last edit. p. 175;
Green v. Smith 1 Atk. 572;
Jones v. Farrell, 1 De G. & J. 208;
Wall v. Bright, 1 Ja. & Walk. 494;
Daniels v. Davison, 16 Ves. 255.

Sir Roundell Palmer, Q.C. and Robinson, for Sir William Foster, contended that the purchaser could not by deposit of the contract deprive the vendor of his rights under it; that the terms of the memorandum of deposit being that the purchaser would assign, if the bank should so request, nothing passed under it until request; that the bank could not set up their charge on the contract for sale as an obstacle to completion; that they should have given notice to the vendor that they would pay the balance of the purchase-money and take an assignment of the lease, and, not having done so, they were entitled to no relief against the vendor. They cited

Tooth v. Hallett, 20 L. T. Rep. N. S. 155; L. Rep. 4 Ch. 242;

Pearce v. Morris, 21 L. T. Rep. N. S. 287;

Mangles v. Dixon, 3 H. L. Cas. 702.

As to the distinction between mortgages of leaseholds and of freeholds by deposit they cited

Moore v. Gregg, 2 Phil. 721;

Flight v. Bentley, 7 Sim. 149;

Lucas v. Comerford, 8 Sim. 499; 3 Bro. C. C. 166;

Moore v. Choat, 8 Sim. 508.

Jessel, Q. C. and Hull, for Pooley, contended that he was not a proper party as no relief was asked against him, and that the bill ought to be dismissed as against him with costs.

Jan. 19.—Lord ROMILLY.—I will not trouble you, Mr. Southgate, upon this case. There is no evidence whatever to induce the court to suspend the ordinary and usual rule. The usual rule of the court, the invariable rule in equity, is not confined to any one species of property or another, but it is this—that any man who enters into a contract may, if he pleases, assign the benefit of that contract to another person; he may charge his contract for the benefit of another person. The person with whom he contracts becomes a trustee for the person in whose favour the charge is given as soon as he has due notice of it. That is not confined to a question of mere sale, but it includes any case of a debt or the like. For instance, a person insures his life in an insurance office; he thinks fit to raise money on the security of the policy after he has been insured for many years. The person who lends him money upon the security of that gives notice to the insurance office not to pay the money to any person other than himself. If the insurance office thinks fit to pay, they must take the consequences, and bear the loss. It is true that it is a *chose in action*. So if a man agrees to sell an estate, or to buy an estate, he may assign the benefit of that contract to another person, either absolutely or to secure a sum of money, and when the person with whom he contracts has notice of that charge, he becomes a trustee for the person to that extent. There is no difference in that respect between one species of property and another. Now, a sort of distinction was endeavoured yesterday to be taken, which would lead to the most disastrous consequences in my opinion, between the sale of a lease and the sale of any other property. There is no distinction at all. It is not a question between the lessor and the person to whom the contract is assigned; but it is simply this—that a man has made a beneficial contract, has entered into a contract which he considers to be beneficial or which has become beneficial by reason

ROLLS.]

M'CREIGHT v. FOSTER.

[ROLLS.]

of his having paid part of the purchase-money or the like, and thereupon he raises money upon it and assigns it as a security to another person who gives notice of it to the person with whom the contract was made. Now, what sort of distinction is there between a person who sells Whiteacre to another and a person who sells, as in this case, the Alhambra Palace in Leicester-square? What sort of difference is there between the two? Is there any difference at all? Supposing that instead of being the lessee of the Alhambra Palace he had been the owner in fee simple of the Alhambra Palace, the question would have been exactly the same. It was said, and said with considerable truth, that the situation of a lessee, particularly of a lessee of such a place as the Alhambra Palace in Leicester-square, is a very onerous one, because he had a ground-rent of 910*l.* to pay every year, and was subject to covenants not merely to keep the premises in repair, and in a proper state, but also to insure against fire to which accident places of that description are supposed to be peculiarly liable. No doubt that was so, but he thought fit to enter into the contract himself. The contract which Sir William Foster entered into was this—[His Lordship stated it, and continued:] There was a proviso in the agreement that there should be a forfeiture if it was not completed by that time, and then it was suggested what a severe case it was upon Sir William Foster that he would be retained all this time, and that the contract could not be altered by reason of this assignment. All which is very true; but then Sir William Foster thought fit to enter into the contract, and it was merely the contract, such as it was, the benefit of which was assigned. There was nothing whatever by reason of the assignment of it to the Birmingham Bank, which enabled either the Birmingham Bank or Mr. Pooley to obviate the condition of the contract which made him liable to forfeiture in case the contract was not completed on the 30th Sept., and up to that time he himself had entered into the contract. Those cases which were cited, beginning with *Lucas v. Comerford*, *Moore v. Gregg*, and *Moore v. Choat* (*sup.*), have no sort of reference whatever to this case; they have not the slightest bearing upon it. There the question was simply whether the lessor had a right to say to the assignee of the lease that he was liable to all the covenants which the lessee was liable to; but that is a perfectly separate and distinct matter. The case unquestionably is an unfortunate one in various respects, but the course which Sir William Foster ought to have taken is as plain as possible. The Birmingham Bank got an assignment of the benefit of the contract. *The contract was obviously a very beneficial one at that time, because 12,500 had been paid, and by paying 10,000*l.* they could have got the whole of the Alhambra Palace conveyed to them, which from various indications in the course of the proceedings seems to be worth about 25,000*l.*, at least I do not reckon it to be worth much less than 25,000*l.*; for at all events it seems to be let to a person who carries on some species of entertainment there who formerly paid a rent for it (he does not now, for I believe he is the owner of the place) of 2750*l.* a year. The course, therefore, which Sir William Foster had to pursue was very simple and very plain. A notice was sent to him that the benefit of the contract had been assigned to the Birmingham Bank. The notice was sent to him in duplicate, and he was asked to return one signed: very properly he did so, and I have not the slightest doubt that he had forgotten all about it. It is very unfortunate, no doubt, but there was the notice and his course was a very simple one. He ought either to have said: "I will have nothing to do with this matter: I cannot accept any notice from you at all;" whether he would have been entitled to say

so is another question, but this he could have done, he could have given them notice that he intended to disregard it, and then they might have taken such steps as they thought fit. However, he does nothing of the sort. He accepts the notice, and then in November, nearly two months after the time at which the contract ought to have been completed, he completed the contract with Mr. Pooley and without regarding the Birmingham Bank. I repeat that his course then was quite plain; it was to send word to the Birmingham Bank that Mr. Pooley was about to complete, or that he intended to insist on the forfeiture unless it was completed within a reasonable time. He ought to have given them a reasonable time, say a week or ten days, and to have said, "If you do not complete within that time I shall insist upon the forfeiture." But he does nothing of the sort; he merely assigns the lease to Mr. Pooley, or to his nominee, without the slightest notice to the Birmingham Bank, the consequence of which is that Mr. Pooley's nominee takes it as a purchaser for value without notice, and can hold it as against all the world. Now, observe what the consequence would be if I were to hold otherwise than I am obliged to hold on the present occasion. I say this that, however valuable the contract was which he had entered into, and however important it was for him to borrow a little money to complete it, although he might have paid half the purchase-money, he could not safely assign the benefit of the contract in order to raise the money to pay the remainder, because the person who had received notice might convey away to another person without taking any notice whatever, or without regarding at all the notice he had received. A more unfortunate decision than that, if my decision were of that character, which it will not be, can hardly be conceived, because by that you would prevent a person making use of a very valuable property for the purpose of raising money which might be required. The result is that the only question in the case, and the question on which I was desirous to read the correspondence, is this—Did the Birmingham Bank, after giving that notice, repudiate all the benefit of the contract? Did they give up and abandon the right to the contract? Upon reading the evidence I am of opinion that they did not. This is certain, that in no respect can there be alleged anywhere that there was any notice to Sir William Foster that they had done so, or that any facts came to his knowledge to make him believe so. He is not justified by the proceedings in that respect. What did take place was this, that a letter or a couple of letters were written in July 1865, in which notice was given to the bank of the course of proceeding, and the manager of the bank seems to have told Mr. Pooley that he must get the money himself, and that they did not intend to advance the money. If this had been communicated to Sir William Foster, and had come to his ears, and upon that sincerely believing that they had repudiated the contract, he had sold it to somebody else, although he would still have been in a very equivocal situation, because he might have had it directly from the bank itself, there might be some excuse, there might have been something more to be said for him, but as the matter stands there is no excuse whatever. The various questions that are raised here are very much in the nature of what we used to be in the habit of calling at the bar an undefended cause, that is to say, the reasons that are given are such as cannot properly be put forward by the mouth of a lawyer, but he is obliged to disguise them in some particular manner in order to prevent them appearing in their naked form; or else, as I said to Mr. Robinson in the course of his argument, the law of notice is useless if that doctrine were to prevail. The result is that, I regret

V.C. M.] WHEATLEY v. THE WESTMINSTER BRYMBO COAL AND COKE COMPANY (LIMITED). [V.C. M.]

to say, I must make a decree against Sir William Foster in the terms of the prayer of the bill, with costs up to the hearing; but I can give the plaintiffs no costs against Mr. Pooley, because they really ask no relief against him; and, under the circumstances, I cannot give him any costs.

Solicitors for the plaintiffs, *Dale and Stretton*, for *Ingleby, Wragge, and Evans*, Birmingham.

Solicitors for Sir W. Foster, *Field, Roscoe, Field, and Francis*.

Solicitor for Pooley, *F. W. Mount*.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.

Dec. 6, 7, and 8, 1869.

WHEATLEY v. THE WESTMINSTER BRYMBO COAL AND COKE COMPANY (LIMITED).

Mines—Sinking pits—Lease—Dead rent—Obligation to work efficiently.

W. agreed with the W. B. company to grant them a lease of a coal mine adjoining one they already worked, giving them two years to prove the coal, and fixing a dead rent with certain royalties. A lease was then granted, giving liberty to win coal, &c., in the usual terms, and to sink pits, &c., and providing that in case they did so they should within two years of sinking pits pay an increased fixed rent. There was then a covenant to work the mine uninterruptedly, efficiently, regularly, and according to the approved practice, and not to leave one seam ungotten in working the others. The rent was paid, but no pits sunk, and the lessees never worked up to the sleeping rent. Upon bill filed to compel the lessees to work uninterruptedly, &c., according to the covenant, and raising the question of the obligation to sink pits,

Held, that there was no obligation to sink pits, or do anything more than pay the dead rent, and that the remedy was at law, and bill dismissed with costs.

Semle, where there is a covenant in a mining lease to work efficiently and pay a certain dead rent, the lessees are at liberty, so long as they pay the rent, to neglect working altogether, in the absence of a stipulation compelling them to do so specifically.

This bill was filed by Thomas Randall Wheatley, and Moreton John Wheatley, against the Westminster Brymbo Coal and Coke Company (Limited), for a declaration that the defendant company was bound to work the Gwersylt Coal and Ironstone Mine, of which the plaintiffs were the owners, uninterruptedly, efficiently, regularly, and according to the usual and most approved practice adopted in the working of mines of coal and ironstone, according to the provisions of the lease under which the company held the mine; and also that the company was bound to work the "Two-yard," "Brassey," and

Main" seams in such a manner as not to get one and leave the others ungotten; for a decree and injunction, in the same terms, from further proceedings with a certain arbitration; and for damages and costs. The plaintiffs, on the 12th Feb. 1859, entered into an agreement with the company to grant them the lease in question, being seised of the Gwersylt Estate in Denbighshire in fee, and of the minerals thereunder, the company being a duly registered company. This contract gave the lessees two years to prove the coal, and otherwise was in substance the same as the contract which followed at the end of that time.

By indenture of lease dated 1st July 1862, made between the plaintiffs of the one part and the defendants of the other part, under the common seal

of the company, it was witnessed that in consideration of the rents, royalties, conditions, provisions, and agreements thereafter reserved and contained, the plaintiffs granted, demised, and leased unto the defendants, their successors and assigns, all and every the mines, seams, veins, and beds of coal and balls and bands of ironstone under the Gwersylt Estate, containing 465 acres, in the occupations of various persons, namely, as delineated in the plan forming part of the lease, with full power and licence to the said lessees, their successors and assigns, to enter upon the estate on the usual terms, according to the plan, without restriction, or any other part with the lessors' approval, or that of their agents; in case of difference the site to be fixed by arbitration. To erect or remove buildings, machinery, &c., necessary for setting the coal and iron works on foot, determinable as after mentioned, and, with such approval as aforesaid as to the surface, without restriction (except as thereafter covenanted for regulating the manner of working) to bore and search for coals, and to drive, sink, make, and use any pit or shaft, tunnel, &c., or necessary subterraneous works, and to do all other acts, matters, and things, within, through, over, or on the estate for working the mines and manufacturing ironstone, pig, or wrought iron, and selling and disposing of the coal, ironstone, &c., on the usual terms, by means of pits, shafts, &c.; with provisions for depositing what was gotten. And also generally into and out of the said Gwersylt Estate to work and drive by outstroke, in-stroke, and sub-stroke, for getting and carrying away the produce of the Gwersylt Mines, as well as any other mines, and to connect the works with the Brymbo mineral branch of the Great Western Railway. There was then a proviso with respect to the mansion-house and buildings on the estate; and it was provided that, without prejudice to the last preceding clause, in case at any time within the period of twenty-one years thereby granted the lessees, their successors and assigns, should find it necessary or proper for the working of the mines to sink a pit or shaft, or erect engines, &c., on the actual site of any building, they should make compensation.

There was then the *habendum* to hold the mines from the 29th Sept. 1860 for twenty-one years, determinable as after mentioned, the lessees paying as follows: For the first year the fixed minimum rent of 500*l.*, for the second year 600*l.*, for the third 700*l.*, and for the fourth and every following year 720*l.*, and so in proportion for less than a year; that in case at any time during the terms the lessees or their successors should sink a pit or shaft, then from and after the expiration of two years they should pay a minimum fixed rent of 1000*l.*; all the minimum rents so fixed to be paid half-yearly. There were then provisions for a royalty of 30*l.* per acre for workable and saleable coal of one foot thick of the several seams called "Two-yard," "Brassey," and "Main Coal," and 20*l.* per acre for coal of inferior quality, and 20*l.* per acre for all other seams. There was then a power to work up to the fixed rents, and that if in any one year they should not do so, the deficiency might be made up in subsequent years. There were then provisions for royalties on the ironstone, with a rent of 100*l.* a year for a way-leave, the rents and royalties to be paid without deduction except property tax. There were then provisions for accounts by the plaintiff's engineer and surveyor, for measurement, &c., to be binding on the lessces unless objected to in six months. There were then covenants by the defendants to pay the rents and royalties, rates and taxes, and repair machinery, and keep proper accounts and plans, and permit inspection of the mines for measurement, diallings, &c., and leave proper pillars;

V.C. M.] WHEATLEY v. THE WESTMINSTER BRYMBO COAL AND COKE COMPANY (LIMITED). [V.C. M.]

and then followed this covenant: "And also should and would at all times during the continuance of the said term thereby granted work and carry on the said 'mines' of coal and ironstone thereby demised, uninterruptedly, efficiently, and regularly (except in the event of strikes of workmen, accidents, or other casualties), according to the usual and most approved practice adopted and used in the working of mines of coal and ironstone; and should and would get and raise the said seams and beds of coal thereby demised cleared out in regular course; and should work the upper of the said seams or beds respectively called 'The Brassey,' the 'Two-yard,' and the 'Main Coal,' each seam in advance of the seam next before it respectively, so as not to endanger the upper seam or seams by undermining. And in case the said lessees, their successors and assigns, should at any time, by working and getting out a lower seam, undermine the upper seam or seams, and such upper seam or seams should afterwards break down or become unfit for working, or necessarily difficult or expensive or dangerous to work, or difficult or dangerous to inspect or examine, after the rent or rate therein before reserved or made payable in respect of such coal as if the same had been actually gotten and sold, and for the purpose of estimating and ascertaining the amount to be paid for such seam or seams, it should be presumed and taken as a fact that such seam or seams existed in a perfect state, and also that the said lessees, their successors and assigns, should not nor would at any time or times get any one of the said several seams of coal and leave the others or other ungotten."

The lease also contained provisions for opening exhausted pits, keeping drifts, &c., in repair, not to underlet without consent, with powers of entry and distress for non-payment of rents and royalties, and a proviso for *cesser* in case of bankruptcy. Then followed covenants by the lessors for peaceable enjoyment and for a removal; and in case of exhaustion of the mine during the term power was reserved to the lessees to give up possession at the end of five years, or at any time afterwards on twelve calendar months' notice, with a clause giving power to refer all differences to arbitration, to be pleaded in bar of any legal proceedings. The bill, having set out the lease, alleged that of the three seams of coal and also "The Crank," the "Two-yard" was the uppermost, "The Crank," "Brassey," and "Main" following, with an average of four, two, four, and seven feet odd of workable coal, containing altogether about 9,000,000 tons, dipping from west north-west to east south-east at a fall of one in seven. That the defendant company were lessees of the Brymbo mine under the Marquis of Westminster, and had sunk pits, &c., on his estate, and by means of a down-brow driven into the "Brassey" having proved the Gwersylt coal for 860 yards and proved its quality in 1862, worked that seam without the others, but even that of late in a very trifling way. That in the latter part of 1864 Mr. Isaac Shore, the plaintiffs' agent, called attention to this fact, and the plaintiffs being advised that the working was not in accordance with the lease, Messrs. Coverdale and Co., the plaintiffs' solicitors, wrote to the defendant company on the subject, to which Mr. Napier, the secretary, replied that he could satisfy them that it was. Endeavours had been made to settle this question, but without effect, and this suit was instituted, and the bill several times amended, and several answers put in.

The defendants had given notice of arbitration, and a deed to settle all differences had actually been determined on, but the proposed settlement went off, a long correspondence having taken place. The bill being filed in January 1865, in February the case was argued upon the motion for the injunction

before Vice-Chancellor Kindersley (2 Drew & Sm. 352; 11 L. T. Rep. N. S. 728), who refused it, making the costs of the defendants costs in the cause: which now came on at the hearing, the bill having been four times amended, and there being a great deal of evidence. The bill charged that the defendants had not worked the mine according to the lease, the workings having been altogether illusory; and from 1862 to 1868 only an acre and three-quarters of the "two-yard" and 18 acres of the "Brassey" having been worked, the "Crank" and "Main" not having been worked at all, and the quantity not exceeding 110,000 tons, and not one quarter of the quantity worked from the Brymbo mine; and if the defendants continued to work as they had done not more than one-twelfth of the coal would be gotten within the term of the lease. That the beds of ironstone were very valuable, and that they had not been virtually worked at all; but that if the defendants had worked the coal and ironstone according to the lease, royalties would have been payable to a very large amount, and, owing to the defendants' neglect and default, the plaintiffs had suffered a great pecuniary loss.

The bill then charged that the defendants were bound to work all the seams, whereas they did not commence working at all until five years after the date of the lease, and nine months after the filing of the original bill, not having been prevented by strikes and casualties. There was then a general charge traversing the terms of the covenant as to working the mines uninterruptedly, &c. The defendants by their answers insisted that they were working the Gwersylt mine precisely as they were working the Brymbo, but that they were at liberty to work one seam and leave the others as they thought convenient. That they had hitherto been unable, from the depressed state of the coal trade, to find a market for a larger quantity of coal than they had worked from the plaintiffs' mine; and that they intended to carry on the works according to the lease, but had not had time. In the evidence the question of sinking pits (none having been sunk) was brought prominently forward, Messrs. Shone, Cadwallader, and Livesey, for the plaintiffs, deposing that pits ought to be sunk, whereas the defendants submitted that, according to the terms of the lease, it was at their option to do so or not as they thought proper; and inasmuch as they had regularly paid the dead rent, that was all that could be required of them. It was in evidence that the defendants had given notice to take a piece of land for the sinking of a pit, but that was all; nothing had been done with respect to it further.

Glasse, Q.C., and Nulder, for the plaintiffs, contended that the defendants were in fact simply keeping the Gwersylt coal and ironstone out of the market. They were working the Brymbo mine, and virtually doing nothing in that of the plaintiffs'. The lease distinctly bound them to work uninterruptedly, efficiently, and regularly, and it was impossible upon the facts to say that they had done either. For the purpose of working properly it was sworn that pits were necessary, and they had not sunk one; and the consequence of allowing lessees of a mine thus entirely to disregard the provisions of their lease would be that they were only bound to pay the dead rent, and might never work or, having worked, shut up the mine. It was a fraud upon the plaintiffs thus to evade the lease; and that was a substantial equity upon which the court would give relief. A reference to chambers would immediately determine the question whether the mine was worked according to the covenant, as the court could call in skilled persons who would give their opinion.

Tipping v. Eckersley, 2 Kay & J., 264;

V.C. M.] WHEATLEY v. THE WESTMINSTER BRYMBO COAL AND COKE COMPANY (LIMITED). [V.C. M.]

Hood v. The London, Chatham, and Dover Railway Company, 2 De G. J. & S. 568;*Hood v. The North-Eastern Railway Company*, L. Rep. 8 Eq. 666; 20 L. T. Rep. N. S. 970.*Lytton v. The Great Northern Railway Company*, 2 K. & J. 394;*Saunderson v. The Cockermouth and Workington Railway Company*, 19 L. J., N. S., 503, Ch.;*Wilson v. Furness*, 21 L. T. Rep. N. S. 553;*Anon.*, 1 Ambl. 209.

Cotton, Q. C., and *Freeling*, for the defendants, insisted that the court had no jurisdiction on this question; it was entirely the subject for an action for breach of covenant, assuming that there had been one, which was not admitted. Such a bill as this was without precedent. If, however, the court should think that there was an equity, on the construction of the lease itself, there was no obligation whatever to sink pits; it was entirely optional, and the payment of royalties was only in case the pits should be sunk and the minerals gotten. Assuming, next, that it was not optional, the defendants on the evidence were working as well as the state of the market and the capabilities of the mine would allow them, and not less efficiently than they were working the mine adjoining. Having power by down-brow or in-stroke, it was quite unnecessary to sink pits; and, as to the ironstone, there being no obligation to work it, they had no machinery, blast-furnace, or other means of manufacturing it. The lease was entirely permissive; it gave power simply, without compelling anything but the payment of the rent, and that part had been punctually observed.

Dickinson's case, 15 Bea.;*Soames v. Edge*, John. 669.*Glasse*, Q. C., in reply, referred to*Rogers on Mines*, 574;*Green v. Sparrow*, 3 Swanst. 1;*Ridgway v. Smee*, Kay, 627.

THE VICE-CHANCELLOR.—This case has been most elaborately and ably argued, everything that learning and ingenuity could suggest having been brought forward on behalf of the plaintiffs. This case raises points of great unimportance, not only to the parties, but also that large class of the community engaged in mining operations. [The V.C. referred to the facts.] The rights of the parties must depend on the legal contract between them; but in considering this it is not unimportant to look at their position and the circumstances leading to the execution of the lease. The father is a gentleman advanced in life, the son a captain of engineers, and probably skilled in his profession, and they were, under a disentailing deed, seized in fee of the Gwersylt Estate. The defendants had for some years worked the Brymbo Mine, adjoining the Gwersylt, apparently with adequate capital, and successfully, the coal measures inclining towards the defendants' mine, which was therefore at a greater depth. In 1859 a contract for a lease was entered into and formed, in some sense, a key to the interpretation of the lease itself. It is obvious that the Brymbo coal had proved good, but that doubts were entertained as to the working condition of the minerals under the Gwersylt estate; whether they were not subject to faults and disturbances, which was principally the cause that the mine had not been worked earlier. If it was without faults it was a most valuable property, for it is clear on the evidence that it would yield not less than 900,000,000 tons, or between 500 and 600 tons per diem, producing a very large income. Of these doubts the contract for a lease is conclusive evidence, for it provides that the lessees shall have two years to prove the existence of the coal. It then

proceeded in details as to payment of the royalties, &c., on which there is no question; but the effect was that, whether the lessees found coal or not, they might determine the lease at a time fixed. The coal proved workable, and the rights were finally determined by a lease. [The Vice-Chancellor referred to it]. This lease contains a power which for many years was considered not to be a necessary incident to a mining lease, namely, to work by "in-stroke," but that power the defendants have by this lease. The clause providing that "in case they should sink pits and shafts they should pay a rent of 1000*l.* after two years," is most material. Upon this and the other clauses relating to pits and working the mine, it is contended that there is an obligation to sink pits. No doubt common sense points out that, in the case of an unopened mine not adjoining another, there is no other mode of working it but by pits; but I confess I have no hesitation in coming to the conclusion in this case, that the object of the lessors, although their views are now altered, was to discourage the sinking of pits, as clearly appears by the increased rent to be paid in that event. Then follows the liberty to sink pits, &c., and the covenant to work so much relied upon. [The Vice-Chancellor read the covenant]. It is admitted that from the execution of the lease, the rent of 720*l.* was regularly paid, but, considering that in 1862 the existence and nature of the coal was proved, the plaintiffs expected large mining operations, and were disappointed that such was not the result; and that they neither got, nor were likely to get, more than the sleeping or dead rent of 720*l.* a year. It is clear that, in order to work up to this rent, the getting of eighty or ninety tons per day would be necessary; but there was no difficulty, having regard to the acreage, of working 300, which would have given a royalty of 5 guineas, or a very large rent; but it is admitted it was not worked even up to the rent within 2000*l.*, and that the defendants might work, therefore, for some time, without paying anything more. At the same time, the plaintiffs ought to have borne in mind the doubts entertained at the inception of the contract; and hence they ought to have considered that 720*l.* was a large additional rent with the surface of the estate untouched, so that the existence of a mine could not have been suspected. The question, however, is, whether anything took place justifying the institution of this suit? I am of opinion that the plaintiffs' dissatisfaction was not as to the mode but the extent of the working, and if they had been satisfied as to that, I feel certain this bill would never have been filed. In other words, they expected to receive large royalties, and hence the question of sinking pits never occurred to them, and neither party desired that they should be sunk. The original bill raised the question, but it does not allege that the defendants should be required to sink pits; but the evidence is directed to this point, and if the views of Mr. Shone and Mr. Cadwallader are correct, the lessee should have thrown upon the defendants the obligation to sink them. [The Vice-Chancellor referred to the evidence.] I think Mr. Shone's evidence is well founded, and that the mine never will be advantageously worked without pits; but it does not follow that the defendants are required to do so. I think under the lease the plaintiffs have no right to require them to sink pits, although it was no doubt their meaning. This evidence, and the amendments of the bill are all directed to this obligation, and it is contended that it was not contemplated to have the mine worked otherwise than by pits; and that proper and efficient working indicates that mode. As I have already said, no doubt that is the only mode in which a mine can be efficiently worked, and I agree with Mr. Shone and the other witnesses, and with the plaintiffs' counsel's contention in that re-

V.C. M.]

STEWART v. SANDERSON.

[V.C. M.]

spect; but the question is not whether the mine can be worked with the greatest possible advantage by pits, but what are the rights of the parties under this lease? That lease does not throw on the defendants the obligation to sink pits, but it does contain a covenant uninterruptedly, efficiently, and regularly to work the mine; what the plaintiffs or the defendants knew about the property signifies nothing. Much stress has been laid on the fact that the defendants have not efficiently worked the mine, and the small quantity of coal raised is relied upon in support of that argument. No doubt, if the rent had been fixed at 3000*l.* instead of 720*l.* a year, the lessors would have cared little what the working was; but the case comes back to the question of what obligation is thrown upon the defendants by the lease. The efficient working as to quantity is not the question, but whether it is a case for the interference of this court. If the parties consider the working insufficient, the remedy is not here, but in a court of law; but, as I must put an interpretation on the covenant, I invited counsel to tell me whether the lessees were, under it, obliged to work beyond the sleeping rent. The case of *Green v. Sparrow* (*sup.*) was cited, but it does not go to that point, but simply of a refraining from working expressly for a fraudulent purpose; and Lord Chancellor King decided that it must be regarded as if the condition had been fulfilled and rent paid accordingly; but it does not decide that there is an obligation to go beyond the sleeping rent. How could it be said what is enough to satisfy the covenant? If the object was to secure a large revenue, it was unfortunate that the plaintiffs were not differently advised, and that the lease was not in a different form; for there is nothing in this lease enabling me to say what quantity of coal per day or per annum would satisfy the covenant. Suppose I agreed to the plaintiffs' contention, and referred it to chambers, and called in skilled persons, I should have as many opinions as there were mining agents examined; it is impossible that the court can carry such a contract into execution. I am unable to see that there has been a breach of the covenant, and I am clearly of opinion that this is not the proper tribunal. In granting a reference it would be taking the management of the mine; and although I agree that, if the contract had been not to sink a pit except in a particular place, an injunction could have been granted to restrain sinking anywhere else, it is clear that this court can neither interfere in the construction of a railway, the management of a brewery, or the carrying on a colliery, although it may appoint a receiver. It would be a violation of the principles of this court to make a declaration that this mine was not worked efficiently, as it would involve an interference which Lord Eldon held in *The Birmingham Canal Company v. Lloyd* (18 Ves. 515) not to be the province of equity, and he refused the injunction. Now, the defendants are not working up to the sleeping rent. Under this lease are they obliged to do more than pay that rent or to work up to or beyond that rent, which is not a small one? I asked for authority on this point; I know of none, and none has been produced, and I assume that none is in existence. In all cases of mining leases, therefore, if the lessors desire to secure the working of a mine beyond the sleeping rent, they must insert a covenant throwing that obligation on the lessee. However inconvenient it may be, my opinion is that, provided the sleeping rent is paid, if there be a covenant to work efficiently, it is in the power of the lessees to keep the mine unworked, there being no obligation on such a covenant to work beyond the sleeping rent. In order to induce lessees to work a higher rent must be fixed. That is the fair construction of this lease,

and I think the litigation has miscarried. As to the minor points, the mode in which the veins should be worked was, in fact, decided by Vice-Chancellor Kindersley, who refused the plaintiffs their costs, and therefore considered the working not improper. The defendants have worked both mines in the same way, and there is no suggestion as to an improper working of the Brymbo. As to the ironstone, there are neither furnaces to manufacture it, nor a sale for it if it is gotten, therefore, it is absurd to say that there is an obligation to work it; there is none. The bill must therefore be dismissed; and, considering how nearly the parties came to an arrangement, I consider the suit ought not to have been proceeded with, and, therefore, I must dismiss it with costs.

Solicitors for the plaintiffs, *Coverdale, Lee, Collyer-Bristow, and Withers.*

For the defendants, *W. Raimondi.*

Thursday, Jan. 13.

STEWART v. SANDERSON.

Will—Construction—Direction to appropriate—Insufficient appropriation.

*A testator directed his trustees, out of the proceeds of the sale of his estate, to appropriate 15,000*l.*, and to invest the same, and pay the income thereof to his wife for her life, and after her death he gave the 15,000*l.* in trust for his children equally, and the residue of his estate amongst his children in unequal proportions. The widow and the trustees entered into a written agreement to appropriate certain railway preference stock and other securities of the value at the time of the appropriation of about 15,000*l.* to represent this fund. At the death of the widow the securities comprised in this agreement had considerably fallen in value.*

Held, that the residuary estate must make good the deficiency in the fund thus set apart.

George Gillespie, by his will dated in Jan. 1862, gave all his real and personal estate to certain trustees upon trust for sale, and out of the proceeds to lay out and invest, or continue invested, a sum of 15,000*l.* in or upon Government, real, or personal security, or in such stocks, funds, or shares as they might in their absolute discretion think fit, and to pay the interest, dividends, and annual income thereof to his wife for her life; and subject thereto the testator declared that his executors should stand possessed of the 15,000*l.*, or the securities upon which the same might be invested, upon trust for such of his children as should attain the age of twenty-one, in equal shares. The testator gave the residue of his property in the proportion of three-tenths to each of his sons, and two-tenths to each of his daughters.

The testator died in January 1863. In March 1864, the widow and his executors and trustees entered into a written agreement whereby it was declared that the stocks and shares specified in the schedule thereto being of the estimated value of 14,990*l.* should be considered as set apart for Mrs. Gillespie's benefit in full performance of the trust or direction in the will contained to lay out or invest or to continue invested the sum of 15,000*l.* The schedule comprised preference stocks in different railways. The agreement recited so much of the will as related to the widow's life interest in the 15,000*l.*, and that she had requested the executors and trustees to join with her in setting apart that sum for her benefit. The widow died in January 1869, and the shares and securities had become considerably depreciated in value since the date of the memorandum of agree-

V.C. M.]

Re HALSEY'S ESTATE—ISAAC v. HUGHES.

[V.C. J.]

ment. Upon the widow's death a suit was instituted for the administration of the testator's estate. The bill stated that questions had arisen between the plaintiffs and the defendants, being the children of the testator, as to whether the railway preference shares above mentioned were to be deemed and taken to have been absolutely appropriated to answer the said sum of 15,000*l.*, or whether the 15,000*l.* ought now to be set apart and duly invested to answer the trusts of the will. The bill prayed for a declaration that the trustees ought to set apart and invest the sum of 15,000*l.* in or upon Government, real, or personal security, to be held by them upon the trusts of the will. The main question was, whether the agreement was such an appropriation of 15,000*l.* as would bind the children and reversioners, or a mere temporary arrangement between the tenant for life and the trustees. The securities comprised in the agreement were now less in value by 3000*l.* than they were at the time of the appropriation. There was no evidence as to whether the preference shares so set apart were perpetual or redeemable.

Ince, for the plaintiff, one of the daughters of the testator, maintained that the agreement was a temporary arrangement only, made with a view of securing the widow's income.

Bardswell, for other daughters, supported the same view.

C. Hall, for the trustees and residuary legatees, being the sons of the testator, contended that there was a complete and final appropriation of the securities to answer the 15,000*l.* The trustees had no power to postpone the appropriation, and, if they had done so, they would have been guilty of breach of trust.

The VICE-CHANCELLOR said there was no valid appropriation. In the absence of evidence to the contrary, he should assume that the shares were liable to be paid off. The doctrine of the court was that an appropriation to be binding must be in securities not liable to be redeemed or reduced in interest. The arrangement was in no way binding on the children, and a sum must be taken from the residue to supply the deficiency. Declare that there has not been a sufficient appropriation of the 15,000*l.*, and that that sum or stocks, funds, or securities, equal in value to such sum, should be set apart or appropriated. Declare that it is for the benefit of the plaintiff and the infant defendants to elect to give effect to the will. Costs of all parties as between solicitor and client out of the residuary estate.

Solicitors, *Chester and Urquhart*.

Friday, Feb. 25.

Re HALSEY'S ESTATE.

Practice—Affidavit of title—Cons. Ord. xxxiv, r. 3.

Where a tenant for life was too infirm to make an affidavit of title on a petition for payment to him of the dividends of purchase-money paid into court by a railway company, an affidavit made by his solicitor was held to be sufficient.

This was a petition by a tenant for life for the investment of purchase-money paid into court by a railway company, and for payment to him of the dividends.

The tenant for life was too infirm to make an affidavit of title as required by Cons. Ord. xxxiv, r. 3, which was accordingly made by his solicitor.

W. Pearson, for the petitioner, now asked that an

affidavit of title by the tenant for life might be dispensed with, and cited

Re Smith's Leaseholds, 14 W. R. 949.

The VICE-CHANCELLOR made the order on the solicitor's affidavit, and dispensed with an affidavit by the tenant for life.

Solicitors for the petitioner, *Vizard and Co.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET, Esq., and Hon. ROBERT BUTLER, Barristers-at-Law.

Friday, Jan. 21.

ISAAC v. HUGHES.

Voluntary settlement—Power of appointment by will, under—Release of power—Resettlement—Will.

A., by a voluntary settlement, made in 1837, settled certain real and personal estates upon himself for his life, then upon his wife for life, and then upon such trusts as he should by will appoint; and in default of such appointments, upon trust for all his children. He had four children by his then wife. She died. The settlor in 1848, by another voluntary instrument, released his power of appointment, surrendered his life estate to the trustees of the settlement of 1837, for the benefit of his four children—whom he named—resettled the property, and covenanted not to defeat the trusts of that settlement. The settlor married a second wife, by whom he had seven children. He made a will devising all his real and personal estate to his widow for life, and after her death to his seven children by her. He died in 1866:

Held (1) that the deed of 1848 was a valid release of the power of appointment by will contained in the settlement of 1837; and (2), that the children of both marriages were *cestuis que trusts* of the settlement of 1837.

This suit was instituted by the trustees of a voluntary settlement to ascertain the rights and interests of all parties under it. By the settlement which was dated the 25th May 1837, and made between Charles Hughes (hereinafter called the settlor) and Mary Ann his wife of the one part, and the plaintiffs of the other, after reciting *inter alia* that the settlor had received the sum of 400*l.* of his wife's money since his marriage, and was desirous of settling certain real and personal estates for the benefit of himself, his wife and children upon the trusts thereafter mentioned. It was witnessed that in consideration of the premises the settlor conveyed and assigned to the plaintiffs, their heirs, executors, administrators, and assigns, the real and personal estates in the settlement particularly described, to hold the same upon trust during the joint lives of the settlor and his wife for such persons, estates, and interests as the settlor and his wife should, as therein-mentioned, jointly appoint; and in default of and subject to such joint appointment, upon trust for the settlor for his life, and after his death upon trust for his wife for her life, and after the death of the survivor of them "upon trust for such person or persons, and for such estate or estates, interest or interests, absolute or conditional . . . as the said Charles Hughes [the settlor] by his last will and testament in writing, or any codicil thereto . . . should direct, limit, or appoint, and in default of such appointment . . . upon trust for all and every the child and children of the said Charles Hughes [the settlor], if more than one, in equal shares," to be paid to them in such manner and at such times as in the said indenture of settlement was mentioned. Mary Ann Hughes died in 1841 leaving

V.C. J.] REG. v. PRICE AND OTHERS (Bridgewater Commissioners) *Ex parte* LOVIBOND. [Q. B.]

four children, the issue of her marriage with the settlor.

By an indenture of the 26th Nov. 1848, and made between Thomas Hughes of the first part, the settlor of the second part, and the plaintiffs of the third part, after reciting that there were the four children (naming them) of the settlor and his late wife, it was witnessed and agreed that the settlor should, for the consideration then mentioned, and the settlor did thereby surrender his life estate in the aforesaid trust, estates and premises, and released and extinguished the power given to him of disposing of the same by will. The trust estates and premises, as also a sum of 1000*l.* secured on his life, as in the indenture now in statement mentioned, were resettled upon such and the like trusts and powers, for the benefit of his said four therein-named children by his said late wife, as were declared in the firstly-stated indenture. The plaintiffs were also thereby appointed trustees thereof, and by it the settlor covenanted with them that he would not make any will or codicil whereby the aforesaid trusts might be defeated or impeached. In 1848 the settlor married the defendant, by whom he subsequently had seven children.

The settlor by his will, dated the 13th Dec. 1866, devised and bequeathed to the defendant Ann Elizabeth Hughes, all his real and personal estates for her life, and after her decease he directed the same to be sold and the proceeds thereof to be equally divided between the seven children, the issue of his marriage with the defendant, or such of them as should be living at her decease, share and share alike, but in case any of his said children should be then dead leaving issue, then he directed that such issue should be entitled to his or her deceased parent's share. And he appointed his said wife, the defendant, and Katherine Sarah Jones joint executrixes of his said will. The settlor died on the 14th Dec. 1866.

In that state of circumstances the questions were, whether the deed of the 25th Nov. 1848 was a valid release and extinguishment of the power of appointment? whether the children of the first marriage alone were intended to be benefited by the settlement of 1837? or whether it extended to the settlor's children by the subsequent marriage.

Charles Walker was for the plaintiffs.

E. E. Kay, Q. C. and *Vincent* were for the children of the first marriage.

Amphlett, Q. C. and *Lawrance* were for the widow.

Karslake, Q. C. and *F. Cates* were for the children of the second marriage.

The VICE-CHANCELLOR was of opinion, first, that the deed of the 25th Nov. 1848 was a valid release and extinguishment of the power of appointment; and secondly, that the trusts of the deed of 1837 extended to the children of the second marriage as well as those of the first.

Solicitors for the plaintiffs, *Janson*, *Cobb*, and *Pearson*.

Solicitor for the defendants, *W. Elgood*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Nov. 24, 1869, and Jan. 20, 1870.

REG. v. PRICE and OTHERS (Bridgewater Commissioners); *Ex parte* LOVIBOND.

Commissioners for inquiry into corrupt practices at elections—Their decision refusing a certificate to a witness reviewable—Their duty in taking evidence— 15 & 16 Vict. c. 57—26 Vict. c. 29, s. 7.

Semble, the decision of commissioners of inquiry as to the existence of corrupt practices at elections, refusing a certificate of indemnity to a witness examined before them on the ground that he had not answered questions in the manner provided by sect. 7 of the 26 Vict. c. 29, is reviewable by this court.

Where, therefore, H. L. was examined before such commissioners, who refused to grant him such certificate on the above-mentioned ground, this court, upon an application for a mandamus commanding them to grant it, being satisfied that he had in fact answered so as to be entitled to such certificate, made the rule absolute.

This was a rule calling upon Edwin Plumer Price, Thomas Chisholm Anstey, and Charles Edward Coleridge, Esqrs., the commissioners appointed pursuant to the provisions of 15 & 16 Vict. c. 57, for the purpose of making inquiry into the existence of corrupt practices in the borough of Bridgewater, to show cause why a writ of *mandamus* should not issue directed to them commanding them to grant to Henry Lovibond a certificate of protection and indemnity pursuant to the statute of the 26 Vict. c. 29, s. 7.

By sect. 8 of the 15 & 16 Vict. c. 57, "An Act to provide for more effectual inquiry into the existence of corrupt practices at elections for members to serve in Parliament," it is enacted that

It shall be lawful for such commissioners by a summons under their hands and seals, or under the hand and seal of any one of them, to require the attendance before them at a place and time to be mentioned in the summons, which time shall be a reasonable time from the date of such summons, of any person whomsoever whose evidence in the judgment of such commissioners or commissioner may be material to the subject-matter of the inquiry to be made by such commissioners, and to require all persons to bring before them such books, papers, deeds, and writings as to such commissioners or commissioner appear necessary for arriving at the truth of the things to be inquired into by them under this Act; all which persons shall attend such commissioners, and shall answer all questions put to them by such commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds, and writings required of them, and in their custody and under their control according to the tenor of the summons, provided always, that no statement made by any person in answer to any question put by such commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding civil or criminal.

By sect. 7 of the 26 Vict. c. 29, "An Act to amend and continue the law relating to corrupt practices at elections of members of Parliament," it is enacted that

No person who is called as a witness before any election committee or any commissioners appointed in pursuance of the Act of the sessions holden in the fifteenth and sixteenth years of the reign of Her present Majesty, chapter fifty-seven, shall be excused from answering any question relating to any corrupt practice at or connected with any election forming the subject of inquiry by such committee or commissioners, on the ground that the answer thereto may criminate or tend to criminate himself. Provided always, that where any witness shall answer every question relating to the matters aforesaid which he shall be required by such committee or commissioners (as the case may be) to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the committee under the hand of their clerk, or from the commissioners under their hands (as the case may be) a cer-

Q. B.] REG. v. PRICE AND OTHERS (Bridgewater Commissioners); *Ex parte* LOVIBOND. [Q. B.]

tificate that such witness was upon his examination required by the said committee or commissioners to answer questions or a question relating to the matters aforesaid, the answer or answers to which criminated or tended to criminate him, and had answered all such questions or such question; and if any information, indictment, or action be at any time thereafter pending in any court against such witness for any offence under the Corrupt Practices Prevention Acts, or for which he might have been prosecuted or proceeded against under such Acts, committed by him previously to the time of his giving his evidence, and at or relative to the election concerning or in relation to which the witness may have been so examined, the court shall, on production and proof of such certificate, stay the proceedings in such last mentioned information, indictment, or action, and may at its discretion award to such witness such costs as he may have been put to in such information, indictment, or action: provided that no statement made by any person in answer to any question put by or before such election committee or commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceedings, civil or criminal.

The *Attorney-General* (Sir R. P. Collier), the *Solicitor-General* Sir J. D. Coleridge), and *Archibald* shewed cause and contended, first, That the answers of Mr. Lovibond were not such as to entitle him to a certificate; secondly, That this court would not review the decision of the commissioners, which therefore must be taken to be final.

The court desired that the argument should in the first instance be confined to the first question, since, should that be decided against the applicant, it would be unnecessary to argue the second question. The argument therefore proceeded upon the first point alone.

H. James, Q.C., and *T. W. Saunders* were heard upon this point in support of the rule.

The court having intimated that before deciding the first question, they should like to have the opportunity of looking through the whole of the examinations, the rule was enlarged until Hilary Term, when the Lord Chief Justice stated that the court desired to hear the second question argued.

Jan. 20.—The *Attorney-General*, the *Solicitor-General*, and *Archibald* were heard in support of their second ground of objection, namely, that the decision of the commissioners is not reviewable. The commissioners before deciding whether or not they will grant their certificate, have to determine two questions. First, Has the witness answered the questions put to him? Secondly, Did the questions tend to criminate him? If the commissioners had to exercise a judicial jurisdiction, this court will not interfere to force them to exercise it in a particular way. [BLACKBURN, J.—You must contend that in every case the refusal of the commissioners to grant a certificate is final and conclusive.] That is so. The commissioners must have such a power, as it is impossible for this court to form an opinion as to the conduct of a witness. [COCKBURN, C. J.—Suppose the commissioners refuse a certificate when it manifestly ought to be granted?] The commissioners can be the only competent judges as to whether or not the certificate should be granted. [COCKBURN, C. J.—Suppose that we are of opinion that as a matter of fact the answers are satisfactory; is the decision of the commissioners to be final, when the Act says, “he shall be entitled to receive a certificate?” The certificate is to say that the witness was, upon his examination, required to answer questions the answers to which would criminate him, and that he had answered all such questions. How could the commissioners grant such a certificate when they were of opinion that he had not answered such questions? [BLACKBURN, J.—It turns upon whether the Legislature has not left the ultimate decision to a jury. As the law stood, upon the former statute it would seem that the commissioners had a discretion, but by the late statute it would

appear that they have no longer any discretion.] It really comes to this, whether or not there has been any judicial decision. An issue which may be raised upon the *mandamus* as to whether or not the witness has properly answered the questions, could not be conveniently submitted to a jury. [MELLOR, J.—There may be difficulties, but then the question is, did the Legislature intend that the judgment of the commissioners should be final. COCKBURN, C. J.—The Legislature may well have considered that this court would not interfere with the decision of the commissioners except in cases where they had clearly gone wrong. LUSH, J.—Does not the late Act give the witness in express terms a right to a certificate if he answers the questions? The change in the language in the two Acts would seem to indicate the distinction between the moral and the legal right to the certificate.] But from the nature of the case the commissioners alone can reasonably decide as to whether or not the questions have been answered. This court will not interfere where a discretion is given to a particular body to decide:

Reg. v. Kensington, 12 Q. B. 654;

Ex parte King, 7 East, 91.

The Legislature could not have intended the decision of the commissioners to be subject to be reviewed by this court, for it places their decision upon the same footing as that of a committee of the House of Commons, and clearly in the latter case no *mandamus* would lie.

H. James, Q. C. and *T. W. Saunders* in support of the rule.—If the arguments on the other side are well founded, a witness, notwithstanding he had really answered all the questions, might be deprived of his certificate, and so be exposed to very severe penalties, having himself no power to cross-examine a single witness before the commissioners, or adduce any evidence in support of his statements. Where a tribunal has a discretion, there no *mandamus* will lie. This application, however, is not for the purpose of reviewing a discretion, but to compel the giving of a certificate upon grounds which entitle the party to it. There would be no greater difficulty in trying an issue of whether or not the witness had truly answered, than a charge of perjury. Unless, indeed, the court can review the decision of the commissioners in a case where they have clearly gone wrong, an honest witness would be wholly without remedy.

COCKBURN, C. J.—This rule for a *mandamus* must be made absolute. Two questions present themselves for our consideration—the first, whether there is reasonable ground to submit for further consideration and decision the question whether Mr. Lovibond has answered the questions put to him so as to entitle himself to the certificate which the Act of Parliament says shall be given in such cases, the second whether, assuming that Mr. Lovibond was entitled to the certificate, this court can interfere by *mandamus* to compel the commissioners to give him a certificate. I am of opinion that upon both those questions there is quite enough to issue this *mandamus*, with a view that the matter may be put in train for further adjudication. I will take the legal point first. I quite agree with the learned counsel who has shown cause against this rule, that if the former statute of the 15 & 16 Vict. had still remained in force unaffected by subsequent legislation, this court could not have interfered, because I take the effect of the provisions of that statute to be this—that in inquiries conducted before these tribunals a party is no longer to have the privilege of refusing to answer a question if the effect of the question is to criminate him, but that on the other hand he is to have immunity from further proceedings, criminal or civil, to recover penalties

Q. B.] REG. v. PRICE AND OTHERS (Bridgewater Commissioners); *Ex parte* LOVIBOND. [Q. B.]

being instituted against him if he answers, or according to that statute "makes discovery" of the facts as to which the inquiry is being held, and so answers to obtain a certificate from the persons who are acting as judges in that inquiry. I think that upon that statute the immunity of the witness depends upon the granting of the certificate, and there being no provision that he shall be entitled to that certificate as of right, it was in the discretion of the commissioners to grant it or not, and if the witness did not get the certificate he had no means of compelling the commissioners to grant it. It is, however, a very different question, as it appears to me when we come to consider the present statute, and I cannot help thinking, that when the Legislature in legislating *in pari materia* and substituting certain provisions in the more recent Act of Parliament for those which existed in the former, has under these circumstances entirely changed the language of the enactment, it must be taken to have done so with some intention and motive. In the present statute the party who is called upon in one of these inquiries, to answer questions tending to criminate him, and does answer, is by the terms of the statute entitled to have the certificate. It is true, that there are difficulties in the exercise of the jurisdiction of this court, in controlling the decision of the commissioners, or it may be a committee of the House of Commons, or it may be now of an Election Judge. I think, however with regard to an Election Judge, that whereas at the time the statute passed no such jurisdiction existed, we must read the statute with reference to the only two cases which it provided for, namely, a committee of the House of Commons and commissioners appointed to carry on such an inquiry as this. It is very true that there are difficulties, but on the other hand and more especially in the case of the committee of the House of Commons, considering that as soon as the committee have made their report they are *functi officio*, they cease to exist, and it would therefore be physically impossible to apply the right to a *mandamus* to such a body as that. On the other hand, as the Act of Parliament distinctly says that the witness who has given answers shall be entitled to a certificate, where we have a body of persons in the shape of commissioners, who are still in existence, and to whom the process of this court may still attach, I do not see my way to the conclusion that because in the one case the exercise of the jurisdiction would be impossible, that therefore it is not to be exercised in the case in which it is possible. On that point, however, there may be some room for doubt, some room for contesting the jurisdiction, but I do not think the doubt upon that question so strong as that we ought to decline to issue the *mandamus* upon the return of which the question of jurisdiction may be more fully considered and determined, and if necessary taken to error. I think that if in the present case we are satisfied that there is certainly sufficient reason for urging that the party is entitled to ask this court for that, *prima facie* a case is made out which requires further consideration. In such a case we ought not to hesitate to make the rule absolute for a *mandamus* upon which the law upon the subject may be hereafter more fully considered.

BLACKBURN, J.—I quite agree in the result that this rule should be made absolute, and I quite agree that there are two questions: first, one of pure law on the construction of the Act of Parliament. I perfectly agree with the learned counsel who argued against this rule, that where there is a discretion, or indeed a discretion of any sort, given to a body of persons who are to exercise it, that though this court can require by *mandamus* the exercise of that discretion, it never can require its exercise in

a particular way. They can order a court of quarter sessions to entertain a case and try whether or not a man is guilty, that would be a case for a jury; or, which is a better illustration, order a magistrate to hear all the evidence brought against a man and determine whether he will commit him for trial or not. The court could not order him to commit, because the magistrate has to make up his mind on that. Therefore, whenever it is a matter of discretion, all we can do is to compel him to do his duty—that is, to take the matter into consideration, and deal with it afterwards. But where the common law or the Legislature has cast on a person the duty in a particular state of facts to do a thing, not to form his opinion or exercise a discretion, or the like, but to do it in a certain state of facts, then no doubt there is a preliminary inquiry whether those facts exist, and no doubt the party called upon to do his duty must to some extent exercise common sense, and see whether the facts do exist. Well, he must do that if the facts exist, and we have then the power on being satisfied that they have been so found, to issue a peremptory *mandamus* ordering him to do the thing which the law makes it his duty to do. That being so, and it not being disputed by the counsel who argued, and the law being in my opinion well-established by numerous decisions, then comes the question under this statute, does the Legislature enact that the commissioners should exercise a discretion in granting a certificate that the questions had been answered? If so, all that we could do would be to order the commissioners to take the matter into account; or does the enactment mean that if the facts do exist the commissioners shall grant a certificate, in which case, if we are satisfied that the facts do exist, then we should order that a certificate be given? Now comes the question on the statute. The original Act is unrepealed, except as to the 9th and 10th sections, the former of which says, "Every person who gives evidence before the commissioners appointed under this Act to make such inquiry, and who upon such examination makes a true discovery to the best of his knowledge, touching all things to which he is so examined, shall be freed from all penal actions, forfeitures, punishments, disabilities, and incapacities, and all criminal prosecutions to which he may have been or may become liable or subject;" and then it proceeds—not in terms as a proviso, for it is a separate section, but it is in reality a proviso—that where any witness has been so examined he shall not be indemnified unless he receive from such commissioners a certificate under their hands stating that he has made a full disclosure. There is no doubt that the indemnity there was twofold: one, that he had really made a true discovery to the best of his knowledge, which is a pretty extensive phrase, and the other that he should obtain from the commissioners a certificate that he had done so.

I think that the true construction as the statute then stood was, that the commissioners were to exercise a discretion, and that the court could never have compelled them under that statute to do more than take those matters into consideration. But then the Legislature has for some reason, I cannot tell what, repealed those two sections, and instead of them it enacts, and the provision extends not only to commissioners of inquiry but to election committees, that [His Lordship read sect. 7, *supra*]. Then it is provided that the production of that certificate shall put an end to all proceedings against him. Now, the words that I have read are quite different from those in the former Act. In the first place, instead of leaving it as it was before, applying it only to commissioners, they have been applied to election committees as well, and no doubt there is a point on that which I will presently refer to, and which to some

Q. B.] REG. v. PRICE AND OTHERS (Bridgewater Commissioners); *Ex parte* LOVIBOND. [Q. B.]

extent bears on the construction of the section. There, instead of providing that it shall be a full disclosure of all he knew about the matters which are being inquired into, it enacts, that if he is asked questions the answers to which tend to criminate himself, and he does answer them, he is to be entitled to a certificate, though he may utterly have refused to answer and endeavour to battle with every matter of the inquiry that did not tend to criminate himself:—as in the case I am suggesting, that a man answers frankly and fully to all questions, such as “Did you commit bribery?” but when he is questioned as a part of the inquiry which may be a very material one indeed, as “Do you not know, or cannot you relate, circumstances which show that the candidates were parties to it, or that bribery was universal?” or other matters of that sort, he may baffle the commissioners completely, and yet be entitled to his certificate of indemnity. I do not think that the Legislature passed the Act thinking of that conclusion, and I only mention it because it is one of the reasons for the Legislature to consider whether the old Act was not better than the new one which has been substituted for it. Then it goes on to say, not that he shall have no indemnity unless he gets his certificate, but it enacts in express terms that he shall be entitled to a certificate. Now it is highly probable that the Legislature were not thinking of the consequences which would follow from entitling him to a certificate absolutely, namely, that a jury might decide and overrule the decision of the Election Committee in one case or the commissioners in the other—they probably were not thinking about that at all; but they have used words which in the ordinary way of legislation would be proper and correct words to express that perfectly legal right to it, provided that the circumstances exist, and I see nothing which militates against it. There are two arguments which I have listened to attentively against giving these words their natural meaning, namely, that if it is to be considered as a positive legal right, the Legislature could not have meant it, because when the witness has truly answered, it must inevitably require some consideration whether the commissioners will let him have a certificate or not, and they cannot be expected by the Legislature to put their hands and seals to a certificate of fact which though a jury under the direction of a judge might think perhaps true, they themselves would think false—that in reality from the very nature of the thing, when any person is required to certify facts which have happened before him, the Legislature must have meant to certify according to his belief—according to his judgment; that he was to tell them what he believed to be true, and that if he made a mistake he was not to be expected to tell what he thought to be a falsehood, because, in reality he did not think it a falsehood. That argument is one which may raise some difficulty, but can hardly, I think, overrule the express words of the Act of Parliament. I quite agree with what my Lord threw out about the substitution of the election judge for the election committee, and that we must look at the fact as if there was an election committee; and everyone who knows the practice of the House of Commons knows that when once the committee had given in their report to the Speaker and had ceased to sit, there could not have been a *mandamus* calling upon them to review their decision. Then there was an argument that the Legislature could not have intended that its proceedings should be reviewable by *mandamus*, and could not have intended to make the granting of a certificate a perfectly legal right to be enforced by a *mandamus*. But I do not think that this argument, upon the whole, is sound. If the Legislature did make it a positive duty, the legal consequences would follow, namely, that it must be enforced where

it can be, although they have made it a positive legal duty where the writ could not be granted and enforced. There is strong ground for suspecting that the Legislature did not contemplate this consequence, nevertheless, if they have enacted that a witness is to be entitled to a certificate, then I think a *mandamus* ought to go, if the facts are established that he really was asked questions tending to criminate himself, and answered every such question. If that is so, I think he would be entitled to a certificate, and a *mandamus* would go to enforce it. That is the opinion I have formed, and if I had to decide finally, I should decide to that effect. The writ must go, and if it is advisable, the question may be taken to the House of Lords. [His Lordship then reviewed the question whether Mr. Lovibond had answered satisfactorily, and concluded:] As it stands, I quite agree that the rule for the writ should be made absolute.

MELLOR, J.—I am not at all insensible to the inconvenience which must necessarily result from the mode of trying the issues upon a writ of *mandamus* if it should go, as our rule would authorise it to do; but at the same time, notwithstanding those inconveniences, I confess that I do not regret the change in the language of the present Act of Parliament as compared with the language of the former Act, because, having reference to the extraordinary consequences which follow from the refusal of the certificate, to a person who has been examined before the commissioners, and considering the policy of the law, which is to induce people to come forward and make a full disclosure of the corrupt practices in which they may have taken part, not for the purpose of coming upon them, but for the purpose, as Mr. James truly pointed out, to enable the Legislature to disfranchise and punish boroughs in which those corrupt practices had extensively prevailed, I cannot help thinking it is desirable there should be some means of reviewing the decisions which the commissioners had come to, and I cannot help thinking, at the same time, that the present case affords a sufficient reason for that. Now as to the construction of the statutes, I certainly have come to an opinion very satisfactory to my own mind, that the writ of *mandamus* is the remedy in this case. When I recollect the distinction in the language between the former Act and the present Act, I cannot help thinking that it must have been made for the purpose of preventing the judgment of the commissioners on the sufficiency of the answers being conclusive. I can only say, if it was not altered without intention, it is a most unfortunate expression—the expression of the present section—because the giving of the certificate is not made in any way to depend upon the answers being to the satisfaction of the commissioners. It is simply a question of fact—did he, or did he not?—and that is the condition upon which the right to the certificate depends. The section does not provide that the witness shall answer every question to the satisfaction of the commissioners, but merely that he shall answer every question relating to the matters aforesaid, which he may be required by the commissioners to answer, and the answer to which may criminate or tend to criminate him. Now that being the state of things, if we are satisfied in point of fact that the inquiries which were made by the commissioners were answered so far as they were entitled to be answered, then the witness is entitled to his certificate; and it appears to me as a matter of right he is entitled to it, and that being so, his true remedy is by *mandamus* to compel the commissioners to grant it in the event of their declining. Beyond all doubt the main questions were answered fully by Mr. Lovibond, and that being so, I think the commissioners ought to have given him a certificate. I think it is highly politic to encourage witnesses

Q. B.]

SMITH v. SYDNEY AND OTHERS.

[Q. B.]

to come forward and give their evidence on full expectation that if they really do state all the facts which are required for the purposes of the inquiry, they ought to be entitled to an indemnity; and I think it would be serious indeed if it should be a prevailing impression that the commissioners may arbitrarily, and without review, refuse to give a witness his certificate.

LUSH, J.—After the elaborate judgments of my learned brethren, I do not think it necessary to say more than that I quite agree in thinking that the writ ought to issue.

Rule absolute.

The Attorney-General announced that he should enter a *nolle prosequi* in the proceedings against Mr. Lovibond.

Attorney for the applicant, *John Bishop*, Tudor-street.

Attorney for the commissioners, *The Solicitor to the Treasury*.

Saturday, Feb. 12.

SMITH v. SYDNEY AND OTHERS.

Trespass—Right of action where judgment set aside—Judgment regularly signed—Jurisdiction of master at chambers—30 & 31 Vict. c. 98, s. 1.

A judgment which has been regularly and in good faith signed, though for an amount greater than is actually due, although it is afterwards set aside, furnishes a defence to an action of trespass brought against the party who causes the defendant to be arrested under a ca. sa. sued out upon it. Secus if the judgment has been signed irregularly or in bad faith.

In order to determine whether the party who causes the arrest is a wrongdoer, the court will look and see what were the grounds on which the judgment was set aside.

Trespass for false imprisonment. Pleas, not guilty and a justification under a ca. sa. upon a judgment for 34l. 9s. Replication to second plea that the judgment was irregularly signed for 34l. 9s., there being only 16l. 1s. due, as the parties who sued out the ca. sa. well knew, and that for that cause it was set aside by one of the masters of the court, and the money paid in excess of the amount due ordered to be repaid. Rejoinder, that the judgment was regularly signed on the nonappearance of the defendant to a writ specially indorsed, and was not set aside for irregularity.

Held, that the judgment having been regularly signed, and not having been set aside for bad faith, an action could not be maintained against the defendants who had caused the plaintiff to be arrested under the ca. sa. sued out upon it.

This was a demurrer to a rejoinder.

The declaration was for an assault, illegal arrest, and false imprisonment by the defendants, H. M. Sydney, C. L. Hutchings, and Francis Romer.

Pleas (1) not guilty, (2) that before the alleged trespass (to wit) on the 14th June 1869, in the Court of Exchequer of Pleas at Westminster, the said C. L. Hutchings and F. Romer, by the consideration and judgment of the said court, recovered against the plaintiff 34l. 9s., and thereupon, the said judgment remaining in force and unsatisfied, the said C. L. Hutchings and F. Romer, by the said H. M. Sydney, their attorney, before the alleged trespasses (to wit) on the 28th June 1869, sued out of the said court a writ of *capias ad satisfaciendum*, directed to the sheriff of Middlesex, whereby the said sheriff was commanded to take the plaintiff, if he should be found in his bailiwick, and him safely keep, so that he might have his body before the barons of the said Exchequer at Westminster imme-

diately after the execution of the said writ, to satisfy the said C. L. Hutchings and F. Romer the sum so recovered, with interest upon the same at the rate of 4l. per cent. per annum from the said day on which the said judgment was entered. And the said writ was then delivered by the defendants to the sheriff of the said county to be executed, and thereupon the said sheriff, by virtue of the said writ, and whilst the same was in force and within his said bailiwick, took the plaintiff and safely kept him according to the exigency of the said writ, which are the alleged trespasses in the declaration mentioned.

Replication: First, joining issue on the first plea; secondly, as to the second plea the defendants say that there is not any record of the alleged judgment remaining in the said Court of Exchequer; thirdly, that the said judgment was irregularly signed for the sum of 34l. 9s., there being then only 16l. 1s. due from the plaintiff to the defendants, C. L. Hutchings and F. Romer, as all the defendants then well knew; and before this suit the said judgment was for the cause aforesaid by an order duly made by one of the masters of the said court set aside, and the money paid in excess of 16l. 1s. to the sheriff by the plaintiff was by the said order ordered to be repaid, less the costs of and occasioned by the application to the said master.

Rejoinder, as to the third replication, that the said judgment was regularly signed in an action commenced by writ of summons by the said C. L. Hutchings, and F. Romer against the plaintiff, who then resided within the jurisdiction of the said Court of Exchequer, in which the said C. L. Hutchings and F. Romer claimed the sum of 34l. 9s. as a debt due to them from the plaintiff, and the said C. L. Hutchings and F. Romer made upon the said writ of summons, and a copy thereof, a special indorsement of the particulars of their claim in the form contained in the schedule A. to the Common Law Procedure Act 1852 annexed, marked No. 4, and the plaintiff having been duly served with the said writ, and not having appeared thereto, according to the exigency thereof, the said C. L. Hutchings and F. Romer, on filing an affidavit of personal service of the said writ of summons, signed final judgment in the form contained in the schedule A to the said Act annexed, marked No. 5, for the sum indorsed on the said writ, and costs, which is the said judgment in the said plea mentioned, and afterwards in due time issued the said execution in the said second plea mentioned, and after the issuing of the said execution, and the arrest and imprisonment of the plaintiff thereunder, as in the said plea mentioned, the plaintiff served the defendants with the following judge's summons:

HUTCHINGS AND ANOTHER v. SMITH.—Let the plaintiffs' attorney or agent attend me at my chambers in Rolls-gardens, on Monday next, at eleven o'clock in the forenoon, to show cause why the judgment signed herein and all subsequent proceedings thereon should not be set aside, and why the plaintiffs should not be ordered to repay to the defendant the sum of 15l., part of a sum of 30l., and the amount paid by the defendant for costs of action, execution and sheriff's fees, on the ground that the only amount payable by the defendant was 15l. and no more, and that such judgment was signed in absolute bad faith after a promise by the plaintiffs that no proceedings should be taken on the writ, and after full notice to plaintiff's attorney that 15l. only was due.

Dated the 3rd day of July, 1869.

GEO. BRAMWELL.

and made affidavit in support thereof, that at the commencement of the said action, 16l. 1s. only was due from him to the said C. L. Hutchings and F. Romer, and that he had paid to the said sheriff of Middlesex, under the said execution, the full sum recovered by the said judgment; and thereupon Master Johnson, one of the masters of the said court, made the following order:—

HUTCHINGS AND ANOTHER v. SMITH.—Upon hearing counsel

Q. B.]

SMITH v. SYDNEY AND OTHERS.

[Q. B.]

on both sides, and upon reading the two affidavits of Sidney S. Smith, and the affidavit of C. L. Hutchings, I do order that the judgment signed herein be set aside; the money paid in excess of 16l. 1s. to the sheriff to be repaid, less the costs of, and occasioned by, this application.

Dated the 7th July 1869. W. H. JOHNSON, Master.

Which is the order in the said replication mentioned, and so the defendants say that the said judgment was not irregularly signed, and was not set aside for irregularity.

Demurrer to this rejoinder, and joinder in demurrer.

Dixon, in support of the demurrer.—The judgment obtained in the former action having been set aside, and no terms imposed on the defendant in that action not to bring an action, he is entitled to maintain the present action for his arrest and imprisonment. A judgment, when set aside, is no protection for what has been done under it, except in the case where it has been set aside for error. In *Prentice v. Harrison*, 4 Q. B. 852, which was an action for false imprisonment, to which the defendant pleaded a judgment recovered, and that the plaintiff was arrested under a *ca. sa.* sued out thereon, a replication averring that the *ca. sa.*, after the issuing thereof and before the commencement of the suit was set aside by a judge's order not averring the grounds of such order, was held bad on special demurrer on the ground that the writ might, under supposable circumstances, have been set aside for reasons which would have been ground of error, and would not therefore have prevented it, until set aside, from being a justification to parties enforcing it, and the replication did not negative the existence of such circumstances. The *ratio decidendi* of the case is in favour of the present plaintiff's contention. "The plaintiff was bound," said *Patterson, J.*, "to show by his replication that the writ under which the defendants justify was set aside under such circumstances that it must have been illegal when they put it in force. Now, if any case can be suggested in which the writ might be set aside, and yet the party enforcing it not liable, the replication is bad, as we cannot presume that the fact was one way or the other. We held the other day that execution sued out more than a year and a day after judgment, without a *sci. fa.* was not void, but voidable by writ of error, and also that the writ and proceedings might be set aside on motion. And we constantly do set them aside in that way, though perhaps in strictness we should only set aside the execution. But if the court or a judge can deal with a writ of execution improperly issued without a *sci. fa.*, and the only mode in which it can be so dealt with is by setting it aside, it is not clear that the writ in the present case was not so disposed of; and the replication not excluding that supposition is too uncertain." It is quite clear from the present record that the judgment was not set aside for error. In *Collett v. Foster*, 2 H. & N., 356, a similar case, judgment had been entered up against the plaintiff, on a warrant of attorney, for 60l. given to the defendant to secure the payment of a debt by instalments, of which less than 20l. were due; and the defendant's attorney caused the plaintiff to be arrested under a *ca. sa.*, endorsed to levy 21l. 10s., an act which the defendant acknowledged that she had authorised; and the writ being afterwards set aside by order of a judge it was held that the defendant was liable in trespass. "To make a distinction," said *Martin B.*, "between writs set aside on the ground of irregularity, and on the ground of their not being warranted by the statute referred to, would introduce difficulties. If the writ issued in course of law and was set aside, I should be prepared to hold the client liable . . . once set aside, the operation of the writ for the protection of the party is at an end." And *Bramwell B.*

"Upon the question as to the replication, I am inclined to think the material point is whether the writ was set aside or not. As to the case of *Prentice v. Harrison*, there may be some doubt whether the rule there laid down is correct. It appears to me that the effect of this replication is to traverse the writ by showing that it was quashed and annulled by the court from which it issued." There is nothing now in existence to protect the present defendant; he alleges a judgment recovered, but it appears on the record that there is no judgment in existence. [*LUSH J.*—The judgment is still on the record of the court in which it was obtained, though there may be a memorandum added to it that it has been set aside by judge's order. Moreover, the writ having been specially endorsed and judgment having been signed on account of the defendant not appearing, we know that it was not irregularly signed.] In *King v. Harrison*, 15 East, 615, *Le Blanc J.* asked if there were any case where the party could justify under process which was afterwards vacated; but none was mentioned. [*LUSH J.*—The judgment only in the present case has been set aside; the writ remains still.] *Brooks v. Hodgkinson* 4 H. & N., 712, is an authority for the proposition that it is not necessary that the writ should be set aside in order to constitute the party a trespasser, provided the judgment has been set aside. There a defendant was taken in execution under a *ca. sa.* issued on a judgment for less than 20l. without the order of a judge who tried the cause, and it was held that he could maintain an action of trespass against the plaintiff and his attorney, though the writ had not been set aside.

Brown, Q.C. (with whom was *Cassall*) for the defendants.—In the first place the master has overstepped his power in setting aside the judgment obtained in the former action. The Act 30 & 31 Vict. c. 68, s. 1, enables the majority of the judges to make rules for empowering the masters of the court, "or some one or more of them, to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the rules and practice of the said courts, or any of them respectively, are now done, transacted, or exercised by a judge of the said courts sitting at chambers, and as shall be specified in any such rule;" but adds a restriction, "except in respect of matters relating to the liberty of the subject." Setting aside the judgment on which the plaintiff was arrested was an act which comes within this exception. [*LUSH, J.*—Then the master can never set aside a judgment; and every step in the cause affects the liberty of the subject if the ultimate result is looked to. *MELLOR, J.*—I don't think much can be made of this point.] As to the other point; the judgment was regularly obtained, the plaintiff in the former action having specially indorsed the writ, and being entitled to sign judgment on the non-appearance of the defendant. In such a case the judgment is set aside only on an affidavit of merits. "Even a regular judgment," it is said in *Chitty's Arch. Practice*, p. 988, "may be set aside upon an affidavit of merits, and in ordinary cases it is almost a matter of course to grant the application for this purpose," and nothing is said about the necessity of imposing the condition that no action should be brought. The cases clearly distinguish between proceedings set aside for irregularity or bad faith and those which are set aside on an affidavit of merits, or on the ground of error. In *Williams v. Smith*, 14 C. B., N. S., 622, *Williams, J.*, says: "If the attachment in this case had been set aside on the ground of irregularity, or that it was issued in bad faith, or in any other way equivalent to irregularity

Q. B.]

SMITH v. SYDNEY AND OTHERS.

[Q. B.]

I should have thought that both the attorney and the client would be liable for any imprisonment which took place under it. But, upon the facts which appeared at the trial, it is not true that the attachment was set aside for irregularity, or on the ground that it was issued in bad faith. The affidavit upon which it issued was sworn by Smith in the ordinary course of justice; and the Master of the Rolls was satisfied that it was a proper one upon which to found an attachment. It was not suggested when the application was made to that learned judge to set aside the attachment that there was any fault in the affidavit, but merely that the issuing of the attachment was not warranted by the circumstances. The Master of the Rolls, however, came to the conclusion that the facts did warrant the attachment. That opinion of the Master of the Rolls was pronounced by the Lords' Justices, upon appeal, to be erroneous. That brings the case within that class of cases where it has been held that the party causing process to be issued is not responsible for anything that is done under it where the process is afterwards set aside, not for irregularity, but for error. It follows, therefore, that the order of the Lords Justices setting aside the attachment in this case does not prevent the parties from being protected against the consequences of what was done under the attachment." And Willes J. said: "It by no means follows that because a writ or an attachment is set aside an action for false imprisonment lies against those who procured it to be issued. If that were so this absurd consequence would follow, that every person concerned in enforcing the execution of a judgment would be held responsible for its correctness. Where an execution is set aside on the ground of an erroneous judgment, the plaintiff or his attorney would be no more liable to an action than the sheriff who executes the process is. When a judgment is set aside for error, the proper course is not to bring an action, but to proceed by writ of restitution or by the course which the modern practice has substituted for it. I entirely agree with what has been laid down by my Lord and my brother Williams, that in order to entitle the party against whom the process issues to maintain an action for any intermediate acts done under it, he must show that the process has been set aside by reason of some misconduct, or at least some irregularity on the part of the person suing it out." [MELLOR, J.—There is certainly no irregularity or bad faith shown in the present case.] The text books state the rule in the same manner. In Lush's Practice (3rd edit.) p., 191, it is said, "Writs irregular in point of form, but not absolutely void, afford a justification so long as they remain in force; but when set aside for the irregularity a right of action arises for anything done under them against the party and against his attorney by whom they are issued." So in 1 Chitty's Arch. Practice, p. 641, "Although the writ be irregular, yet unless it be set aside the party at whose suit it is issued, and his attorney, may justify under it. But after it has been set aside for irregularity they cannot do so; and the latter is liable in trespass as well as the former for an arrest or the like made under it." *Philips v. Biron*, 1 Strange Rep. 509, was also referred to, where it was said, *per curiam*, that "in the case of error it is no fault of the party but of the court, and therefore binds till reversed."

Diron in reply.—The report in the case last cited does not state on what grounds the judgment was vacated. In *Williams v. Smith*, Williams J. was of opinion that, if the attachment had been set aside on the ground of irregularity or bad faith, "or in any other way equivalent to irregularity," an action would lie. It only appears on the present record that the judgment was knowingly signed for too

much. [LUSH J.—As to the averment that it was knowingly done, I take that to be mere surplusage, and to be wholly immaterial to the issue.]

MELLOR J.—I think our judgment must be for the defendants. Everything which could be said in favour of the other view of the subject has been said, and the case did no doubt present some difficulty as to the conclusion we should arrive at. It appears upon the record that the plaintiff had issued a writ, specially indorsed, claiming too much, and the defendant, instead of resisting, allowed judgment to go against him by default. There was then a valid subsisting judgment against him at the time of the application to the master. The ground of application to the master was that the plaintiff had recovered more than was due to him, the defendant also alleging that the judgment for the excessive amount had been signed in bad faith, and execution issued for more than the proper amount. But the master, in setting aside the judgment, has confined himself to the one ground, or rather has negatived any imputation of bad faith; and there does not seem to have been any strictly legal irregularity in the proceedings at all. If, then, the master treated the judgment as a valid one, and set it aside, not on the grounds mentioned in the summons, but did so as what may be called a matter of favour to the defendant; in that view, it seems to me we are entitled and bound to look and see what really were the grounds on which it was set aside, and whether the plaintiff was in reality a wrongdoer either in proceeding irregularly or against good faith. The plaintiff in the present action has failed to make out that the former plaintiff was a wrongdoer in either of these ways, and, looking at the record, I can see nothing entitling him to maintain action. This is, I think, the true view of the case, and I think it falls within the rule suggested, though not embodied in an actual decision, by Williams J. in the judgment in *Williams v. Smith* (*ubi sup.*) which has been referred to. I am therefore of opinion that the defendant is entitled to judgment.

LUSH, J.—I am of the same opinion. I think it is well established that the mere fact that judgment has been set aside is not of itself sufficient to make the plaintiff in the action a wrongdoer; but that the court, in order to determine whether he is such, must see also the grounds on which the judgment has been set aside, whether for irregularity, bad faith, or on the merits. Now the authorities distinguish between that which is an act of the court and that which is an act of the party; and it is only where the proceedings are set aside for misconduct of the party that he is made a wrongdoer by relation. Now, looking at this record, it is plain that the order of the master was made, not upon the ground of any misconduct on the part of the present defendant, but because the master was satisfied that there was, for some reason or another, a larger sum mentioned in the judgment than was properly due, and he interfered in an equitable manner, and in order to place the parties in their just position towards each other. The rejoinder shows that the plaintiffs in the first action had issued a writ and had specially indorsed upon it the particulars of their claim; that the defendant made default in not appearing; and that the plaintiff, at the expiration of the specified time, signed judgment as he was authorised to do by the Common Law Procedure Act 1852. The judgment so signed was as valid and good by way of protection for anything done under it as if the defendant had appeared and the case had been tried and a verdict had been returned by a jury for the whole amount claimed by the plaintiffs, and

C. P.] COSSEY AND WIFE v. LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. [C. P.]

the court had given judgment upon that verdict. Where judgment is signed in the case of a writ specially indorsed, on the expiration of a certain time, that judgment is as much the act of the court as judgment upon the verdict I have mentioned would have been. It is simply an act of the court, and it was set aside by way of correcting an erroneous act of the court, and not as being a wrongful act of the defendant. This case, therefore, falls within the established principle that the plaintiff in an action is not made a trespasser by reason of the judgment obtained in the action being set aside on the ground that it was an erroneous act of the court.

HANNEN, J.—I am of the same opinion. It is clear that the mere fact of a judgment being set aside does not deprive the party who has obtained it of the protection which it affords, otherwise it would be sufficient to plead *nul tiel* record simply; and it is plain upon the authorities that that is not sufficient, but that it is necessary to go further, and show on what grounds the judgment was set aside. The effect of the rejoinder in the present case is to show us what were the real facts, and to establish that this was not a case of irregularity in the signing of judgment, but the contrary. The reason of the rule is that the court may see whether, on examination of the reasons which induced the setting aside of the judgment, the party who signed it was in reality a wrongdoer. If he were a wrongdoer, then the judgment having been set aside would be no shield to him. It seems to me that the defendants in this case were not, in the legal sense of the term, wrongdoers, that they did only what the law authorised them to do when the defendant in the former action did not appear to make his defence; and that the master set aside the judgment, not for irregularity, but only by way of favour to the defaulting defendant, in order to prevent a larger sum being recovered than was due. I am therefore of opinion that our judgment must be for the defendants.

Judgment for the defendants.

Attorney for the plaintiff, J. W. Sykes.

Attorney for the defendants, H. M. Sydney.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR and H. H. HOCKING, Esqrs.
Barristers-at-Law.

Jan. 29 and 31, 1870.

COSSEY AND WIFE v. LONDON, BRIGHTON, AND
SOUTH COAST RAILWAY COMPANY.

Medical reports—Impending litigation—Privileged communications.

The plaintiffs sustained injuries in a railway accident, caused, as alleged, by the defendants' negligence. The plaintiffs made a claim on the company, by letter, for compensation, and a medical officer in the employ of the defendants called upon the plaintiffs and made an investigation of the injuries they had sustained; he afterwards sent written reports to the defendants of the plaintiffs' condition, and subsequently this action was commenced for compensation:

Held, on an application by the plaintiffs for inspection of these reports, that they were confidential communications obtained by the defendants with a view to impending litigation, and that they were privileged from inspection within the limitation laid down in Woolley v. The North London Railway Company, L. Rep. 4, C. P. 602; 20 L. T. Rep. N. S. 613.

It appeared from the affidavit of the plaintiffs' attorney that this action was brought to recover compensation for injuries inflicted upon the plaintiffs

by a collision of trains on the defendants' railway at the New Cross Station of the said railway, on the night of the 23rd June last.

The writ of summons in the action was issued on the 24th Dec. last; declaration in the action was delivered on the 5th Jan. inst., whereby the plaintiffs claimed 5000*l*.

Before the action was commenced the defendants' medical and other officers examined the plaintiffs, to ascertain the nature and extent of their injuries, and the compensation the plaintiffs required.

On or about the 3rd Dec. last the plaintiffs' attorneys received from the defendants' attorneys a letter, in which certain reports were referred to, which were believed by the plaintiffs' attorneys to be the reports of the defendants' said medical officers.

Application had been made by the plaintiffs attorneys to the defendants' attorneys to inspect and take copies of or extracts from the said reports, and refused.

The plaintiffs were advised that having submitted to be examined by the defendants' said officers, they were entitled to inspect the reports of such examination made by the defendants' said officers; that it was necessary that they, the plaintiffs, should be prepared to prove the said reports as part of their case on the trial of this action, and that they had just grounds to maintain this action.

It appeared from the affidavits of the defendants' attorney, who was acquainted with the arrangements of the defendants' company, and terms upon which the principal officers thereof were employed, that Dr. Duncan Maclachlan Maclure, Bachelor of Medicine of the University of London, member of the College of Physicians, lecturer on physiology at Westminster Hospital, &c., was the regular and permanent medical officer of the said company, and was employed at a salary to attend the servants of the said company, and to examine into and report upon all cases of injuries to passengers on the said railway, with the view of advising thereon and of meeting any claims that might be made on the said company in consequence thereof.

On the 13th July 1869 the said company received from the plaintiff William Cossey a letter of which the following is a copy:

Prince Alfred, Offord-road, Barnsbury-park,
London, July 20th, 1869.

Sir,—I regret to inform you that the effects of the collision at New Cross on the evening of the 23rd June have been much more serious than I had anticipated. I have suffered very much myself, nearly every joint has been affected, and it has been with difficulty and pain that I have been able to do anything. I feel shaken all over, and everything is burdensome.

My wife is more seriously affected. The veins in the legs have been inflamed; the pain in back has been very severe, and the system altogether upset. In addition she is ruptured, and has been compelled to wear a truss. As to all these matters, I beg to refer you to Dr. Ingoldby, surgeon, 11, Finsbury-square.—I remain, yours truly, W. Cossey.

After the receipt of the said letter the said Dr. Maclure, at the request of defendants, visited the said William George Cossey on behalf of the defendants, and as such medical officer as aforesaid, in order to inquire into the nature of their alleged injuries, and with a view of enabling the company's advisers to meet and consider what should be done in reference to the claim for compensation put forward by the said letter; and the said Dr. Maclure made certain reports, dated 7th Oct. 1869, as to the injuries sustained by the plaintiffs respectively, which are the only medical reports made to defendants concerning the matter in dispute in this action, and which are the reports mentioned in the letter from defendants to plaintiffs' attorneys.

These reports have been regarded by the defendants as, and are of a strictly private and confidential nature, emanating from an official and agent of the company, and made only for the information and guidance of the directors and their advisers

C. P.] COSSEY AND WIFE v. LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. [C. P.]

and the said Dr. Maclure has in his said reports spoken of sums of money which, in his opinion, might be paid by the said company as compensation to the plaintiffs for their said injuries.

The said Dr. Maclure would, as was believed, be a necessary and material witness for the defendants on the trial of the said action, and would be called as such witness, and his said reports would form the subject matter of his evidence at such trial.

The defendants were advised and believed that the production of the said medical report to the said plaintiffs, or their attorney, would be prejudicial to the interests of the defendants and to their defence on the trial of this action.

Application had been made by the plaintiffs at chambers to inspect in the presence of witnesses, and take copies of and extracts from, the reports made by the medical officers of the defendants of the injuries sustained by the plaintiffs, and the reports made by the defendant's officers or agents of interviews had with the plaintiffs as to the compensation the plaintiffs required. Willes, J., to whom the application was made, endorsed the summons, "Referred to the court, cause to be shown in the first instance."

Crompton now moved the court for an order accordingly.

Joyce showed cause in the first instance.

Cur. adv. vult.

Jan. 31.—BOVILL, C. J.—This was a motion for a rule to obtain inspection of certain medical reports in the custody of the defendants, and cause was shown in the first instance. The main ground of objection to inspection by the plaintiffs was that the reports were procured by the defendants with a view to impending litigation. There is no doubt about the principle in cases of this kind; it was distinctly laid down in *Woolley v. The North London Railway Company*, L. Rep. 4 C. P. 602 20 L. T. Rep. N. S. 613. I am there reported to have said: "I am of opinion that where a report is made by an officer of a company to the manager for the purpose of conveying information to him upon the subject to which it relates, it is not privileged, whether made before or after litigation has been commenced or threatened, and whether it contains matters of fact or of mere opinion. . . . If opinions are obtained confidentially with a view to litigation, they are privileged." Amongst other cases upon which that conclusion was based was that of *The Chartered Bank of India v. Rich*, 4 B. & S. 73. It was an action between the plaintiffs, who carried on business as bankers in various places, and the defendant, who had been their agent at Bombay, upon an agreement between them, of which the plaintiffs alleged the defendant had committed breaches; the documents, for which inspection was asked by the defendant, were all written by or to officers of the plaintiffs with the view of obtaining or furnishing information as to the proceedings to be taken by the plaintiffs against the defendant before the action was commenced. The court held that they were privileged, and ought not to be produced for the inspection of the other side. Cockburn, C. J. said, in his judgment, "If a man writes a private letter to an agent or friend, asking him to obtain information for him on a matter as to which he is about to engage, or has already engaged in litigation, I doubt whether a discovery or inspection of the answer to that letter would be ordered by any of the learned judges in equity to whose decisions reference has been made; and I will not be a party to establishing such a precedent." As we stated in *Woolley v. The North London Railway Company*, there are many cases where it has been held that information, which may

have been obtained in the ordinary course in apprehension of litigation, must be disclosed, as in *Coleman v. Truman*, 3 H. & N. 871, and in *The Chartered Bank of India v. Rich*, where Blackburn, J. said, "If I thought that the present case was like *Coleman v. Truman*, in which there was a question whether there had been fraud committed by the plaintiffs and their agents in India, I might be of a different opinion." The question for us here is what is the nature of the documents in this particular instance? They are reports of the medical officers of the company, written certainly months before this action commenced, and therefore, as the plaintiffs contend, they ought to have inspection of them, on the authority of *Baker v. The London and South-Western Railway Company*, L. Rep. 3 Q. B. 91. We must see whether the point raised on the affidavits in that case was the same as that here. I think not. The only objection made by the defendants there, in resisting the production of the documents, was that they were confidential communications made to the defendants by their agents or servants in the course of their duty. The action was brought by executors to recover damages for the death of the testator, caused, as alleged, by the negligence of the defendants' company. The defendants pleaded not guilty, and that the deceased had accepted 75*l.* in discharge of all claims connected with the accident, from which it was alleged the death had afterwards resulted. The defendants had sent a clerk in their secretary's office and their medical officer to see the deceased, and ascertain his state, and to negotiate as to the pecuniary compensation to be made him. The court ordered the plaintiff's inspection and copies of the reports made to the defendants by these officers of their interviews with the deceased; and I think they rightly so held, because the case was peculiar, and the reports could not be said to have been made with a view to the litigation which afterwards took place; further, than that, we are informed by one of the counsel in that case of a fact which does not appear in the report, viz., that the accord and satisfaction pleaded by the defendants was resisted on the ground of fraud. If that were so I can clearly understand that no other conclusion was possible. In the judgment Cockburn, C. J. adhered to the decision in the *Chartered Bank of India v. Rich*, but distinguished it from the case before him, and that distinction may have been based upon something in the affidavits beyond what appears in the report. There is nothing in the affidavits here in any way suggestive of fraud, but they are sufficient to show clearly that the reports related to the compensation to be offered by the company. Dr. Maclure was employed for that purpose in order to avert litigation; and after the accident occurred, upon a complaint being made by the plaintiffs, he went in the course of his employment to investigate their injuries, with a view to the claims for compensation which they had made upon the company. This case seems to me, by its circumstances, to be within the privileged exemption from inspection which is the result of the decisions in the *Chartered Bank of India v. Rich*, and *Woolley v. The North London Railway Company*. It is not an exceptional case like that of *Baker v. The London and South Western Railway Company*, but it must be governed by the rule of protection applicable to confidential documents written with a view to impending litigation. It is not necessary that the litigation should have actually commenced. The rule will be refused.

SMITH, J.—The question in this case is whether the rule concerning the privilege of confidential documents written with a view to impending litigation applies to these medical reports. I think they

C. P.]

CORNISH v. STUBBS.

[C. P.]

come within the limitation this court laid down in *Woolley v. North London Railway Company* upon the authority of previous cases. As I said in that case, "I understand that limitation to be this, that, if the documents are procured for the purpose of assisting the party in an impending litigation, and to obtain advice, they are not to be produced." I agree entirely with our conclusion in that case, and I wish also to refer to a case of *Ross v. Gibbs*, 39 L. J. 61, Ch., in which Stuart, V.C. said, "The privilege which exempts a communication from production is the privilege of the client, and not of the solicitor; and communications relative to the subject-matter of the suit, and furnished with a view to litigation, are as much protected upon principle, when made by a lay agent to a litigant, as they are when made by a solicitor." It seems to me that those observations are sound, and the limitation laid down by us in *Woolley v. North London Railway Company* ought to be construed liberally in favour of the litigant in whose possession the documents are. The present case seems to me to be certainly within that limitation; the reports were written after the plaintiffs made claims against the company, and when the company were in fact in immediate peril of an action; they were obtained by the defendants with a view to litigation. We were pressed in the argument by the case of *Baker v. London and South-Western Railway Company*, in the Queen's Bench. I should be sorry to disagree with that decision, and it is not necessary to do so, for the circumstances of that case differ from those here: in that case it was not contended that the reports there were obtained with a view to the litigation then before the court.

BRETT, J.—I am strongly of opinion that the rule in *Woolley v. North London Railway Company* is a good working rule with reference to matters of this kind, and it is clear to my mind that the decision in *Baker v. London and South-Western Railway Company* does not necessarily conflict with it; therefore, the only question is as to the application of the rule to this case. The medical man employed by the company went to examine the plaintiffs merely for the purpose of assisting the defendants in coming to a determination to admit or resist the plaintiffs' claims. Under such circumstances, inspection of the medical reports ought not to be granted.

Rule refused.

Attorneys for plaintiffs, *Martineau and Reid*.

Attorneys for defendants, *Baxter, Rose, Norton, and Co.*

Friday, Feb. 11.

CORNISH v. STUBBS.

Landlord and tenant—Reasonable time to remove goods after expiration of tenancy.

Plaintiff occupied a house of the defendant at a weekly tenancy, with the privilege of storing goods on a wharf and in a warehouse of the defendant adjoining; there had been an arrangement between the plaintiff and the defendant's predecessor in title that the plaintiff should be allowed a reasonable time beyond the conclusion of his tenancy by a week's notice, in order to remove his goods; the defendant alleged that he never assented to the plaintiff's use of the warehouse, but the plaintiff continued his occupation and paid rent as before. Defendant refused to allow the plaintiff to remove his goods from the warehouse after the expiration of a week's notice to quit; and the judge directed the jury at the trial of an action upon a breach of the alleged agreement, that if they believed in the existence of the arrangement stated by the plaintiff to have been

made between him and the defendant's predecessor in title, the plaintiff had a right to recover:

Held, that this direction was right.

This action was tried at Warwick before Cleasby, B. The plaintiff was a builder and furniture dealer at Birmingham; the defendant was executor to his deceased father, who held on lease a canal wharf and some dwelling-houses abutting thereon. One Howell was sub-lessee of these premises, and on the 20th May, 1861, the plaintiff became a yearly tenant under him of one of these houses, at the annual rent of 35*l.*, including taxes. The plaintiff also had the joint use of some offices, a right of road over the wharf to them, and the privilege of laying timber or other materials on any part of the unused wharf, and in a warehouse thereon. On the 25th March 1864 Howell gave plaintiff a quarter's notice to quit, in order to make him a weekly tenant, and to determine his tenancy at the expiration of the lease from Stubbs. At the conclusion of the period of this notice the plaintiff became a weekly tenant, under an agreement in writing, the tenancy to be determinable at a week's notice by either Howell or the plaintiff. There was also a verbal arrangement at the same time that Howell should not determine the tenancy without giving the plaintiff a sufficient opportunity to remove his cumbrous stock and obtain other premises. On the 29th Sept. 1864, Howell's lease expired, and, according to the plaintiff's evidence, he became tenant on the same terms to the testator, the defendant's father, who died in June 1868. The plaintiff afterwards continued to pay rent to the defendant, and, as he alleged, continued his tenancy on the same terms as before.

On the 16th Jan. 1869, defendant served upon plaintiff notice to quit on the 25th Jan. The plaintiff desiring to make fresh terms with the defendant, took no steps to remove, and on the 27th Jan. he received a letter requiring him to give up possession to the defendant forthwith, requesting him at once to remove all materials from the wharf and warehouse he had been using, demanding compensation for the use of the warehouse, and threatening ejectment.

The plaintiff made proposals for a continuation of his tenancy, which, however, the defendant refused, and the plaintiff advertised a sale by auction of all his goods and materials for the 11th and 12th Feb. 1869.

On the 8th Feb. the plaintiff received a letter, in which the defendant stated that he would not allow the sale to take place unless compensation were first paid for the use of the warehouse in which the defendant alleged the plaintiff had been a trespasser.

The plaintiff declined to pay the compensation claimed, and the defendant prevented the sale by auction from taking place as advertised.

On the 15th Feb. the defendant entered a plaint in the Birmingham County Court for recovery of the possession of the premises, and obtained an order for delivery of possession in a month. The plaintiff then sold his stock by private treaty, at a great sacrifice, and on the 8th April gave up possession of the premises, and paid defendant 2*l.* 14*s.* rent for four weeks to that date.

The plaintiff brought this action to recover compensation for the loss he had suffered in consequence of the defendant's interruption of the sale by auction.

The declaration contained two counts:—First, For that the defendant broke and entered a certain messuage or tenement, warehouse, stable, wharf and premises of the plaintiff, situate and being No. 41, Aston Road, and at Aston Junction Wharf contiguous thereto, in the parish of Aston, in the

C. P.]

CORNISH v. STUBBS.

[C. P.]

borough of Birmingham, in the county of Warwick, and excluded the plaintiff therefrom, and kept him so excluded for a long space of time, and prevented him ingress, egress, and regress, for the purpose of holding a sale by auction on the said premises, and stopped and prevented the said sale being held, whereby the plaintiff lost the expenses to which he had been put in advertising and preparing for the said sale and the benefits he would have derived therefrom, and had to sell the goods to be there sold at a great disadvantage and loss, and was and is otherwise much injured. Second, for that the plaintiff was lawfully in the occupation of a certain messuage, shop, warehouse, and appurtenances thereto belonging, situate and being in the Aston-road, Birmingham, and was entitled to the use of certain wharf land thereto contiguous, and was possessed of a right of way on to the said wharf land, and to the said messuage, warehouse, and premises, through a certain gateway or entrance, situate between the said Aston-road and the said wharf land, and entitled to have access, egress, and regress, to and from the said wharf land, warehouse, messuages, and premises for himself, and those whom he should permit to enter or leave the said wharf land, warehouse, messuages, and premises, at all reasonable times for the purpose of business or otherwise, or for attending any sale of the plaintiff's goods, and merchandise, chattels, and effects on the said land and premises; and while the plaintiff was so lawfully in occupation and so entitled as aforesaid, the plaintiff was about to quit the possession and occupation of the said premises, and his interest therein had but a short time to run, and he was desirous of selling by public auction prior to his so quitting the said premises, certain stock, goods, merchandise, and effects of the plaintiff upon the said land and premises, and had for the purpose engaged an auctioneer, and advertised the said sale to the public, and had catalogues of the said goods printed and circulated, and otherwise been at great expense and trouble to make the said sale publicly known, and to render it profitable in all respects, and the said sale was advertised for and intended to be held on a day just prior to the plaintiff so ceasing to have any interest in the said land and premises, and on such a day as if the said goods were then sold, there would be not more than sufficient time to permit the removal thereof from the said land and premises before the plaintiff's interest therein ceased and expired. And the reversion in the said land and premises expectant on the plaintiff's said interest then ceasing was vested in the defendant and others. And the defendant had notice of all the premises hereinbefore alleged. Yet the defendant wrongfully and maliciously shut the said gates, and caused them to be kept closed at the time of the said sale, and blocked up and obstructed the said way, and wholly prevented any use of the said right of way there, and excluded all those who had come to attend the said sale from entering on to the premises, and prevented the auctioneer from entering the said land and premises, and wrongfully and maliciously prevented the said sale from taking place, whereby the plaintiff lost the benefit of the said sale, and lost all benefit of the services of the auctioneer, and lost the money he had expended in paying for the services of the said auctioneer, and in preparing, printing, and distributing the said catalogues, and in advertising and preparing for the said sale, and was forced and obliged to sell his aforesaid goods and chattels at a sacrifice, and greatly under their real value, and has been damaged in his reputation and business, and has been and is otherwise greatly damnified. And the plaintiff claims 500*l*.

The defendant pleaded 1. Not guilty. 2. As to

the first count that the messuages, tenement, warehouse, stable, wharf, and premises were not the plaintiff's. 3. As to the said first count, that at the time of the alleged trespass the said messuage, tenement, warehouse, stable, wharf, and premises were the freehold of the defendant, wherefore the defendant in his own right broke and entered the same and excluded the plaintiff therefrom, and kept him excluded therefrom, and prevented him ingress, egress, and regress. 4. As to the second count of the declaration, that the plaintiff was not lawfully in occupation of the said messuage, shop, warehouse, and appurtenances, nor was he entitled to the use of the said wharf land, nor was he possessed of the said right of way.

Replications:—1. Issue. 2. As to the defendant's third plea, that before and at the time of the committing of the acts, grievances, and trespasses to which that plea is pleaded, the plaintiff was possessed of the said messuage, tenement, warehouse, stable, wharf, and premises, and held the same as tenant at a certain demise from the defendant to the plaintiff.

Rejoinders:—1. Issue upon second replication. 2. As to the said second replication, the defendant says that, before the said time when, &c., the said tenancy had been duly determined.

Surrejoinder:—Issue upon second rejoinder.

The judge asked the jury at the trial if they thought there was an actual agreement between the old Mr. Stubbs and the plaintiff, that the latter should not be turned out without having the opportunity afforded of removing his property, that is, reasonable time for removing any materials he might have there. He also said if they were not satisfied of the existence of that agreement, he still thought there was an agreement with Howell that the plaintiff should have the advantage of using this wharf-ground, and that he should not be turned out without having time and ample opportunity allowed him to take his things away; it was for them to say whether this agreement was continued with the consent of Stubbs.

The jury found a verdict of 100*l*. for the plaintiff. The learned judge stayed execution.

On the 8th Nov. *A. Wills* obtained a rule *nisi*, calling upon the plaintiff to show cause why the verdict found for him should not be set aside, and a new trial had between the parties on the ground that the judge misdirected the jury in telling them that if they thought the alleged conversation between the late Mr. Stubbs and the plaintiff really took place they ought to find for the plaintiff, whereas the judge ought to have told the jury that a tenancy to be determined by a notice to quit of an indefinite duration was unknown to the law. Also on the ground that the verdict was against evidence; or to show cause why the damages should not be reduced.

O'Brien, Serjt. and *Beasley* now showed cause against this rule.—Here the tenant had a right by agreement with his landlord to retain possession of the demised premises after the end of the term for a particular purpose; and by *Woodfall's Landlord and Tenant*, p. 590, "such right will in effect operate as a prolongation of the term," and it will justify the outgoing tenant in defending an action of trespass at the suit of the incoming tenant, or the outgoing tenant may maintain trespass:

Knight v. Bennett, 3 Bing. 364;

Beaty v. Gibbons, 16 East. 116;

Griffiths v. Puleston, 13 M. & W. 358. :

Wills supported the rule—With the exception of agricultural leases, there must be a certain time at which every tenancy expires. Exceptions have

C. P.]

CORNISH v. STUBBS.

[C. P.]

been made to the rule for the benefit of agriculture, as in

White v. Sayer, Palmer 211;

Strickland v. Maxwell, 2 C. & M. 539;

Wigglesworth v. Dallison, 1 Doug. 201; 1 Sm. L. C. 539;

Beavan v. Delahay, 1 H. Bl. 5.

At all events, with regard to storing materials upon the wharf and in the warehouse, there was merely a verbal licence revocable at any time; and it was never assented to by the defendant himself. Even if an agreement to allow the tenant time to remove goods were proved, it would be too indefinite to give the plaintiff a cause of action. [WILLES, J.—That is not so; by Co. Litt. 56a, a tenant at will, if put out by the lessor, shall have free entry by reasonable time to take away his goods; and it appears by Lord Coke's note, "reasonableness in these cases belongeth to the knowledge of the law."]

BOVILL, C. J.—I think there is no objection, as a matter of law, to a weekly tenancy, determinable by a week's notice, with a condition attached that the tenant shall have a further reasonable time to remove his goods from the premises. Evidence was adduced on the plaintiff's part that such an arrangement had been entered into, and the jury have found in accordance with that evidence. It has been contended that the plaintiff's privilege to store materials on the wharf and in the warehouse was a mere licence at any time revocable, but it seems to me rather to have been an interest in the nature of an incorporeal hereditament annexed to the tenancy. The right to remove goods or fixtures from premises leased by a tenant after the expiration of his tenancy is well known to the law, as appears from the passage cited by my brother Willes from Co. Litt. Why, then, should not such a right exist by agreement in the present case? Lord Coke speaks of a tenancy purely at will, and says the fixtures may be removed after the lapse of a reasonable time; and it was held in the case of *Stansfield v. The Mayor of Portsmouth*, 4 C. B., N. S., 120, that a reasonable time for the removal of fixtures was impliedly allowed under a lease which made no express provision to that effect; the action in that case was by assignees in bankruptcy of a shipwright who had leased premises from the defendants; he had erected during his term certain machinery for the purposes of his trade, which by the lease became at the end of the term the property of the defendants; the lease also provided that this last-mentioned stipulation should not apply to machinery or other articles erected or set up for any other purpose than that of a shipwright's trade, "but that it should be lawful for the lessee at any time during the term, or at the expiration thereof, to remove and take away all such last-mentioned machinery, &c., from the said demised premises." The lease further provided that in the event of the lessee becoming bankrupt, the lessors might re-enter and take possession of all machinery, &c., used or employed in the business of a shipbuilder. Upon the bankruptcy of the lessee the lessors re-entered, but it was held that the assignees of the lessee were entitled to enter for the purpose of removing the fixtures other than those set up for the ship-building business, and to a reasonable time for that purpose. The law with regard to farming leases stands on the same principle. It is difficult to distinguish between the application of this principle to premises demised and to a privilege annexed to a tenancy. If, then, the agreement alleged by the plaintiff in this case was made, he had a right to remove his goods from the wharf and warehouse within a reasonable time after the conclusion of his tenancy of the other premises, and if the defendant obstructed him in the exercise of that right, he must be liable for the injury he so

caused; the fact of the privilege or licence being affixed to the tenancy at one entire rent places the defendant in the same position as his predecessor in title who entered into the arrangement. The defendant received rent from the plaintiff after the testator's death, and acquiesced in the tenancy. There is nothing to show that he did not acquiesce in the whole of the terms, the verdict was in his favour, and he had a right of action for the breach of the agreement.

WILLES, J.—I am of the same opinion. The tenant was originally to have a reasonable time for the removal of his goods after the termination of his tenancy, and there was evidence of a new contract between the plaintiff and defendant by which this stipulation was revived. The payment of rent by the plaintiff was continued after the death of the defendant's father; the defendant was at law the devisee of his father, and the stat. 32 Hen. 8, c. 34, gave to lessees the like remedy against the grantees of reversions, which they might have had against their grantors. The executors of a lessee, on the other hand, if they continue to occupy, are certainly bound by the terms of the original agreement: (*Buckworth v. Simpson*, 1 C. M. & R. 834.) As to the goods in the house rented by the plaintiff, such a stipulation as that reasonable time for removal should be allowed after the conclusion of the term may doubtless be entered into by contract. No authority has been cited against such an arrangement, and provided it is not claimed for any other purpose but that for which it was intended, it seems to me that we ought to recognise it. As to the goods on the wharf and in the warehouse, which were stored there, as is alleged, merely by the licence of the defendant's father, there may be somewhat greater difficulty. The right must be merely an incorporeal hereditament, which could ordinarily only be conveyed by deed; but if, as it seems here, it was annexed to the tenancy, I think we can hold that it might have been created by parol agreement. This seems to have been the view taken by Lord Cranworth in *Wood v. Leadbitter*, 13 M. & W. 838, when he directed the jury, that assuming the ticket for admission to the land of Lord Eglintoun had been sold by him to the plaintiff, it was lawful for Lord Eglintoun to remove him from the land without returning the money or assigning a cause, after giving him reasonable notice to quit. In the judgment upon that case Alderson B. reviewed with approval the decision of the Queen's Bench in *Wood v. Manley*, 11 Ad. & E. 34; that was an action of trespass for coming on plaintiff's land to remove hay which defendant had purchased, and for the removal of which plaintiff had given defendant leave to enter as often as he should see fit. The jury were directed that the licence to come from time to time to remove the hay was irrevocable; the court refused a rule on the ground of misdirection, because they said this was a case not of a mere licence, but of a licence coupled with an interest. (See also *Lord Bolton v. Tomlin*, 5 A. & E. 856.) I have no doubt that the acquiescence of the defendant in the terms upon which the plaintiff had been occupying under the testator involved the licence as well as the tenancy, and the rent was clearly paid for both; it is by no means clear that under the circumstances the defendant could have revoked the licence by itself, at all events without the consent of the plaintiff.

M. SMITH, J. concurred.

Rule discharged

Attorneys for plaintiff, *Fearon, Clifton, and Fearon* for *Hawkes*, Birmingham.

Attorneys for defendant, *Emmets, Watson, and Emmet* for *Stubbs and Fowke*, Birmingham.

Ex.]

BURROWS v. THE MARCH GAS AND COKE COMPANY (LIMITED).

[Ex.]

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Jan. 15 and 18.

BURROWS v. THE MARCH GAS AND COKE COMPANY (LIMITED).

Negligence—Accident from gas explosion—Action for injury therefrom—Damages—Contributory negligence—Act of stranger, conjointly with defendants' negligence, causing damage—Liability of both—Breach of contract—Tort—Remote and proximate cause—Measure of damages.

The plaintiff, wishing to have gas laid on upon his shop and premises at M., employed B., a gasfitter, to do the work, and being informed by B. that the gas company (the defendants) always supplied and fixed the service pipe, leading from their main in the street to the meter upon the consumer's premises, he thereupon requested B. to arrange with the company, on his plaintiff's behalf, for the supply and fixing such service pipe accordingly, B. himself supplying all the other necessary pipes and fittings. B. arranged with the defendants' manager, and the service pipe was duly supplied and laid down by the defendants, and communication was thereby effected between their main in the street and the plaintiff's meter, situated under the stairs on the ground floor of his premises, some distance in from the outer wall. That being done, the gas was turned on by the defendants from their main, prior to the usual time of gas-lighting, on the afternoon in question, for the purpose, as the defendants alleged, in accordance with their custom in such cases, of testing the new work, but no workman or other person on their behalf was present on the premises when the gas was so turned on. A strong smell of gas being apparent to the plaintiff's servants, immediately after the gas had been so turned on, they requested a gasfitter in the employ of B., named S., who happened to be at work on another part of the premises, to ascertain the cause of it, which he accordingly proceeded to do, with a lighted candle in his hand. The consequence was that, upon entering the plaintiff's shop, the explosion took place which caused the injury complained of in this action. It was proved that the gas escaped through a slit or hole in the service pipe supplied and laid down by the defendants. The jury found that the escape was caused by a defect in the pipe, and that the defect was in the pipe when supplied; and they further found that there was negligence in S. in using a lighted candle:

Held, by the Court of Exchequer (Kelly, C. B., and Martin, Channell, and Pigott, BB.) that the defendants were liable to the plaintiff in substantial damages for negligent breach of contract in not having supplied a proper and sufficient service pipe, or, at all events, for not having left it in a perfect state; and that the fact of the explosion being due to the two conjoint causes of the defendants' negligence in supplying a defective pipe, and of the negligence of S. (a stranger to the plaintiff so far as this action was concerned), did not exonerate the defendants from liability for the result of their negligence in the performance of their contract.

This was an action brought by the plaintiff against the March Gas and Coke Company, to recover damages from them as a compensation for loss and injury accruing to the plaintiff from an explosion of gas on his premises, which it was alleged on his part arose from and was due to the negligence of the company in laying down upon his said premises a service pipe which proved to be unsound and defective, for the conveyance of gas from the company's main in the public street to the gas meter in the plaintiff's house.

The plaintiff, by his declaration, alleged that the

defendants were a company making and selling gas for profit and reward, and that it was agreed between him and the defendants that the latter should provide, and well and sufficiently lay, a proper and sufficient communication, and proper and sufficient service pipes, from the main of the defendants to a certain gas meter within the premises of the plaintiff, for the purpose of furnishing, and so as to furnish, the plaintiff with a supply of gas, to be used in and on the said premises, for rates and reward to be therefor paid by the plaintiff to the defendants; yet the defendants did not provide and properly lay a proper and sufficient communication, and proper and sufficient service pipes, for the purpose aforesaid, but so negligently and improperly conducted themselves in and in relation to the providing and laying a communicating service pipe for the purposes aforesaid, that the pipes provided and used by the defendants for that purpose were not proper and sufficient, and the same were not well and sufficiently laid by the defendants, and by reason thereof, after gas had been turned on through the same by the defendants for the purpose of supplying the plaintiff therewith, to be used on the said premises as aforesaid, large quantities of the said gas leaked and escaped from the said communication and pipes, and caught fire, and exploded, and blew out the front of the plaintiff's shop, being a part of the said premises, and blew away and destroyed the floorings, counters, and fixtures of and in the said shop, and greatly cracked and injured the walls and other parts of the said premises, and greatly injured the stock-in-trade and the goods of the plaintiff then being on the said premises, whereby the plaintiff sustained great damage, and had to incur great expense in and about repairing the said damage, so done as aforesaid in and to the said premises, and lost and was deprived of the value of the said stock-in-trade and goods so injured as aforesaid, and was for a long time deprived of the use of his said shop for the purposes of his trade and business therein, and was much injured in his said trade and business and otherwise.

Pleas. 1. A denial of the agreement as alleged. 2. Not guilty. And, upon these pleas issue was joined.

At the trial at the last summer assizes at Cambridge, before Cockburn, C. J., and a special jury, the facts of the case appeared in evidence to be the following:—

The plaintiff was a draper, grocer, and commission agent, carrying on business at March, in the county of Cambridge, and the defendants were a gas company there incorporated and registered under the Companies Act 1862. The plaintiff, having made extensive alterations and additions to his premises, was desirous of increasing the supply of gas which had hitherto sufficed for his purposes, and of having gas laid on in the new and additional parts of his premises, and he accordingly employed a gas fitter in the town named Bates to do this work, and to supply the new and additional internal gas fittings which would be required. Upon being informed by Bates, that it was the custom and practice of the gas company themselves to supply and fix the service pipe, leading from their main pipe in the public street to the gas meter on the consumer's premises, the plaintiff requested Bates to arrange as to such pipe with the company, and Bates accordingly saw the defendants' manager, and arranged with him on the plaintiff's behalf for the company's providing and furnishing requisite service pipe from the main to the meter, and the necessary supply of gas, Bates himself supplying and fitting the pipes leading from the meter to the various other parts of the plaintiff's premises, and all the other gas fittings. The service pipe in question was accordingly furnished by the defendants, and was laid down by a

[Ex.]

BURROWS v. THE MARCH GAS AND COKE COMPANY (LIMITED).

[Ex.]

workman of their own, and extended from their main in the road outside the house, through the outer wall of which it passed, to the meter within, which was situated under the staircase on the ground floor of the plaintiff's premises, at some little distance in from the outer wall. The pipe having been so laid down and fixed, and communication between the main and the meter having been thereby effected, the defendants, in accordance with their usual practice in such cases, turned on the gas from their main at an earlier hour in the afternoon of the day in question than the usual time of gas lighting, for the purpose, as a matter of precaution, of testing the new work.

There was some discrepancy and conflict in the evidence, as to whether or not the defendants informed the plaintiff of their being about to test their work by turning on the gas. The defendants' workman stated that he told Bates that "the gas was about to be turned on for that purpose, but Bates, on the other hand, said he had no recollection of anything of the kind having been told him. Be that, however, as it may, Bates was not present when it was turned on, and sent no one to be there for him, nor did the defendants send anyone on their part to test the new work. Soon after the gas had been turned on as above mentioned, a strong smell of gas pervading the whole premises became apparent to the servants of the plaintiff who were there; and a workman in the employ of Bates, of the name of Sharrott, happening to be on the spot at the time for the purpose of testing his own work in other parts of the plaintiff's premises, was informed of the smell, and requested to ascertain where the escape was taking place. Thereupon Sharrott took a lighted candle into the shop, and, having tried about the pipes and joints on both sides of the counters, and found nothing there, he took up a portion of the flooring near the door, but failed to perceive any smell of gas. He then went to the meter, and upon examining it found that the index finger stood at zero, thus clearly demonstrating that no gas had passed from the defendants' new service pipe into the meter, and that the escape was therefore taking place in some part of that pipe between the meter and the outer wall. Presently after this, seeing a young woman going out from the shop in the direction of the spot where he had taken up the flooring, he ran forward to the place with the lighted candle in his hand, in order to prevent her from tumbling into the hole in the floor, and, on his coming there, the explosion of gas immediately occurred, which blew him into the street, where he was picked up in an insensible state, and which caused the injury to the plaintiff's premises and property, to recover compensation for which in damages the present action was brought. There was a conflict of evidence also as to the state of the service pipe supplied by the defendants; the plaintiff's case being that there was originally a slit or chink in the pipe itself, arising from an imperfect "weld." The defendants' case, on the other hand, being that the damage to the pipe arose, not from any defect in its original construction but, from the rough and improper handling which it underwent on the part of the plaintiff's men in laying it down. There was also conflicting evidence as to whether this laying down was done by the company's workmen alone, or whether Sharrott, Bates's man, took any part in that job. Evidence was also given, on the part of the defendants, that the proper way to search for an escape of gas, especially when it was evident that it was escaping under a flooring, was to use the sense of smell, or to listen for the sound of the gas escaping, or to pass the hand along and feel for the escape, which would be notified by the difference of temperature between the gas and the atmospheric air. Sharrott, on the other hand,

maintained that the ordinary and the only way, to try for an escape of gas at a joint in a pipe, was to use a light, and that an explosion could not occur at a joint.

The Lord Chief Justice left the following questions to the jury:—First, was the escape of gas occasioned by a defective pipe? secondly, if so, was the defect in the pipe at the time it was supplied by the company, or was it caused by the rough and improper handling of it when it was being laid down, and, if so, then; thirdly, was the rough handling done by the defendants' servants, or by Sharrott, the workman of Bates the agent of the plaintiff? and fourthly and lastly, was there negligence and an absence of reasonable care in Sharrott in using a lighted candle under the circumstances?

The jury found:—That the escape of gas was occasioned by a defect in the pipe, and that defect was in the pipe when supplied. They also said: "We find that Sharrott was deficient in prudence on the occasion in using a lighted candle, although there is no evidence that he had reason to suppose that there was a dangerous escape of gas at the time. We do not think there was culpable neglect, only a common want of prudence on the part of Sharrott."

In answer to a further question by his Lordship, whether there was a want of reasonable prudence under the circumstances, the foreman replied, "There was a degree of carelessness, but not wilful neglect." Upon being desired by the learned judge to give a specific answer, if possible, to the question whether there was an absence of reasonable and proper prudence and caution, without troubling themselves as to culpable negligence in what Sharrott did, the jury again retired, and on their return handed in the following finding on paper. "The jury find that there was negligence on the part of Sharrott in using a lighted candle." The foreman then said: "They wish to add, with your Lordship's consent, to their decision that *the company also were negligent in not sending their own foreman to test the new pipes.*" Whereupon his Lordship said, he thought that that latter finding as to the negligence of the company was *ultra vires* altogether. The damages were assessed by the jury at 404*l.*, for which amount the verdict was entered for the plaintiff, leave being reserved by the learned judge to the defendants to enter the verdict for them, or to reduce the damages.

A rule was accordingly obtained by *O'Malley, Q. C.*, in Michaelmas Term last, on the part of the defendants, to set aside the verdict found for the plaintiff and to enter it for the defendants, on the ground that, upon the evidence, the verdict ought to have been entered for them: or to reduce the damages to nominal damages, on the ground that the damage resulted from the negligence of Sharrott, and not from the defendants' breach of contract. Against that rule,

Keane, Q. C., and *C. G. Merewether*, for the plaintiffs, now showed cause. The accident would not have happened had the defendants faithfully performed their contract, and the damage done was the natural and consequential result of their breach of contract. It is not too remote, nor does it relieve them from responsibility, or disentitle the plaintiff to recover, as against them, that a third person (Sharrott), who was not a servant of the plaintiff, or at all connected with him, was also guilty of negligence which conduced to the explosion which, had the defendants' work been properly done, could not have occurred. [They were here stopped by the court, who called on]

O'Malley, Q. C. and *W. Graham*, for the defendants, to support their rule. Here negligence was

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BURROWS v. THE MARCH GAS AND COKE COMPANY (LIMITED).

[Ex.]

found by the jury on the part of Sharrott, the workman of Bates, who represented the plaintiff, and undertook to see the work properly done. It is clear that, but for the conduct of Bates or his man, the alleged negligence of the company would not have produced the accident; and the established rule, therefore, must prevail, that the plaintiff, having been by his servant or agent contributory to the accident, cannot recover. But if that is not so, the damage here is, nevertheless, not a damage arising from the negligence of the defendants. The injury here was the result of the negligent and wrongful conduct of Sharrott, a third party, who used the lighted candle, he being, too, a skilled person, and who must be supposed to be cognisant of the nature of gas, and the work to be done, and of the danger attendant on using a candle under such circumstances. In the present case, moreover, there was no contract, express or implied, to provide a perfect pipe, but only a pipe which was to be made perfect at a future time, by testing. In gas and water works allowance is always made for a large percentage of escape by inevitable leakage. This pipe was to be tested with a view to being made perfect, and the accident arose in the course of the testing, because that operation was unskilfully done by a stranger to the defendants, for which they are not answerable. They were not bound to supply an absolutely perfect pipe. But, even assuming a contract, and a breach of it, then it is contended that the damage is not such as flowed proximately or directly therefrom. The defendants had no control over Sharrott, whose act it was, and who was rightfully on the premises on the plaintiff's work. On that point the case in the Common Pleas of *Ward v. Weeks*, 7 Bing. 211; 9 L. J. 6, C. P.; 4 M. & P. 797, was applicable, in which the original utterer of the slander was held not liable for damage done by its repetition by a third person to whom he had spoken it, and over whom he had no control. In *Holden v. The Liverpool New Gas Company*, also, 3 C. B. 1; 15 L. J. N. S. 301, C. P., Tindal, C. J., in delivering the judgment of the court says, "It appears to us that the injury sustained by the plaintiff is not solely imputable to the want of due care on the part of the defendants, but that the plaintiff has by his own voluntary act been contributory to it himself. The plaintiff knew that the pipe which brought the gas into the house still remained, as before, with the stop-cock in the inside of the house, which would prevent the gas being supplied to the house if properly turned, and the house, being without a tenant, was under his own charge and care. We think, therefore, that the plaintiff was himself wanting in the ordinary care of seeing that the stop-cock in the inside was closed, which would have effectually prevented the gas from escaping." Those observations show that a plaintiff ought to look after the gas in his own house, and be careful. Again, in *Wilson v. The Newport Dock Company*, in this court, 14 L. T. Rep. N. S. 230; L. Rep. 1 Ex. 177; 35 L. J. 97, Ex., Martin, B. thought the defendants had a right to a *bona fide* and reasonably sound judgment being exercised, as to what course the captain there was to adopt, for the safety of the vessel under circumstances of danger, and that it was a question for the jury, who, in that case, found that the captain did the best he could, and was not guilty of negligence. Now, in the present case, the jury found that the best was not done under the circumstances. If anything, therefore, could have been done to prevent the accident, the defendants are not liable. *Vicars v. Wilcocks*, 8 East. 1; 2 Sm. L. C. 5th edit. 461, is also in point, as to remoteness of damage. It is submitted, 1st. That there was contributory negligence in the plaintiff by his agent or servant; 2nd. If not, that there

was no negligence in the defendants, but in a person introduced by the plaintiff, and who improperly dealt with the pipe; 3rd. There was no contract to supply an absolutely perfect pipe at first, and the contract declared on was not proved.

KELLY, C. B.—The plaintiff in this action claims damages in respect of injuries sustained to his property by reason of an explosion of gas, which took place upon his premises. The action is said to be in contract; but when we look to the declaration, we find that, though in truth it sounds in contract, the contract is stated by way of inducement only, and it is in form and in substance an action for negligence in the performance of a contract. Now, the contract was, undoubtedly, that the defendants should supply and lay down a pipe from their main to the meter within the plaintiff's premises. It appeared that it was unusual for the company to carry pipes supplied by them, or fixed or laid down by them, beyond the outer wall of the premises of the consumer, but this case was proved to have been exceptional in that respect, for the pipe which the defendants contracted to, and did, lay down, extended from their main, through the outer wall, to the meter which was situated some distance in from the outer wall, and under the staircase in the plaintiff's premises. It appeared that the mischief arose in this way. The pipe having been laid down, and the work so far completed that it only required to be tested, the company some little time afterwards turned on the gas, which thereupon flowed into the pipe that led from the main to the meter. It does not appear that the plaintiff had any notice that this was about to be done. The gas having been so turned on, on the afternoon in question, it seems that a man named Sharrott, a workman in the employ of a Mr. Bates, a gasfitter who had been employed by the plaintiff to superintend and fix the fittings in other parts of the premises, but not employed by the plaintiff to interfere at all with the gas pipe in question, happened to be upon the premises, not for the purpose of testing the pipe laid down by the defendants, but for the purpose of looking after his own work, that is, the work done by Bates, and being there he is told that there is an escape of gas. Thereupon he proceeds to the spot, unfortunately with a lighted candle in his hand, for the purpose of ascertaining where the escape is taking place, and, either while he was proceeding to the spot where the gas was escaping, or having left the candle upon the counter in some part of the shop, where it could be reached by or come in contact with the gas which had escaped, it did by some means come in contact with the gas, and an immediate explosion took place, and the injury was done which is complained of in this action. The question is whether the defendants are liable in damages for this injury. Now it is quite clear that the injury did not arise from the mere act of the defendants alone in having furnished an insufficient and defective pipe, and from the consequent escape of gas therefrom; but, a quantity of gas having escaped through the defective pipe, and Sharrott having brought a lighted candle to the spot, the explosion occurred from the two conjoint acts or causes of the escape of the gas and the application to it of the lighted candle by Sharrott. That being so, if Sharrott had been the servant of the plaintiff for this particular work, and had thus contributed to the injury, which the plaintiff has sustained, by his negligence in doing such work, and in the performance of his duty to the plaintiff, that would have been contributory negligence on the part of the plaintiff, by or through his servant, and then, upon the well-known principle of law applicable to these cases, the plaintiff could not have maintained this action. But, when

Ex.]

BURROWS v. THE MARCH GAS AND COKE COMPANY (LIMITED).

[Ex.

we come to look at the facts, we find that Sharrott is a mere stranger as regards the plaintiff. He was not the plaintiff's servant in any sense in which that term can be used. He was the servant of Bates, who was employed by the plaintiff, in the same way as the gas company had been employed by the plaintiff, to do certain work on the premises. The question is, whether the plaintiff and Bates, and Sharrott, the servant of Bates, can be identified with the plaintiff for the purposes of this cause, for upon that depends the maintenance of this action. If that were so, then if a person employs several contractors, as carpenters, bricklayers, painters, and such like, to do work upon his house, and if an injury be done to his property by their conjoint negligence, each of them might say "this damage would never have occurred but for the negligence of the others," and the consequence would be that the owner would have his property destroyed by the negligence of two or three distinct persons employed by him to do work for hire and reward, and yet would not be able to maintain an action for compensation. I am of opinion that such is not the law. If the owner of property sustain an injury to his premises through the conjoint negligence of two or more contractors, or tradesmen, whom he has employed to do certain work upon his property—one being, let us suppose, as in this case, a gas company, employed to lay down a gas pipe, from the defective nature of which gas pipe injury is in fact sustained, and another person being employed to do work in other parts of the premises, and in the execution of that work such person be guilty of negligence, which, coupled with the negligence of the gas company, occasions an explosion, by which the employer's property is injured, I am of opinion that he can maintain an action against both; and as there can be no plea in abatement of such a case, if he sues one or the other, each is liable to the action. Under these circumstances the question remains to be considered, whether the facts here are such as to present the question to the court in the way which I have stated. It is contended that the defendants were not bound to at once supply a complete and perfect gas pipe, but only a gas pipe to be afterwards made perfect by testing. That argument cannot, I think, avail the defendants here. Here the defendants are charged with negligence in the performance of their contract to lay down a gas pipe, and the negligence on their part consists in this, that they had laid down an imperfect and defective pipe, and having laid it down, it was for them to make it perfect. They turned on the gas without, as is alleged by the plaintiff, any notice to him of their being about to do so, and they sent no workman of their own to superintend the testing, and took no precautions to prevent an escape of the gas. Consequently the gas did escape. The question is, whether their negligence thus far is not complete? Even if from an accident some servant of the house, unconscious that gas was escaping, and therefore unconscious of any danger which might exist, had proceeded to the spot with the candle, and so an explosion had been caused, it would be the defendants' negligence that would have caused it. Without any negligence on the part of any other person their negligence is complete. Then comes the question whether it really was the defendants and not Bates (who is said by the defendants to be identified with the plaintiff), or anyone in his employ, who was to test the pipe in question. Now the evidence is clear. Bates himself proves, through Sharrott, that he, Sharrott, went to test his own work, and not the company's; and there is no evidence to contradict that. It is clear, therefore, so far as regards testing the defendants' work, or looking to it at all for any purpose whatever, Sharrott is an entire stranger. It is an accident only that he happened to be employed

upon the gas fittings in other parts of the premises. Being a gasfitter, or the workman of a gasfitter, it was natural that he should be applied to, and called in to advise and assist when it was supposed that there was an escape of gas. The negligence on the part of the defendants being thus complete, the only remaining question is, whether Sharrott is identical with Bates, and Bates with the plaintiff. I have already observed that neither Bates nor Sharrott were the servants of the plaintiff, or in any way under his control in respect of this particular work. This man Sharrott was, in the contemplation of the law, a stranger, so far as regards his conduct with respect to this explosion, and cannot be identified in any way with the plaintiff so as to make the plaintiff, in contemplation of the law, a contributory to the accident. Under these circumstances, the jury found that this escape of gas was occasioned by a defective pipe, and that the defect existed when the pipe was supplied by the company; and they also found, though the question was not left to them, that the company were negligent in their duty in not sending their own foreman to test the new gas pipes. Taking these together, it is clear that the defendants were guilty of negligence; and the plaintiff not being identified with Sharrott, whose negligence and imprudence in carrying a candle to the spot, no doubt contributed to the explosion, and so to the injury complained of, and being in no way responsible for his act, I am of opinion that the action is maintainable against these defendants, and that this verdict ought not to be disturbed. The defendants' rule, therefore, will be discharged.

MARTIN, B.—I am of the same opinion. This rule was obtained on two grounds: First, that the verdict ought to be entered for the defendants, which can only be on the ground that there was no evidence for the Chief Justice to leave to the jury. Now I am clearly of opinion that there was evidence which that learned judge was bound to leave to the jury, and that, if he had not left it, he would have been guilty of misdirection. Secondly, that the damages were excessive, and that they ought to be nominal only. But I apprehend that when the facts are looked at that will be found not to be so. Upon the two grounds, therefore, upon which this rule was obtained, I think it ought to be discharged. But I own my impression is that this declaration is in contract and not in tort. However, that is immaterial, because I propose to give my judgment upon the real facts and substance of the case. The facts were these: The plaintiff desired to have gas introduced into his premises, for which purpose new pipes and a new meter were required. He accordingly went to a Mr. Bates, who was a gasfitter in the town, and Bates told him that the defendants, the March Gas Company, would supply the meter, and connect the meter with their own works, thus having complete control of the meter and of the communication of gas to it. All that Bates or the plaintiff did was to convey the pipes from the meter into the interior of the premises. That information having been communicated by Bates to the plaintiff, the latter requested Bates to take the necessary steps for the purpose, which Bates said he would do. Bates then applied to the managing man of the defendants, and it is perfectly clear to my mind that thereupon a contract was made by the defendants with Bates on behalf of the plaintiff, that the defendants were to furnish a meter and a supply pipe for the purpose of communication from their gas main to this meter in the plaintiff's premises. Now that seems to me to be the exact contract stated in this declaration, thus: "It was agreed between the plaintiff and the defendants that the defendants should provide and

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BURROWS v. THE MARCH GAS AND COKE COMPANY (LIMITED).

[Ex.]

well and sufficiently lay a proper and sufficient communication, with proper and sufficient service pipes, from the main of the defendants to the gas meter within the premises of the plaintiffs." The declaration then goes on to aver "that the defendants did not provide and properly lay a proper and sufficient communication and proper and sufficient service pipes for the purpose aforesaid." Now it seems to me, if the declaration had stopped there, that that made a perfect contract; what follows is a mere statement which we now very often find in actions upon contracts. The defendants begin by pleading *non assumpsit*, that is, denying the contract. Then they say, "We are not guilty of negligence." Now, what occurred? The defendants, having entered into this contract, proceeded to execute it, and a pipe, which communicated from their works to the plaintiff's meter, had a hole in it, of three inches long, so that immediately upon the gas being admitted into it the gas escaped into the plaintiff's premises. It is as clear therefore, that there was a breach of contract as anything can be; and if the Lord Chief Justice had refused to leave that to the jury, I apprehend he would have been in the wrong. He was bound to leave it. Consequently, I think there is no ground for either a nonsuit or for entering a verdict for the defendants, as proposed by this rule. Upon that ground, therefore, I am clearly of opinion that the defendants entirely fail. Then comes the second point of reduction of damages. Now it would be a new point to me that, as has been contended to-day, if a man entered into a contract with another, and was guilty of breach of contract, and, from the negligence of a servant of the party with whom the contract was made, conjointly with such breach of contract an injury occurred, the person who broke the contract was thereby relieved from liability to damages. It may be so; but so far as I am aware, it is only in cases where there has been contributory negligence. It is said, that, in this case, nominal damages only, if any, are recoverable. I do not think so. There is not the slightest pretence for calling this man Sharrott a servant of the plaintiff, so as to make the latter liable, or responsible, for contributory negligence. My Lord has stated, and stated correctly, what the circumstances were. This gas escaped in consequence of a breach of contract on the part of the defendants. The gas having escaped, this man Sharrott, naturally did what any man would endeavour to do, he tried to find out where the escape was taking place, and in doing that he used a lighted candle, which it seems was an improper mode of investigating the matter; in consequence of that, the gas which had been allowed to escape by reason of the defendants' breach of contract, exploded; and I am clearly of opinion that the doctrine of contributory negligence does not apply to this case, and that there was no such relation between the plaintiff and Sharrott as to deprive the plaintiff of his right to damages, by reason of the gas having exploded in consequence of the candle held by Sharrott.

CHANNELL, B.—I also am of opinion that this rule should be discharged. I agree in the view of the facts, upon the evidence, taken by my Lord and my brother Martin. It does not appear to me, according to my view of this case, to be very important whether this action be considered as founded on contract or founded upon a duty; but whether it be a contract on the part of the defendants, or whether it be a duty, I rather incline to the opinion that the contract, if a contract, or the duty, if a duty, was not one which imposed upon the defendants the necessity of taking upon the premises pipes that were at the time absolutely perfect. These pipes are connected by screws, they act as a conduit for the

passage of gas, and the very nature of the materials used is such as to give rise, in the great majority of cases, to a reasonable expectation of leakage at first; but I think the obligation on the part of the defendants was this, that they should leave the pipes when they had connected them together and tested them, in a perfect state. So far, I agree with Mr. O'Malley. But then it appears to me that that does not relieve the defendants from responsibility, or limit their responsibility to nominal damages. The defendants were bound to leave the pipes, when connected, in a perfect state. They did not do that, and therefore they are guilty of negligence and responsible in this action. But if, on the other hand, the testing was left by them to be accomplished, not by Bates himself, but by Sharrott, who was Bates's servant, it seems to me that that would leave the defendants in this dilemma, that the act complained of and by which the explosion took place, was the act of the defendants, and was caused by their default in that respect. On these grounds I think the plaintiff is entitled to his verdict.

PIGOTT, B.—I am of the same opinion, and I found my judgment, not upon the form of the pleadings, but upon the facts of the case. I cannot see that the form of the pleadings can make any difference in the right of the plaintiff to recover in a case like this, where the count really might be taken to be either in contract or in tort. If it states a contract, it also states a duty arising out of that contract, and then it states negligence as the breach of contract, and out of that negligence mischief arises to the plaintiff for which he is entitled to recover damages. That throws us, therefore, upon the consideration of the facts, in order to see whether, either in the one form or the other, on this count the plaintiff is entitled to recover. Now the facts have been stated by the court, and you do not propose to repeat them. We must take it to be found by the jury, and to be the fact, that the negligent conduct of the defendants, in performing their contracts, resulted in this mischief. Whether it was proximate or remote may be an arguable matter, considering the question of contract; but the mere fact that there is another cause brought in, without which the damage would not have occurred, does not make the first and chief cause a remote cause of the damage that occurs. It could only disentitle the plaintiff to recover upon the ground that he has contributed to that, without which the damage would not have occurred. It seems to me that, in any way of looking at it, the escape of gas was the proximate cause of the damage of which the plaintiff complains. If that be so, although there is another cause, a *causa sine qua non*, without which the explosion would not have occurred, that does not disentitle the plaintiff to recover. Then comes the question, is he disentitled to recover because he is responsible for contributing to the damage? I agree with my Lord that what we have to determine is, is the plaintiff responsible for the act of Sharrott? It seems to me that he is not. As my Lord has put it, there were two independent tradesmen employed by the plaintiff to do a work conjointly upon his premises. Both are guilty of negligence by which the plaintiff sustains considerable damage. Is he to be disentitled to complain of the negligence of one tradesman because another contributes to the damage? It seems to me that he ought to be entitled to complain of both, and to recover against both. Because he is entitled to recover against one, that cannot disentitle him to recover against the other. I think, however, in another aspect of the case, it might be well argued that in truth these defendants did turn on the gas for the purpose of letting Bates test it, leaving their own work to be tested by Bates. If that is the true view of the facts, they are respon-

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STOWE AND OTHERS v. QUERNER.

[Ex.

sible for the negligence of Bates's workman, Sharrott, and in that way would be clearly liable. I do not, however, rest my judgment so much upon that, inasmuch as the evidence leading to that result is not so clear upon the notes. I agree, on the whole, with the judgment that has been given by the rest of the court. I think the plaintiff is entitled to retain his verdict, and that this rule should be discharged.

•Rule discharged.

Attorneys for the plaintiff, *Chester and Urquhart*, 11, Staple-inn, E.C., agents for *Lace, Banner, Gill, Newton, and Bushby*, Liverpool.

Attorneys for the defendants, *Meredith, Meredith, and Roberts*, New-square, Lincoln's-inn, W.C., agents for *Wise and Dawbarn*, March.

Feb. 8 and 9.

STOWE AND OTHERS v. QUERNER.

Evidence—Copy policy—Admissibility of—Secondary evidence—Admissibility depending on question of fact—Whether such question for judge or jury.

The issue in an action on a policy, being the execution of the policy, the plaintiffs, having given defendants notice to produce the policy, tendered in evidence a document which he had received from defendants purporting to be a copy of the policy. The defendants' counsel then tendered evidence to show that no such policy had ever been executed, and asked the learned judge to decide whether that were so or not, as a necessary preliminary to the admissibility of the copy. The judge refused to do so, and admitted the copy, leaving the question whether the policy had ever been executed ultimately to the jury:

Held, that he was right in so doing.

Declaration by shipowners against an underwriter upon a policy of insurance upon freight.

First plea that the defendant did not become an insurer of the plaintiffs as alleged. Issue.

The trial took place at the Liverpool summer assizes, before Hayes, J.

It was proved by one of the plaintiffs' witnesses that the course of business in Liverpool with reference to insurances is that upon acceptance of the proposals for an insurance by the underwriters, a slip is signed, and subsequently a stamped policy is executed in accordance with the slip, of which a copy is sent to the assured, the original remaining in the hands of the underwriter until payment of the premiums, which is made upon the 10th day of the following month, when the original is handed over to the assured. It was proved that proposals for an insurance on freight of the ship *Oaklands* had been made by the plaintiffs to defendant and accepted, and a slip signed, and that subsequently the plaintiff had received a document from defendants purporting to be a copy policy.

The plaintiffs had given the defendant notice to produce the original policy, and upon his not doing so the plaintiffs' counsel proposed to prove the policy by putting in the copy. The counsel for the defendant then tendered evidence to show that notwithstanding the delivery of the copy no such policy had ever been executed, and asked the learned judge to hear such evidence and decide before admitting the copy in evidence whether any duly stamped original policy had ever existed. The learned judge refused to hear the evidence thus tendered at this stage of the cause, and ultimately left the question of the existence of a duly stamped policy to the jury. The jury found a verdict for the plaintiffs.

A rule nisi had been obtained for a new trial on Vol. XXII., N.S., No. 538*.

the ground that the admissibility in evidence of the alleged copy policy was a question for the decision of the judge, and not for the jury, and ought to have been decided by the judge when the evidence was tendered.

Butt, Q.C. and Trevelyan showed cause. It will be contended on the other side, that where you offer a copy as secondary evidence of a document you must show that there is an original of which it is a copy, and that such original is lost, or, being in the hands of the other side is not produced upon notice, and that if evidence be tendered on the other side to show that there is no original the judge is bound to hear it and decide as a preliminary to the admissibility of the secondary evidence, the question whether there is such an original. Now we contend that this copy was admissible as primary evidence as a distinct statement or admission from the other side without any question as to the existence of an original:

Slatterie v. Pooley, 6 M. & W. 684; 10 L. J. 8, Ex.; *Reg. v. Basingstoke*, 14 Q. B. 611; 19 L. J. 87, M. C. By the 30 & 31 Vict. c. 33, s. 15, a penalty is imposed on any broker who issues a copy without a duly stamped policy being in existence. The presumption is, therefore, that there was a duly stamped policy. The judge was right in leaving the question to the jury. The distinction is this: Where the issue upon which the admissibility of the evidence depends is collateral to the cause, it is for the judge to decide it; but where it is the main question in issue in the cause, it must be left to the jury. Then the question whether a policy existed is the very question at issue. This is not a mere stamp objection.

Quain, Q. C., and Dr. Commins, supported the rule.—The judge was bound to hear the evidence tendered, and decide the question whether there was an original policy duly stamped. In *Bartlett v. Smith*, 11 M. & W. 483; 12 L. J. 287, Exch., when the admissibility of a bill of exchange, purporting to be a foreign bill, and stamped accordingly, was objected to on the ground that though it purported to be drawn abroad, it was in fact an inland bill drawn in London, and evidence was tendered to prove that fact, it was held that the judge ought to have received the evidence in that stage of the cause, and decided upon the admissibility of the instrument, and not to have received the evidence afterwards as part of the defendant's case, and submitted it to the jury. In *Boyle v. Wiseman*, 11 Exch. 360; 24 L. J. 160, Exch., an action of libel, the plaintiff in order to prove the publication of the libel tendered secondary evidence of the contents of a letter written by the defendant. On the part of the defendant a document was produced as the original, and it was held that the judge was bound at that stage of the cause to hear the evidence on both sides, and to decide whether the document offered was the original or not, and that if it was, the secondary evidence was inadmissible. In *Doe v. Davies*, 10 Q. B. 314, the question ultimately raised in an action of ejectment being whether E. S., deceased, was legitimate or not, a certificate of the marriage of E. S.'s alleged father, T. D. to her mother was produced by a witness who said he received it from E. S. The question was then put whether E. S. made at that time any statement respecting her mother's marriage: Held, that this question was admissible, it having been proved before to the satisfaction of the judge that E. S. was a member of the family, and it not appearing that any dispute was known at that time to exist; and that it made no difference as to the admissibility of the answer, that the question whether E. S. was a member of the family was, in fact, identical with

Ex.] HART v. FRONTINO AND BOLIVIA SOUTH-AMERICAN GOLD MINING COMPANY (LIMITED.) [Ex.]

the issue on which the opinion of the jury would be ultimately taken. It is laid down in Taylor on Evidence, 5th edit., pp. 35-37, that all questions of the admissibility of evidence are for the judge, and he must determine all the facts upon which they depend. It is contended for the plaintiffs that this copy having been delivered by the defendant was an admission, and therefore not secondary evidence; and that therefore no preliminary question of the existence of an original arose as to its admissibility. But it is clear that a copy cannot be evidence if no original exists. They also cited

Doe d. Whitcomb, 6 Ex. 601; 20 L. J. 297, Ex.

Cur. adv. vult.

Feb. 9.—BRAMWELL, B.—This was an action on a policy, and in proof of the policy the plaintiffs produced a document which had been delivered to them by the defendant, purporting to be a copy of a policy showing that the same had been duly executed and stamped. It was shown that by the custom the actual policy was not delivered to the assured until payment of the premium, but, in the mean time, a copy was delivered, and it was contended that by this means the copy was evidence of the existence, in the hands of the defendant, of a duly stamped policy. For this policy the plaintiffs called, but it was not produced. It was then said that upon such nonproduction, the copy became evidence. The defendant's counsel then stated that he was in a condition to displace the effect of this evidence by showing that no policy had ever been executed, and he called on the judge to hear evidence on the interlocutory question. The judge refused, and the question is, whether he was right in such refusal. We think that he was. If the objection had merely been that there was a policy, but it was not duly stamped, upon the authorities the contention might have been well founded. But here the objection was that there was no policy at all. The objection went to the ground of the action; it went to show, not only that there was not secondary evidence, but not even primary evidence of the document. If the judge had acceded to it, there could have been no proof given for the plaintiff at all. The difference between this case and *Boyle v. Wiseman* is this: If the judge there had received the evidence, and come to the conclusion that the document produced by the defendant was the original, the plaintiff might have given the original in evidence. The judge would only have decided what was the proper mode of proof, but here the judge would have decided that there was no case to prove at all. Take the case of an action for libel, and suppose that a witness had said that he had received a letter containing the libel, and that he had destroyed it, and thereupon a copy was tendered, the defendant could adduce evidence to show that the letter was not destroyed, perhaps, but could he produce evidence to show none had ever been written, and ask the judge to reject the copy on that ground. The distinction is between cases where the objection to the evidence is an objection to it as a piece of evidence conceding that primary evidence exists, and cases where the objection is that the very ground of the case fails; in the former cases the question is for the judge to decide, but in the latter he must let the question go to the jury. Some attempt was made to show that this was a stamp objection, but the true objection was that there was no policy at all in which the stamp objection was, as it were, merged.

MARTIN, B.—The only doubt I had was whether the defendant was not entitled to have the opinion of the judge on the question of the policy's being stamped; but I have come to the same conclusion on the point as my brother Bramwell.

PIGOTT, B.—I am of the same opinion; indeed, I should be inclined to go further, and hold that the copy was not only secondary, but primary, evidence.

CLEASBY, B. concurred.

Rule discharged.

Attorneys for plaintiffs, *Westall and Roberts*, for *Forshaw and Hawkins*.

Attorneys for defendant, *Chester and Urquhart*, for *Lawrence, Liverpool*.

Friday, Feb. 11.

HART v. THE FRONTINO AND BOLIVIA SOUTH-AMERICAN GOLD MINING COMPANY (LIMITED.)

Joint-stock company—Shares—Register—Removal of name from—Estoppel.

The plaintiff purchased and received a transfer of certain shares in a joint-stock company from one P. It appeared that P.'s name was not then on the register of shareholders, but he was subsequently registered, and was called on by the company to pay calls, which he did. He then called on the plaintiff to repay him the amount of such calls, which plaintiff declined to do until he became registered owner of the shares. The company, upon receipt of the transfer to him from P., registered him as holder of the shares, and he thereupon paid to P. the amount of the calls paid by P. upon the shares. Subsequently one F. claimed to be the rightful owner of the shares, they having been sold and transferred to him by the holder of them previously to their pretended transfer to P. The company having investigated the case, came to the conclusion that F.'s title was good, and therefore removed plaintiff's name from the register of shareholders, and inserted that of F. Plaintiff thereupon brought an action against them to recover for the loss of his shares:

Held, that the company had by their acts estopped themselves from denying that plaintiff was entitled to the shares, and he was therefore entitled to recover.

This was an action brought to recover damages for the wrongful removal of the plaintiff's name from the register of the defendants' company as holder of 200 shares therein.

The declaration stated that the defendants are a company registered under and according to the Companies Act 1862, and having a capital divided into shares; and that whilst the plaintiff was the proprietor of 200 shares in the said company, and after he had agreed to become a member of the said company in respect of the said 200 shares under the said Act, and whilst his name was entered in the register of members of the said company, kept under the said Act, as a member of the said company, with the addition therein to his name of a statement of the said shares so held by him as aforesaid according to the said Act, the said company wrongfully and without authority, and against the will of the plaintiff, ceased to keep the name of the plaintiff entered on the said register as a member of the said company in respect of the said shares, and entered in the said register the name of another person as the holder and proprietor of the said 200 shares, and as a member of the said company in respect thereof instead of the plaintiff, whereby the plaintiff's title to the said shares was injured and he lost the said shares, and was deprived of the power of selling or otherwise disposing of the same, and lost all the profits, dividends, and advantages, which would otherwise have accrued to him from such shares and from being the registered holder thereof.

Second count for money had and received.

Pleas to first count: 1. Not guilty; 2. Denial that plaintiff was proprietor of the shares, and a member of the company; 3. That although the defendants had caused the plaintiff's name to be

Ex.] HART v. FRONTINO AND BOLIVIA SOUTH-AMERICAN GOLD MINING COMPANY (LIMITED.) [Ex.

entered on the said register as the holder and proprietor of the said shares, and as a member of the said company in respect thereof, as in the said first count alleged as aforesaid, they did so at his request, under a mistaken supposition and belief that he had become holder and proprietor of the said shares, and that he was a member of the said company in respect thereof, when in truth and in fact he did not become and was not such holder or proprietor or member, and one George Fitzgerald having become the proprietor of the said shares and a member of the said company in respect thereof, and having been such at the time of the plaintiff's name being so entered, and the said George Fitzgerald having requested the said company to enter his name on the said register as a holder of the said shares and as a member of the said company in respect thereof, they did accordingly, in order to correct the said mistake and give the said George Fitzgerald his rights in that behalf, cease to keep the name of the plaintiff entered on the said register as a member of the said company, with the addition of the statement of the said shares as held by him, and removed and omitted the plaintiff's name from the said register as a shareholder or member of the said company in respect of the said shares, and entered on the said register the name of the said George Fitzgerald as the holder and proprietor of the said 200 shares and as a member of the said company in respect thereof, instead of the plaintiff, and as they lawfully might, for the cause aforesaid, and which are the acts complained of in the said first count; 4. To the second count, never indebted.

Issues thereon.

The cause came on to be tried before Martin, B., at the sittings in London after Trinity Term 1869, when, by consent of the parties, a verdict was found for the plaintiff for 500*l.* damages, and 40*s.* costs, subject to the following

CASE.

The defendants are a company limited by shares incorporated and registered with memorandum and articles of association under the provisions of the Companies Act 1862, the capital of the company being 100,000*l.*, in 50,000 shares of 2*l.* each. On the 20th Sept. 1866 the plaintiff purchased, through his brokers, Messrs. McNeill and Long, 200 shares in the company, at the price of 116*l.* 5*s.* On the 2nd Oct. 1866 the plaintiff paid to the said Messrs. McNeill and Long the said purchase-money for the said shares, and received from them a transfer of the said shares, executed by one Charles Powell, together with the certificates of the said shares, being forty certificates of five shares each. The said shares were in the said certificates and transfer numbered from 48,101 to 48,300, both inclusive. The said certificates, which were signed by two of the directors and countersigned by the secretary of the company, were in the following form:

Certificate of share.—The Frontino and Bolivia South American Gold Mining Company (Limited), incorporated under the Companies Act 1862. Capital 100,000*l.* in 50,000 shares of 2*l.* each. This is to certify that the person named in the register of shareholders is the proprietor of five shares numbered 48,101 to 48,105, both inclusive, in the Frontino, &c., Company, subject to the articles and memorandum of association of the above company. Given under the common seal of the said company the 30th May 1864.

P. J. VANDER BYE, } Directors.
G. NOAKES, }

W. G. POWNING, Secretary.

In the month of Dec. 1866, a call of 2*s.* 6*d.* per share was made by the company, and was paid to the company by the said Chas. Powell in respect of the said 200 shares, which were so purchased by the plaintiff as aforesaid, but of which the said Chas. Powell was and remained the registered proprietor upon the books of the company at the time when

the said call was made and paid, and thenceforward until the plaintiff's name was entered on the register as hereinafter mentioned. The company gave to the said Charles Powell a receipt dated the 15th Jan. 1869, for his said payment in respect of the said call. The said Chas. Powell applied to the plaintiff to recoup him in respect of the call so paid by him, but the plaintiff declined to do so until he should have become the registered holder of the said 200 shares.

In the month of April 1867 the plaintiff lodged the said transfer of the said 200 shares at the office of the company, in order to be entered as the holder thereof on the register of the company. The said Chas. Powell thereupon wrote to Mr. Phillips, the managing director of the company, objecting to the registration of the plaintiff in respect of the said shares. But the said Mr. Phillips replied to the effect that the calls having been paid, and the transfer lodged, the directors had no alternative but to pass and register the same. The plaintiff was accordingly accepted by the company as proprietor of the said shares, and his name was entered upon the share and transfer ledger, and upon the register of transfer, and upon the numerical register of the company, as transferee of the said shares, Nos. 48,101 to 48,300, both inclusive, under date the 2nd May 1867, as appears by the said books. The plaintiff also received from the company the following certificate, signed by the managing director of the company:

No. 1087. I hereby certify that B. W. Hart, Esq., of 37, Moorgate-street, E.C., is the registered holder of 200 shares, Nos. 48,101 to 48,300 in the Frontino, &c., Co., on which 32*s.* 6*d.* per share has been paid.

HENRY L. PHILLIPS, Managing Director.

Dated, 2nd May, 1869.

Share certificates have been issued for every five shares, and are to be handed over on a transfer being made. The certificate not being required when shares are transferred is no evidence of the shares being held by the person named therein.

After and upon the faith of such registration as aforesaid, and the delivering of the aforesaid certificate, the plaintiff repaid to the said Chas. Powell the amount of the call which he had paid as aforesaid in respect of the said shares, and the plaintiff was treated by the company as the holder of the said shares, and remained on the register in respect thereof until Jan. 30, 1868.

The market price of the shares of the company at the time when the plaintiff purchased his said shares was 11*s.* 6*d.* per share, on the 2nd May 1867 it was 7*s.* 8*d.* per share, and on or about the 30th Jan. 1868 it was 17*s.* 6*d.* per share, and at the commencement of this action was 15*s.* per share. On the 30th Jan. 1868 the plaintiff's name was, by the order of the directors of the company without the knowledge or consent of the plaintiff, removed from the said numerical registry and from the said share and transfer ledger, but not from the said register of transfers. The company have ever since the said 30th Jan. 1868 refused to replace the plaintiff's name on the register, or to treat or consider him as a shareholder.

The circumstances under which the plaintiff's name was removed were as follows:

On or about the 14th Sept. 1866, Col. George Fitzgerald, then of Imperial-square, Cheltenham, and who is the said George Fitzgerald mentioned in the defendants' third plea, purchased through a London broker named James Law 200 shares of and in the said company, numbered 48,101 to 48,300, both inclusive, for the sum of 102*l.* 10*s.*, and of which shares the then secretary of the company, Mr. W. G. Powning, was the beneficial owner and registered proprietor, and the said Col. Fitzgerald employed his solicitor, Mr. W. Compton Smith, of Lincoln's-inn-fields, to pay for the said shares and

Ex.] HART v. FRONTINO AND BOLIVIA SOUTH-AMERICAN GOLD MINING COMPANY (LIMITED). [Ex.]

act for him in the transaction. The said W. C. Smith was also then and ever since solicitor of the said company. On the 28th Sept. 1866, the said W. C. Smith accordingly paid to the said James Law the said purchase-money by his cheque for the sum of 102*l.* 10*s.* drawn on the Bloomsbury branch of the London and Westminster Bank, and made payable to the order of the said W. G. Powning. The said James Law acted in the said sale as the broker of the said W. G. Powning, and on the same 28th Sept. 1866, the said W. G. Powning executed and sent to W. C. Smith a deed of transfer of the said shares for the execution of the said Col. Fitzgerald as the transferee thereof, and the said transfer was inclosed in a letter of which the following is a copy:

My dear Colonel,—I send you enclosed the requested form of transfer of the said shares (48,101 to 48,300) in the Frontino and Bolivia, which please execute, in the presence of, and have it attested by, a witness. You can then return it to the office, 192, Gresham House, E.C., direct for registration, whereupon the shares, certificates, and registration certificate will be handed to me or you on application.

The said W. C. Smith on the same day forwarded the said transfer by post to the said Col. Fitzgerald, and on the 27th Sept. 1866, the said Col. Fitzgerald forwarded the said transfer duly executed by him to the officer of the said company for registration.

On the 15th Nov. 1866, the said W. G. Powning absconded, and the aforesaid transfer of the said 200 shares from him to Fitzgerald was never found by the said company, or by anyone, and, in ignorance of the execution or existence of the said transfer, the said company allowed the plaintiff to be registered as a proprietor of the said shares, and issued to him on the 2nd May 1867, the certificate of that date.

In the said month of May 1867, after the said 2nd thereof, Col. Fitzgerald sent the company the following letter:

Dear Sir.—I beg to bring to your notice that in September last I purchased of Mr. Lane, stockbroker, 200 shares 48,101 to 48,300 in Frontino and Bolivia, which were paid for in cash by my friend Mr. Compton Smith, the certificates &c., being handed to the office for formal registration. The said shares, it would appear, were sold by the late secretary to Mr. Powell, stockbroker, to whose possession they have been traced. I have Mr. Lane's receipt for my payment somewhere, but, in the confusion of changing my residence, cannot, at this moment, put my hand upon it. I trust that by the fraudulent act of the secretary of the company I shall not be permitted to be a sufferer.

Thereupon the company entered into an investigation, not giving any notice to the plaintiff, who never at any time, till his name was struck off as aforesaid, had any notice of there being another claimant of the shares. On such investigation, the books of the company were examined, and also Mr. W. C. Smith, whereupon a report was made by the directors to the effect that the name of the said Mr. Hart should be removed from the said register and that of the said Col. George Fitzgerald be inserted instead, which report was conditional on a statutory declaration being made, and which statutory declaration setting out the purchase by the said Col. Fitzgerald of the said shares as aforesaid was made by the said Col. Fitzgerald and the said W. C. Smith jointly. The result was plaintiff's name was struck off as aforesaid, and that of the said George Fitzgerald substituted, up to which time it had not been on the register in respect of the said shares.

A notice of what had been done was sent to the plaintiff, which stated that the company thenceforth would hold Fitzgerald liable to pay all calls, and that any calls paid by Powell or Hart would be and the same were thereby offered to be returned.

As, amongst other points in dispute, the parties differ as to what constituted the register, it is agreed that the books called the share and transfer ledger, register of transfers, and numerical register,

should form part of the case. Until Powning absconded all the books of the company were managed by Powning or his clerks, none of the directors ever looking at the same. By the said books it appears that the said Powning and James Harris were the holders of a large number of shares, besides those in question. The said shares in question appear by the said books to have been transferred from the said Powning to the said James Harris, but there is no evidence one way or the other of any transfer to the said J. Harris, nor can such be found. Harris absconded with Powning. By the said books the said shares appear to have been transferred by the said James Harris to the said Charles Powell, and by the said Charles Powell to the plaintiff, and such transfers were respectively proved and were both dated 28th Sept. 1866. The name James Harris in the said books appearing as the transferee of the said shares, was written in after Powning absconded at the office of Mr. Moate, the accountant, to whose office they were sent by the directors because of the confused state in which they were at some time during the six months next after the absconding of Powning, viz., Nov. 1866, by a person named Moss, who did so at the dictation of some one in the office. None of the transferees in this case mentioned searched the register before accepting their respective transfers, nor is it usual to do so. The court was to be at liberty to draw inferences of fact, and the question for them was whether under the above circumstances the plaintiff was entitled to recover damages from defendants in respect of the premises. If the court was of opinion in the affirmative judgment to be entered for plaintiff for such sum as it should think proper and costs of suit.

Brown, Q. C. (with him *Cohen*), for the plaintiff. The defendants are estopped from disputing the plaintiff's title to these shares after recognising him as a member of the company in respect of them. *Re Bahia and San Francisco Railway Company*, L. Rep. 3 Q. B. 585; 18 L. T. Rep. N.S. 467, is in point. [They were then stopped by the court, who called on]

Bush Cooper (with him *Hawkins, Q.C.*), for the defendants. The case cited is distinguishable. In that case it was held that the giving of the certificate by the company amounted to a statement by them, intended to be acted upon by purchasers of shares in the market, and a purchaser having acted upon it and altered his position, the company were estopped from denying it. There the company armed the purchaser with the means of going into the market and deceiving the public. That, on the principle laid down by the cases of *Pickard v. Sears*, 6 A. & E. 469 and *Freeman v. Cooke*, 2 Ex. 654, amounted to an estoppel. But the present case is different. Here the only certificates ever given were those given to Powell and that given to plaintiff. The first were certificates under the common seal of the company no doubt, and therefore certificates such as are contemplated by the 31st section of the Companies Act 1862, and which might, if acted upon by a purchaser, have constituted an estoppel, but it must be observed that they only stated the person on the register to be the owner of the shares. They could, therefore, only work an estoppel *quoad* persons who searched the register, and thus were misled by them; but here none of the transferees ever searched the register, and so those certificates may be put out of consideration altogether. Then the certificate given to plaintiff was only signed by the managing directors, and therefore is not within the Companies Act at all, and moreover it contains a provision that it is not to be evidence for this purpose. The plaintiff's title, if any, must be either by a regular

Ex.]

TOLEMAN v. PORTBURY AND OTHERS.

[Ex. Ch.]

chain of transfers or by estoppel. Now it is clear from the case that he has no title by transfer. Harris, who conveyed to Powell, never had a title. There is no trace of any transfer to him. Mere registration gives no real title any more than registration in the register of Middlesex could give a title to land without a conveyance. The case, on the other hand, shows a good transfer to Fitzgerald. It must be taken then that the plaintiff can have no title unless by estoppel. If he had a really good title his remedy would be by an application at chambers under the 35th section of the Companies Act to get the register rectified by the substitution of his name for that of Fitzgerald. Then we contend there was no estoppel. The certificates were none for the reasons above stated, inasmuch as the plaintiff was never misled by them, not having searched the register; and if the register had been searched at the time of the sale to plaintiff, neither Powell's nor Harris's name would have been found on the register, for Powning was the registered owner. The plaintiff got a certificate of ownership, and if he had taken it in the market and sold, there would have been a perfect case against us on the part of any purchaser from him; but he himself was never misled. Until the books are looked at the statement in these certificates is a mere soliloquy, and therefore cannot be an estoppel. With respect to the payment of the calls by the plaintiff, they were paid by virtue of his agreement with Powell, and not of any inducement held out by the company. The plaintiff is in this dilemma: if he has a good title to the shares in any way, striking him off the register does not destroy that title, and his remedy is to get himself put on again; he is not deprived of his shares; if ever they were his they are as much his now. The plaintiffs cannot exclude him by any act of theirs; the utmost he is entitled to recover is the probable costs of any proceeding to get himself reinstated.

Brown, Q.C. in reply.—There is clearly an estoppel as to Powell and the plaintiff. The company made a call on Powell and received the amount from him. The plaintiff claims under Powell. Then again when Powell called on plaintiff for an indemnity against those calls, plaintiff declined to pay them until registered, and on the faith of such registration he ultimately paid. Plaintiff would clearly have been rendered liable to creditors of the company; for it has long been held that a person holding shares cannot afterwards repudiate. According to the contention of the other side a purchaser can never be safe unless he investigate the whole train of previous transfers. The practice with respect to shares in such companies is, that you never investigate the title of your immediate transferor if the company recognise him as a member. The company have recognised Powell as a member of their partnership. It is quite clear that if a contest arose between the plaintiff and Fitzgerald on the question who is now entitled to be placed on the register the plaintiff would fail, and that shows that he really has lost the value of his shares by the fault of the defendants.

MARTIN, B.—The facts of this case are shortly these:—The plaintiff *bonâ fide* bought these shares in open market, and he received a transfer from Powell. At the date of this transfer it appears Powell's name was not on the register, but in the following November the defendants adopted Powell as holder of the shares, and received calls from him. Powell applied to the plaintiff for repayment of those calls, and the plaintiff says that he will not repay them until his name is put on the register. The name was thereupon entered on the register; the defendants chose to adopt Powell as the holder,

and the plaintiff being called on to indemnify him against the calls does so, and the defendants give a certificate that he is the registered holder. No authority seems to me necessary to show that if the company throughout a transaction treat a man as the owner of shares they cannot afterwards turn round and deny his ownership.

BRAMWELL, B.—I am of the same opinion. Mr. Cooper appears to me to be probably right in contending that the true title to these shares was in Fitzgerald; but the plaintiff, in my opinion, has a good title as against defendants by estoppel. The plaintiff was registered by them; perhaps he could not have compelled them to register him, though, probably, he could, inasmuch as it would seem Powell could. It may, perhaps, be contended Powell could not; in any case, it is for them to say whether they will do it; but, if they do it, they cannot undo it. The plaintiff is entitled to say "You have accepted me as a shareholder, and cannot now repudiate me." This doctrine is no novelty. Take the case of a negotiable instrument paid by a banker; the banker cannot recover the money back on the ground that it is a forgery. Here suppose the plaintiff had sold the shares and handed over the certificates; clearly the vendee would have a good title. Then could the defendants have come to plaintiff and said, "We must have a remedy over against you inasmuch as you have put us in this position?" Clearly not, and the result would be to show that the plaintiff would be in a better position by selling than by remaining owner. I can see no reason for this. Then, again, would the plaintiff have had any answer if sued by the defendants for calls? I think not. Then why should one party be bound and the other not? My only difficulty has been that the judges of the Queen's Bench in the case that was cited seem to rely on the certificates but not on the registration. I think, however, the same principle is applicable to both. I suppose the damages will be the value of the shares when the company removed the plaintiff's name from the register, as in the case in the Queen's Bench which has been cited. (a)

PIGOTT and CLEASBY concurred.

Judgment for plaintiff.

EXCHEQUER CHAMBER.

Reported by J. SHORTT, Esqr., Barrister-at-Law.

Friday, Feb. 4.

(Before KELLY, C.B., WILLES and BRETT, JJ., MARTIN, CHANNELL, PIGOTT, and CLEASBY, BB.)

TOLEMAN v. PORTBURY AND OTHERS.

Ejectment—Forfeiture—Covenant not to "permit" a sale on the premises without licence—Onus probandi.

C., the lessee of a certain dwelling house, under covenant not to permit a sale by auction on the demised premises, without the consent in writing of the lessor, sublet the house, with the consent of the lessor, to R., and subsequently made an assignment, by bill of sale, of all his goods and chattels upon the demised premises to three other persons who sold the goods and chattels by public auction on the premises. In an action of ejectment for a forfeiture by breach of the covenant, the above facts only having been proved, and the plaintiff having been nonsuited at the trial:

Held (affirming the judgment of the Queen's Bench), that the nonsuit was right; per Kelly, C. B., Martin and

(a) Upon the court's giving judgment as above, it was stated by the defendants' counsel, in answer to a question from the bench, that the measure of damages must be taken as being the value of the shares, and judgment accordingly passed for an amount estimated on that basis.

Ex. CH.]

TOLEMAN v. PORTBURY AND OTHERS.

[Ex. CH.]

Pigott, BB., because there was no evidence that the sale by auction took place with the permission of the defendant; per Willes and Brett, JJ. and Cleasby, B., because the plaintiff was bound to give evidence of the non-existence of a licence in writing; per Channell, B., for both reasons.

This was an action of ejectment commenced the 7th Dec. 1867, by writ directed to the defendants and all persons entitled to defend the possession of all that messuage or tenement, situate and being No. 7, Westbourne-grove, late No. 4, Sussex-terrace, Westbourne-grove, Bayswater, together with all ways, paths, passages, &c., thereto belonging or usually held or enjoyed therewith, in the Parish of Paddington, in the county of Middlesex, to the possession whereof Eliza Toleman claimed to be entitled and to eject all other persons therefrom.

The defendant, Peter Clarkson Reed, on the 30th Dec. 1867, appeared to the writ; and the defendants, Jas. Wm. C. Aylett, George Frank Reed, and Thos. Carr Artaud, on the 31st Dec., appeared to the writ and defended for the whole of the messuage, tenement, and premises therein mentioned; but no appearance was entered or defence made by Wm. Portbury or Robt. Wm. Candler.

The following are the particulars of breach of covenant for which ejectment was brought, delivered pursuant to the order of Mellor, J., viz., the permitting a sale by public auction to take place on the premises, late 4, Sussex-terrace, Westbourne-grove, now 7, Westbourne-grove, Bayswater, on the 25th May 1867, without the consent in writing of the plaintiff first had and obtained contrary to the covenant contained in the lease made between the plaintiff of the one part, and Robert William Candler of the other part, which lease is dated the 23rd March 1860.

The cause came on for trial before Mellor, J. at Westminster Hall on the 17th April 1868, when the following facts were proved:

By indenture of lease dated 23rd March 1860, made between the plaintiff of the one part, and the defendant Robert William Candler of the other part, the premises described in the aforesaid writ of ejectment were demised by the plaintiff to Robert William Candler, his executors, administrators, and assigns, for twenty-one years from the 25th March 1860, at the yearly rent of 122*l.* 5*s.* payable quarterly. By the indenture of lease the defendant Robert William Candler for himself, his heirs, executors, administrators, and assigns, covenanted with the plaintiff that he would not permit any sale by public auction to take place on the premises without the consent in writing of the plaintiff, Eliza Toleman, her executors, administrators, and assigns. The lease also contained a covenant on the part of the defendant Robert William Candler, not to assign or underlet the premises without the consent of the plaintiff, and also the usual proviso for re-entry on non-payment of rent, and in case of the breach or non-observance of any of the covenants on the lessee's part contained.

On the 2nd April 1867, the plaintiff by licence under her hand of that date gave and granted her consent to the defendant Robert William Candler, to demise and lease or underlet to the defendant Peter Clarkson Reed, his executors, administrators, and assigns, the premises comprised in, and demised by the indenture of lease, for the term of fourteen years from the 25th March 1867, less three days.

On the 23rd April 1867 the defendant Robert William Candler, pursuant to the licence, demised by way of underlease the premises to the defendant Peter Clarkson Reed, by way of mortgage, to secure the sum of 300*l.* which is still unpaid; the lease being worth at a low estimate from 500*l.* to 600*l.*

On the 30th April 1867 the defendant Robert

William Candler duly executed an assignment of all his goods, chattels, and effects in and upon the premises to the defendants, James William Clements Aylett, George Frank Reed, and Thomas Cave Artaud. The other defendant William Portbury was the occupier of a portion of the premises.

On the 23rd May 1867 one James Edgeby, in partnership with the defendant J. W. C. Aylett as auctioneers and estate agents, sold by public auction in and upon the premises all the goods, chattels, and effects, by the direction of the defendants, J. W. C. Aylett, G. F. Reed, and T. C. Artaud, the trustees; and previously to the sale bills announcing the same had been posted on the premises.

At the trial the respective counsel for the defendant, Peter Clarkson Reed, and for the defendants, James W. C. Aylett, G. F. Reed, and T. C. Artaud, submitted to the judge that the plaintiff should be nonsuited on the ground that she ought to have been examined as a witness to prove that she had not assented to the sale by public auction, and that there was no evidence of such sale having taken place without her consent, or that the defendant Peter Clarkson Reed or the lessee knew of or permitted the sale.

The judge directed a nonsuit to be entered, and reserved leave to the plaintiff to move to set aside the nonsuit and enter a verdict for the plaintiff, with liberty to the court to draw inferences.

Within the time in that behalf allowed by the rules and practice of the court, namely, on the 20th April 1868, the plaintiff, in pursuance of the leave reserved, applied for and obtained a rule to show cause why the nonsuit should not be set aside and a verdict entered for the plaintiff.

Afterwards, on the 5th May 1869, the Court of Queen's Bench discharged the rule to show cause.

Against this the plaintiff now appealed, pursuant to the provisions of the Common Law Procedure Act 1854.

By an order of Mellor, J., dated the 24th Aug. 1869, the names of the defendants J. W. C. Aylett, G. F. Reed, and T. C. Artaud were directed to be struck out of the writ and all subsequent proceedings, without costs on either side as between them and the plaintiff; and the names of those defendants were retained in this case only to show the course of proceedings taken in the question.

The question for the opinion of the court of appeal was, whether the rule of the 20th April 1868 ought to have been discharged, or ought to have been made absolute on the ground therein stated.

Brown, Q.C. for the plaintiff. There are two points involved in this case (1) whether it was incumbent on the plaintiff to give evidence of the non-existence of a licence in writing to have the sale on the premises, and (2), whether, if the *onus* of giving such evidence lay upon the plaintiff, there was not sufficient evidence to go to the jury. As to the first point, if any written licence was given by the plaintiff it must have been in the possession of the defendant, and he was the proper party to give evidence of it. The *onus probandi* should be held to lie on the defendant on the general ground that the plaintiff is not called upon to prove a negative. *Morton v. Copeland* (16 C. B. 517), is undistinguishable in principle from the present case. There it was held that in an action for penalties imposed by the Dramatic Copyright Act (3 & 4 Will. 4, c. 15 s. 2), for representing the composition of authors without their consent in writing, the *onus* of proving the consent of the author or proprietor lies upon the defendant. "The general rule" says Starkie on Evidence (4th edit.) p. 585, "is in conformity with the suggestions of natural reason and a principle of obvious convenience; that the party who alleges the affirmative of any proposition

shall prove it; for a negative does not admit of the simple and direct proof of which an affirmative is capable. And this is conformable with the maxim of the civil law, *Ei incumbit probatio qui dicit, non qui negat.* In the *Apothecaries' Co. v. Bentley*, Ry. & M. 159, which was an action for a penalty on the statute, 55 Geo. 3, c. 194, for practising as an apothecary without having obtained the certificate required by that Act, it was held that the *onus probandi* that the defendant had obtained his certificate lay with him and not with the plaintiffs. "I am of opinion," said Abbott, C. J., "that the affirmative must be proved by the defendant. I think that it being a negative the plaintiffs are not bound to prove it; but that it rests with the defendant to establish his having a certificate." In *Rex v. Turner*, 5 M. & S. 206, upon a conviction under 5 Anne, c. 14, s. 2, against a carrier for having game in his possession, it was held sufficient if in the information and adjudication the qualifications mentioned in 22 & 23 Car. c. 25, s. 3, be negatived, without negating them in the evidence. "Does not common sense show," said Lord Ellenborough, C. J., "that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended?" and he cites *Spieres v. Parker*, 1 T. R. 144, where Lord Mansfield laid down the rule that in actions upon the game laws the plaintiff must negative the exceptions in the enacting clause, though he throw the burden of proof on the other side. "The same," said his lordship, "was said by Heath, J. in *Jelfe v. Ballard*, 1 B. & P. 468; and such, I believe, has been the prevailing opinion of the Profession and the practice." On these authorities it is submitted that the *onus* of proving that he had a licence in writing to permit the sale on his premises, lay upon the defendant in this case. [WILLES, J. referred to *Doe v. Whitehead*, 8 A. & El. 571, where it was held in an action of ejectment by landlord against tenant, on an alleged forfeiture by a breach of covenant to insure in some office in or near London, that the omission to insure must be proved by the plaintiff. MARTIN, B.—Candler with the consent of the plaintiff passed the possession of the premises out of himself to Reid, and therefore it seems to me that the state of things in which the condition would operate did not exist at all. KELLY, C. B.—For all that appears Candler might have actually refused to allow the auction to take place on the premises. Whether that would amount to a sufficient defence in point of law, I do not say.] He was bound by his covenant to prevent the auction taking place. In *Doe v. Whitehead*, the covenant was to do a particular thing, and it lay upon the plaintiff in an action for a forfeiture to prove that it had not been done; in the present case the covenant is not to do a particular thing without a licence, and the plaintiff had proved that the thing has been done, and it is submitted that on the authorities the burden of proving the existence of the licence lay upon the defendant. Taylor on Evidence, 5th edit., p. 379, mentions a second exception to the general rule that the burden of proof lies on the party who substantially alleges the affirmative, viz., that "where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or negative character, and even though there be a presumption of law in his favour. This exception equally prevails in all civil or criminal proceedings instituted against parties for doing acts which they are not permitted to do unless duly qualified. The same rule is recognised in the Ecclesiastical Courts; and therefore, if proceedings be there instituted against a clergyman for non-residence without licence or exemption, the promoter of the suit need neither allege nor prove

that the defendant had not a licence, or was not resident on another benefice," for which *Bluck v. Rackman*, 5 Moo. P. C. R. 305, 314, is cited. [WILLES, J.—I observe that Mr. Best in his Book on Evidence, 4th edit. p. 376, says of the ruling of the court in *Doe v. Whitehead*, "This ruling seems upheld by subsequent cases," and refers in the note to *Wedgwood v. Hart*, 2 Jur. N. S. 288; *Price v. Worwood*, 4 H. & N. 512.] Taylor on Evidence, pp. 371, 372, cites it to illustrate an exception to the general rule as to the *onus* lying on the party affirming, viz., that "if a disputable presumption of law in favour of an affirmative allegation, the party who supports the negative must call witnesses to rebut this presumption . . . because the law in favour of the party in possession will presume that he has satisfied the terms of the covenant, and had the landlord wished to have been relieved from the necessity of establishing this negative proof, he might easily have inserted a clause to that effect in the lease." [BRETT, J. referred to *Doe v. Robson*, 2 Car. & Pay. 245, where it was held that to support an ejectment on a forfeiture of a lease by non-performance of a covenant, if the covenant be to do an act, the plaintiff must give some evidence of the omission of the act.] The covenant was here not to do an act, and proof has been given of the act having been done.

Baylis for the defendant.—The plaintiff in the present case seeks to divest an estate created by his own act; he must then prove his case strictly, even though he have to prove a negative. The plaintiff was held bound to prove an omission on the part of the defendant to insure the demised premises in *Doe v. Whitehead*, 8 Ad. & El. 571. "There was no direct proof of non-insurance," said Lord Denman, "but the defendant, when called upon at the trial to produce a policy after notice did not do so. I think that quite insufficient. Then it is said that the fact of insurance ought to have been proved by the defendant. I am not of that opinion. The estate was vested in him; and his title could be got rid of only by proving a forfeiture. I do not dispute the cases on the game laws which have been cited; but there the defendant is in the first instance shown to have done an act which was unlawful unless he was qualified; and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and therefore takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the defendant's knowledge, but that does not vary the rule of law. And the landlord might have had a covenant inserted in the lease to insure at a particular office, or to produce a policy when called for, on pain of forfeiture. If he will make the conditions of his lease such as render the proof of a breach very difficult, the court cannot assist him." The same observations apply to this case. It is said that the existence of the licence in writing was a fact peculiarly within the knowledge of the defendant, but the plaintiff can now produce evidence on that subject by means of interrogatories administered to the defendant. The cases cited relating to actions for penalties are all distinguishable from the present on the grounds mentioned by Lord Denman in *Doe v. Whitehead*. Further, the defendant's covenant in the present case is that he will not "permit" a sale to take place on the demised premises. Now by permission must be understood lawful persuasion. Nothing that is done contrary to the covenant without the defendant's authority or consent can amount to a breach of this covenant. Where a covenant was that defendant had not done, nor "permitted nor suffered" to be done any act whereby an estate was encumbered, it was held that assenting to an act which the cov-

EX. CH.]

TOLEMAN v. PORTBURY AND OTHERS.

[EX. CH.]

nanter could not prevent, was not a breach of the covenant (*Hobson v. Middleton*, 6 B. & Cress. 295), and the word "suffer" was in that case and not in the present. Bayley, J. said "the words 'permitting and suffering', do not bear the same meaning as 'knowing of and being privy to'; the meaning of them is that the defendant should not concur in any act over which he had a control . . . if 'permitting and suffering' applies only to that which he could prevent, it is clear that his consent in this case was not a breach of the covenant." What the lessee did in the present case was to give a bill of sale after the mortgage, when he had no legal estate at all, and no power to permit or suffer any act to be done on the premises. Lastly it is submitted that there was no evidence which should have been left to the jury. Not only was there no evidence of the non-existence of a licence in writing, or of a permission of the sale by Candler, but there was no evidence of either Candler or the mortgagee being in possession of the premises at the time. Candler was in fact at the time a mere stranger.

Brown, Q. C., in reply.

KELLY, C. B.—I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. Sitting here in a court of error, I must not be supposed to hold that if the covenant in the present case had been that no sale should take place upon the demised premises without the licence in writing of the lessor, there was no evidence to leave to the jury upon which the plaintiff would be entitled to recover a verdict. I express no opinion whatever upon that point; because I do not admit, taking the view that I do of the case upon the whole of the facts, that we are necessarily called on to pronounce an opinion on that point; and also because I am by no means satisfied that the Court of Queen's Bench gave judgment against the plaintiff in discharging his rule upon that point. I pass over, therefore, the question whether, where an action of ejectment is brought for a forfeiture said to be incurred by the breach of a covenant of this nature—not to permit a sale to take place upon the premises without the licence in writing of the lessor, it is incumbent upon the lessor, that is, the plaintiff, and not upon the defendant, the lessee or one claiming under him, to show by evidence that there was or was not a licence in writing. Looking at the covenant in the present case, we find it in these terms:—that the defendant would not permit any sale by public auction to take place on the premises without the consent in writing of the plaintiff. Now, whether there was or was not sufficient evidence to go to the jury of the want of a consent in writing on the part of the lessor, it is quite clear to my mind that it is an essential part of such a covenant that an unlicensed sale on the premises, in order to constitute a breach of the covenant, must have been one which took place with the permission of the lessee; and looking to the whole of the facts of this case, I am of opinion that there was no evidence to go to the jury that the sale on the premises did take place by his permission. I might, perhaps, have entertained that opinion also, in the case of an action of covenant, but this being an action for a forfeiture, which we must regard strictly, we must be satisfied that there was clear evidence to go to the jury that there had been a forfeiture, and I think the evidence in the case was insufficient for that purpose, and, therefore, that the judge, if the point was made at the trial, was quite right in nonsuiting the plaintiff. What are the circumstances of the case as they were proved at the trial? No actual permission of the sale on the part of the lessee was proved *de facto*. Nor was any particle of evidence adduced tending to

such a conclusion, or anything from which we can imply it. How stands it then on the presumptive evidence? It appears that Candler was the lessee, but it also appears that he had underlet the premises to one Reed, and subsequently had assigned the furniture and effects on the premises to three persons, and it seems doubtful whether he remained in actual possession of the premises. But assuming that Candler was in actual possession of the premises, and continued to dwell there, it appears that he had assigned away the furniture and effects to be sold, and the question arises whether, under the circumstances, he permitted the sale to take place on the premises, or whether it took place under his authority. In the first place he had no legal right to interfere with the sale or with the assignees, or with the property sold. He had, in fact, no legal right to be on the premises at all. I do not, however, say that he was necessarily a trespasser, as he might be there with the licence of the under tenant. If, therefore, he had actually endeavoured to prevent the sale on the premises, and had forbidden it to the assignees and the auctioneers, there was no obligation upon them to attend in any way to his prohibition; and it is quite consistent with the evidence that he not only did not permit the sale on the premises, but actually opposed it. But it is not necessary that we should go so far. It is enough to say that there is no evidence that he authorised the sale in any way; and when we look at the words of the covenant we see that the sale in order to constitute a forfeiture, must not only be without the licence of the lessor, but that the lessee must "permit" the sale, his covenant being that he would not permit a sale to take place on the premises without the plaintiff's consent. There is certainly no evidence that he did in fact, directly or indirectly, permit it. On this ground, therefore—viz., that the act of sale was done by persons over whom the lessee had no control—the plaintiff was rightly held not entitled to recover. I am aware, from our attention having been called to it by my brother Willes, that there is a case in 1 Taunton, 183, *Attersoll v. Stevens*, which seems to point another way. In that case, according to the marginal note, J. T. demised land to the plaintiff at an annual rent for 21 years, with liberty to dig half an acre of brick earth annually; the lessee covenanted that he would not dig more, or, if he did, that he would pay an increased rent at the same rate that the whole brick earth was sold at. A stranger having dug and taken away brick earth, the lessee recovered against him the full value of it, and he was held entitled to retain the whole damages, Mansfield, C. J., saying: "The consequence of this taking by a stranger, and of this action against the stranger, is, that as between the lessee and the lessor it must be taken to have been dug by the lessee; if this and what himself had dug did not together exceed the half acre per annum, there is nothing to pay; but if it exceeds that quantity, the lessee must pay the stipulated rent for the surplus." That, however, turned upon the construction of the covenant in that case, and not upon the question on whom the *onus probandi* lay. Further, that was not a case of forfeiture, but only of a breach of covenant. That case, therefore, is quite consistent with the judgment which I am now pronouncing. Mansfield, C. J., at p. 202, cites from Coke thus: "Lord Coke, 2 Inst. 303, says, the lessee shall answer for the waste done by any stranger; for he in the reversion cannot have any remedy but against the tenant, and the tenant shall have his remedy against the wrongdoer, and recover all in damages against him, and by this means the loss at last shall light upon the wrongdoer. If the lessee gave permission to a stranger to dig, no doubt it would be the act of the lessee, and he would be bound to pay the lessor

Ex. CH.]

THE DUERO.

[ADM.]

the stipulated price. Then what is the difference between his agreeing to it, and his standing by while the stranger takes it?" But this, again, does not point to a case of forfeiture. Therefore I distinguish that case in Taunton's Reports from the present, which is a case of forfeiture which we are bound to regard strictly. Looking at the whole of this case, I do not hesitate to say that there was no evidence which the judge could properly have left to the jury of a permission by the defendant of the sale which took place on the demised premises.

MARTIN, B.—I am of the same opinion.

WILLES, J.—I rather concur in the judgment in favour of the defendant on the other ground. I do not wish to say that I dissent in any way from the judgment of the Lord Chief Baron, but I prefer to rest my opinion on the foundation laid under the auspices of my lord when at the bar, in the case of *Doe v. Whitehead*, 8 Ad. & El. 571, where it was held that in an action of ejectment for a forfeiture for not insuring according to covenant, the omission to insure must be proved by the plaintiff; and where Littledale, J., that most accurate lawyer, whose mind was imbued with ancient learning, pointed out the distinction between the case of *The Apothecaries' Company v. Bentley* (*ubi sup.*), relied on by Mr. Brown, and such a case as the present. "In the cases cited as to game," he said, "the defendant had to bring himself within the protection of the statutes which prohibited any person from using an engine to destroy game, or from having it in his possession, unless properly qualified or authorised. A like observation applies to *The Apothecaries' Company v. Bentley*. But here, where a landlord brings an action to defeat the estate granted to a lessee, the onus of proof ought to lie on the plaintiff. It is true that if the action had been in covenant the onus would have lain on the defendant; but that does not show that it will so lie in a different form of action." In order to show that the estate which he has granted has become divested out of the tenant, the lessor must show the act on which he relies as constituting a forfeiture to have been done under the circumstances necessary to constitute a forfeiture; and he does not show that in the present case by showing a sale by auction on the demised premises, without showing also the additional circumstance that it was done without the tenant's having obtained his landlord's permission. Without that the argument for the forfeiture is incomplete, and the estate remains vested until circumstances are shown to have occurred by which it is divested; and it is not sufficient to show the existence of circumstances which probably might divest it.

CHANNELL, B.—I am of opinion that the judgment of the Court of Queen's Bench should be affirmed. There may be an allegation in language which is negative in its character; and if that allegation is traversed, there are cases to show that the party traversing the negative allegation has thrown upon him the burden of proof, as in replevin where *riens in arrear* is pleaded. But I think that that does not apply to the present case, and that where an estate is vested by the act of the plaintiff it is upon him to show that it has become divested; and when he relies on a forfeiture he must prove everything which is necessary to show that the forfeiture has taken place. I think, therefore, that the rule deduced from actions for penalties does not apply to actions of ejectment for forfeitures. But, even if it were otherwise, I am clearly of opinion that there is no evidence in the present case to show that the act relied on as constituting a forfeiture took place with the permission of the defendant.

PIGOTT, B.—I agree that the judgment of the Queen's Bench should be affirmed. If it were ne-

cessary to determine the first point, I should wish to consider the matter further before I gave an opinion upon it.

BRETT, J.—I also agree, on the ground that the plaintiff was bound to give some evidence of the negative proposition, that the sale took place without any licence from him in writing.

CLEASBY, B.—The covenant in the present case is not to permit a sale on the demised premises without a licence in writing from the lessor. The breach of that involves two things, one positive—viz., the permitting the sale to take place on the premises; the other negative—viz., the non-existence of a licence in writing from the lessor. Evidence of the positive part must be given by the lessor to establish a forfeiture. So also I am of opinion that evidence must be given by him of the negative part; and as he has not done that, I am of opinion that the judgment of the court below should be affirmed.

Judgment affirmed.

Attorney for plaintiff, *Reed*.

Attorney for defendants, *Ellerton*.

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister at-Law.

July 24 and 31, 1869.

THE DUERO.

Damage to cargo—Bill of lading—Exemption from liability.

Where a bill of lading exempted a shipowner from liability for the negligence of his master and crew, and a suit was instituted for damages to cargo sustained in consequence of their negligence:

Held, the shipowner was not liable for the damage.

This was a special case, the facts of which were as follows. On or about the 10th July 1868, Messrs. Carey Brothers and Co., of Tarragona, in Spain, as agents for Samuel Hanson and Reginald Hanson, trading under the name or style of Samuel Hanson and Son, of No. 47, Botolph-lane, in the city of London, fruit merchants, the plaintiffs in this cause, delivered to Messrs. P. M. Tintare, of Barcelona, in Spain, the owners of the *Duero*, 180 bags of Barcelona nuts, the property of the plaintiffs, to be carried from Tarragona to London on board the above-named steamship *Duero*, then lying in the port of Tarragona, for reward to the defendants in that behalf, upon the terms of a bill of lading. The said goods were, when shipped as aforesaid, in good order and condition. The said steamship subsequently proceeded on her voyage to London, where she arrived on or about the 6th August 1868, when the said goods were delivered to the plaintiffs. The said goods were delivered to the plaintiffs as aforesaid in a damaged condition, such damaged condition having been occasioned by the negligence and default of the master and mariners of the said vessel in and about stowing the goods on board of her.

The question for the opinion of the court on this special case was, whether the defendants were protected from liability by the terms of the bill of lading.

If the court should be of opinion that the defendants were protected from liability, then judgment should be entered for the defendants, and the plaintiffs condemned in the costs of all the proceedings in this cause. If the court should be of the contrary opinion, then the defendants should be condemned in such amount of damages as might be agreed to by the parties, or should be ascertained by the registrar and merchants in case the parties could not agree to either, with the costs of all the proceedings in the cause. The exceptions in the bill of lading

ADM.]

THE PRINCESS ROYAL.

[ADM.]

the alleged detention of the cargo was a detention by third parties claiming by title of possession in derelict, and not a detention by the master or his agent; and in support of this objection, the cases of the *Tigris* and the *Norway* were cited to show the utmost extent to which the court had gone, and the *Santa Anna* (32 L. J. 211 Adm.; Lush. 198), as marking the limit which the court had set to its jurisdiction in cases of "breach of duty or contract" under the statute. But to these cases were added in the reply, and it may be convenient to mention them now, the *Danzig*, Bro. & Lush. 102, in which the court exercises jurisdiction over a claim for short delivery of cargo as per bill of lading in a British port, though the goods not delivered were not in fact carried into port. The *Bahia*, Bro. & Lush. 61, in which the plaintiffs were the owners of certain corn which was laden on board the *Bahia* at New York under a bill of lading to be delivered at Dunkirk, in France; that on the voyage the master put into Ramsgate, and landed the cargo, and refused either to carry on to Dunkirk or to give delivery at Ramsgate; the *Wilhelm*, in which the plaintiff complained that the master delayed the prosecution of his voyage, and that, owing to his negligence, the cargo did not reach the port of destination until an unduly late period, and in which the court pronounced for the damage, and made the usual order of reference to the registrar and merchants (July 25, 1865) this case has not been reported. The *Felix*, L. Rep. 2 Adm. 273, decided by myself, in which the plaintiffs obtained damages because the master did not obey the order of the consignee to discharge his cargo in a particular dock. A second objection to these articles is that the matters pleaded in them amount to a charge of felony, and that a court of civil judicature must refuse to entertain such a cause until a criminal court has adjudicated that a felony cannot be the foundation of a civil action; thereupon, and for this position, reliance was placed upon *Cox v. Paxton*, 17 Ves. 329, and *Stone v. Marsh*, 6 Barn. & Cress. 564, and *Deacon's Bank Rep. Ex parte Elliot*, 194, and the statute 24 & 25 Vict., c. 97 s. 43, re-enacting sect. 6 of Will. 4 & 1 Vict. c. 89 (repealed by 24 & 25 Vict., c. 95), was cited to show that the charges contained in the articles were bartrous and felonious. The third and last objection was that this being a proceeding *in rem* and not *in personam*, the ship or *res* was not liable for acts of the master done without the scope of his duty (Davies' Amer. Rep., p. 164), and that this position was not affected by the fact that the master was (as pleaded in the second article) the sole owner, and that this court had refused to allow a cargo to be arrested in a case in which the same person was owner of the ship and of the cargo: (*The Victor*, Lush. 72, 76.) It was also urged that innocent liens on the ship not at present opposed might be injured by these proceedings against the ship. These various points in the case have been well argued on both sides, but inasmuch as I am about to say why I think the articles are substantially admissible in their present form, it is not necessary to state the arguments in reply to which I in great measure accede, as fully as, in a case somewhat novel, I have thought it right to state the objections. The real ground of action in this suit is stated in the 12th article of the petition, which is as follows: "The said cargo was never delivered by the defendant to the plaintiffs in accordance with the terms of the said bill of lading, although such non-delivery was not occasioned by any of the perils in the said bill of lading excepted." Assuming, as I am bound to do at present, the facts to be correctly stated in the other article, there is no doubt that the averment contained in this article is true. The owners J

have gotten their goods at a port other than that specified in the contract, and not from the master, but from third parties, namely, the salvors. Here, then, is a breach of contract relating to the goods whereby the owners have been damnified. I am of opinion that it is not necessary that the damage should be actual in order to found the jurisdiction of the court. It may be of that constructive character resulting from wrong or improper delivery or detention, or the like causes; and in this opinion I am fortified as well by the precedents to which I have referred as by the natural construction of the language of the statute; and it appears from the articles objected to that, although the detention of the cargo was not immediately the act of the master, inasmuch as it had passed out of his hands into those of third parties, who had a lien upon it; yet that the detention was the consequence of previous misconduct on the part of the master, through which it passed into the possession of these third parties. The articles which plead these facts are admissible according to the rules of this court, as showing the history of the transaction and the continuing liability of the master. I will now deal with the objection that the action ought to have been in *personam*, and not in *rem*, that the master acted beyond the scope of his duty, and that in condemning the *res* I may be injuring innocent liens which do not appear. I am of opinion that the petitioners have a right under the statute to institute this suit in *rem*, and that the owner of the ship is responsible to the shipper for the loss or damage alleged in this case. I do not think that the objection that the act of the master did not bind the owner as in the case of the *Waldo*, which is well deserving of study, affects this proposition. The master, in that case, had been made by the shipper the consignee of the cargo. The case of the *Ida* was of a more peculiar character; the judgment in it was founded on a want of jurisdiction in the court, and in the judgments no reference is made to the argument that the owner was not liable because the master exceeded the scope of his duty; as to the possible existence of secret liens on this ship, the answer is that, if there be such, the possessor of them is apprised by the forms of this court that he may come in and defend his interest and obtain for his claims their due priority. With respect to the objection that they contain a charge of felony in which the action for the civil wrong is merged, I felt at first some difficulty upon this point, and I am certainly not inclined unnecessarily to entangle myself in this question of merger, which is perhaps not in principle always very satisfactorily explained, or in practice always very consistently applied, by the authorities at common law. It is true that although the master be sole owner, the acts alleged would probably render a British subject guilty of felony under the statute 24 & 25 Vict. c. 97, and it has been suggested that although the vessel be a foreign vessel and the master a foreigner, yet, as the offence was committed *super altum mare*, this court of maritime international law ought to hold itself less fettered as to criminal jurisdiction in this matter than a common law court, which would in these circumstances be competent to take cognisance of the offence (*Reg. v. Serva and others*, 1 Den. C. C. 104; *Reg. v. Anderson*, 1 Cr. Cas. Res. 161). I must not be understood as assenting to this argument, but I shall direct the word "fraudulently" to be struck out in both the articles; it is not necessary for the case of the petitioner in this court, it introduces an issue which might unnecessarily complicate and increase the costs of the suit. With this alteration I admit the petition.

Proctor for the plaintiffs, Stokes.

Solicitor for defendant, Barker, agent for Turnbull and Bull, Hartlepool.

NISI PRIUS.] CLARKSON AND OTHERS v. YOUNG—PLAYFORD v. MERCER AND ANOTHER. [NISI PRIUS.

NISI PRIUS.

COURT OF QUEEN'S BENCH.

SITTINGS AFTER HILARY TERM IN MIDDLESEX.

(Before LUSH, J.)

Thursday, Feb. 17.

CLARKSON AND OTHERS v. YOUNG.

Marine insurance—Concealment of material fact—Deck cargo.

In an action upon a policy of insurance the defendants pleaded that the fact that the ship insured was to carry a deck cargo was not disclosed, and on their behalf it was contended that such concealment avoided the policy. But it was

Held, that it would not avoid the policy entirely, but only as regarded the cargo carried on deck.

This was an action brought by a firm of ship-brokers in the City, to recover 900*l.* on a policy of insurance effected by them to secure them the freight and disbursements on the voyage of the ship *Annette*, chartered by them on behalf of the owner. The claim being made on the policy, was resisted on various grounds, as that it was not communicated to all the underwriters that the vessel was missing, and that it had a deck cargo, &c.

The plea containing the defence with reference to the deck cargo was the eighth, and was as follows:—That the said policy was made in London, and that before and at the time of the making of the said policy there was at London and elsewhere in England, a well-known and approved usage and custom of trade among shippers, merchants, and underwriters in the trade of carrying goods in ships on the said insured voyage, that a policy of insurance on freight and on advances on freight in the ordinary form, such as the said policy in the declaration mentioned, does not cover the freight or the advances on the freight payable for or in respect of goods stowed upon deck, unless the underwriter has at the time of the making of such policy notice by such policy or otherwise that the said goods are to be stowed on deck, of which said custom and usage the plaintiffs and the defendant at the time of the making of the said policy in the declaration mentioned, had notice and made the policy with reference thereto. And the defendant, says that the said cargo in the declaration mentioned was stowed on deck, of which the defendants had at the time of the making of the said policy no notice whatever by the said policy or otherwise.

Issue was joined on this plea.

The ship was chartered in September 1868, to go to Honduras, take a cargo of mahogany, and bring it to a port in this country. It took the cargo on board in November, and sailed homewards, twenty-two of the heavy mahogany logs being on deck, or lashed to the sides. In the middle of the month it was lost. In the mean time the captain had written home to his principals, the plaintiffs, to insure for freight and disbursements, and on the 16th Dec. the present policy was effected for 400*l.* disbursements and 500*l.* freight. At that time it was not known by the plaintiffs that the vessel was lost; but she was "overdue," and it was known that there had been very bad weather. This state of things, however, was not (it was said) known to all the underwriters, and those who knew it refused the insurance; neither was it known that the timber was partly laden on deck, which, it was now said, greatly increased the risk and peril of navigation. The non-disclosure of these facts constituted the "concealment" complained of. There was contradictory evidence, however, both as to the alleged concealment and the materiality of the facts alleged to have been con-

cealed. Witnesses were called on the one hand to prove that there was a concealment, and on the other hand to prove that there was not; on the one hand to prove that a deck cargo was dangerous, and on the other hand to prove that it was not so. It appeared that the bill of lading mentioned a deck cargo, and that it was not shown to the underwriters.

Prentice, Q. C., Watkin Williams, and A. L. Smith were for the plaintiffs.

Sir J. Karlake, Sir G. Honyman, and Cohen for the defendant.

Before summing up,

LUSH, J. desired to know what was the view of the defence as to the deck cargo.

Sir J. Karlake said he apprehended the fact ought to have been mentioned to the underwriters.

LUSH, J.—Do you say that its non-disclosure would vitiate the policy entirely?

Sir J. Karlake said he submitted that it would.

LUSH, J. said he knew of no authority to that extent, and should rule otherwise. He believed it had already been established by authority that the omission to mention such a matter only went to the extent of the claim.

Sir J. Karlake submitted that if it increased the risk of navigation it went to the whole.

LUSH, J. said he should rule otherwise, but would reserve the point. In summing up he left to the jury the questions, (1) Whether there had been a concealment of a material fact as to the sailing of the ship; and (2) Whether there had been a concealment of a material fact as to the deck cargo.

Verdict for the defendant on both points.

Solicitors for the plaintiffs, *Plews and Irvine.*

Solicitors for the defendant, *Thomas and Hollams.*

COURT OF QUEEN'S BENCH, GUILDHALL.

Monday, Feb. 28.

(Before BLACKBURN, J., without a Jury.)

PLAYFORD v. MERCER AND ANOTHER (a).

Sale of cargo—From the deck—Harbour dues payable by vendor.

A cargo of ice was consigned to the plaintiff, and before the ship came into harbour the defendants purchased the cargo, with a condition that the ice was to be taken from the ship's deck by them.

Held, that the contract 'from the deck' meant that the vendor should pay all that was necessary in order to enable the purchaser to remove the cargo from the deck, and that harbour dues charged to be paid before goods could be removed were payable by the vendor.

This was an action for the balance of an account between the parties. About 50*l.* was paid into court, and the only dispute was as to the 6*l.* 6*s.*, paid by the defendants to the captain of the ship *James*, for harbour dues at Lowestoft, upon the unloading of a cargo of ice, consigned by that ship to the plaintiff, but purchased from him by the defendants.

The ship arrived in Lowestoft Roads on the 21st Oct. 1869, and on the following day the plaintiff sent circulars informing his customers, and offering the cargo for sale. The defendants made an offer for the cargo "free on the quay;" the plaintiff

(a) Reported by M. W. McKellar, Esq., Barrister-at-Law.

[PROB.]

TICHBORNE v. TICHBORNE.

[PROB.]

replied by telegraph naming a different sum, and saying, "The ice to be taken from ship's deck by you." The defendants telegraphed back "consign the vessel to us." At the defendants' request by the same telegram, the ship was brought alongside a wharf in Lowestoft Harbour, and unloaded; the bill of lading was not given to the defendants.

O'Malley, Q. C., for defendants, contended that they were not consignees of the cargo, and they were no more liable for harbour dues than for the freight. [BLACKBURN, J.—Would the shipowner have a lien on the cargo, in order to discharge these dues?] This is a cargo which was purchased at the price named by the plaintiff, and was delivered to the defendants on deck instead of on the quay, merely for convenience. [BLACKBURN, J.—Lighterage charges would depend upon the agreed place of delivery, and the question here is, whether it is the same with the harbour dues.] The defendants are prepared to establish the custom in their favour. [BLACKBURN, J.—No question of custom arises; the matter entirely depends upon the construction of the contract.]

Joyce, for the plaintiff, argued that the dues were payable for the use of the harbour, and after the sale of the cargo on deck, the defendants might have landed it wherever they pleased. The sale took place whilst the ship was in the Roads, and the plaintiff ought not to be responsible for the expenses of the cargo after it was sold. Although the defendants did not get the bill of lading, they were, in fact, consignees, and they were liable for dues in the same way as they would have had to pay for lighters, if they had employed them. Further, even if the defendants should not pay for the dues, they must be a charge upon the captain, and the plaintiff could not in any way be responsible.

BLACKBURN, J.—I think the contract "from the deck" means that the vendor shall pay all that is necessary in order to enable the purchaser to remove the cargo from the deck; and assuming, as I do, that the harbour dues are by the Lowestoft Harbour Act (which neither side has produced before me) charged to be paid before goods can be removed, the plaintiff should pay them, and consequently the defendants are entitled to the verdict. I find the verdict for defendants on the pleas of payment and set-off, and I reserve leave to the plaintiff to move the Court of Queen's Bench to enter a verdict for him; both parties to be concluded by the decision of that court, unless leave to appeal be granted.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Jan. 25.

(Before Lord PENZANCE.)

TICHBORNE v. TICHBORNE.

Interest suit—Administrator pendente lite—Order of the Court of Chancery—Probate Act, 70th section.

The creditors of a deceased intestate instituted a suit in Chancery for the administration of her estate. This court, on the application of one of the parties to an interest suit in this court touching the administration to the deceased, had appointed an administrator pendente lite, and the Court of Chancery made an order on him to apply a portion of her estate to the payment of her debts.

The court declined to interfere with the order of the Court of Chancery.

This was an interest suit for the administration

of the estate of Dame Henrietta Tichborne, who died intestate. There was a suit pending in Chancery, and Stuart, V.C. appointed Mr. Richard Humphreys receiver of the real estate. In June last this court on the motion of the defendant appointed Mr. Humphreys administrator *pendente lite*; and the Vice-Chancellor made an order on the administrator *pendente lite* to apply a certain portion of the estate for the payment of the deceased's debts. The administrator accordingly advertised for sale a portion of the effects of the deceased, including jewels, trinkets, plate, &c.

Dr. *Tristram* now moved, on behalf of the plaintiff, for an order not to proceed to sale without the sanction of this court. By the 70th section of the Probate Act, under which his appointment was made, the administrator was to act under the immediate control of this court, and the usual practice had been for an administrator before disposing of the personal estate of a deceased person to refer the matter to the registrar of this court. The money in hand from the deceased's estate was 1034*l.*, and the debts proved and claimed amounted to 1255*l.*, leaving a deficit of 221*l.* The plaintiff was ready to deposit a sum of 300*l.* in the registry to meet this deficit rather than that the personal ornaments of the deceased should be sold.

The *Solicitor-General*, for the defendant, intimated that the offer would not be accepted.

Dr. *Tristram* asked, therefore, that the sale should not take place until the registrar of this court had investigated the claims; and if the sale were insisted on he asked that the administrator should be directed not to sell more than necessary to meet the claims.

The *Solicitor-General* opposed the motion on behalf of the defendant. It would bring this court and the Court of Chancery into conflict. The estate was insolvent, and unless this sale took place the money necessary to clear off deceased's debts would not be forthcoming. There was no ground for interfering with the order of the Court of Chancery.

Bridge, for the creditors, also opposed the motion. If the plaintiff wanted the articles he could attend at the sale and buy them.

Dr. *Tristram*, in reply, referred to the section of the Act, and contended that the administrator could only act under the control of this court.

LORD PENZANCE.—There is no doubt that as soon as this court appoints a person administrator *pendente lite*, he is by the express words of the statute clothed with all the powers of a general administrator, and that he has to act under control and direction of this court. But here there is an administration suit in Chancery, and that court has proceeded according to its practice in that suit. It would be mischievous, therefore, and *ultra vires*, if, while there is a suit pending in the Court of Chancery, this court were to make the order prayed.

Dr. *Tristram*.—The plaintiff is not a party to the suit in Chancery, and has no right to interfere with the proceedings there. The only means he has of moving in the matter is by coming to this court and asking for a direction to the administrator *pendente lite*.

LORD PENZANCE.—There is no doubt that this court has power to make orders upon an administrator *pendente lite*, and in most cases there is no doubt that while a suit is pending the administrator is subject to the control of this court, and no other. In this particular case it happens that two relations are squabbling as to who is entitled to the adminis-

Held, also, that the equality clauses of the special Act and Railway Clauses Act applied to the extra charge for packed parcels; that the words "same" and "like" in those Acts had not different meanings, and

H. OF L.]

THE GREAT WESTERN RAILWAY COMPANY v. SUTTON.]

[H. OF L.]

that the words were used not with reference to the contents of the parcels, which the company had no means of knowing, but to the parcels themselves, according as they were like or different for the purpose of carriage; and that the words "under the same" or "under like circumstances," referred to the conveyance of the goods, and not to the class of persons for whom they were carried:

Held, lastly, that an action for money had and received would lie to recover back the overcharges made upon the carriage of the plaintiff's goods, such overcharges being in violation of an obligation imposed on the company by Act of Parliament to charge all persons equally.

Baxendale v. The Great Western Railway Company, 16 C. B., N. S., 140; 9 L. T. Rep. N. S. 814, approved; Garton v. Bristol and Exeter Railway Company, 1 B. & S. 112; 30 L. J. 273, Q. B., overruled.

Error upon a judgment of the Exchequer Chamber, affirming a judgment of the Exchequer, in favour of the defendant in error.

The action was brought by the defendant in error to recover from the plaintiffs in error the sum of 961*l.* 13*s.* 1*d.*, being the amount of alleged overcharges made upon certain parcels of goods carried on their railway by the plaintiffs in error.

The declaration was on the common count for money had and received. The plea was, never indebted.

The facts are fully stated in the report of the case in the Exchequer Chamber (13 L. T. Rep. N. S. 222; 35 L. J. 18, Ex.; 3 H. & C. 800); shortly they were as follows:

The plaintiff in the action, at the trial before Martin, B. at the London Sittings after Trinity Term, 1864, proved that he pursued in London the trade of collecting small parcels, enclosing them in one package, and forwarding them to his agents in the country for delivery to the various consignees. These packages were called "packed parcels," and many were forwarded by the defendants' railway.

By the defendants' tariff, parcels between 1*cwt.* and 500*lb.* were divided into five classes, according to the description of goods they contained, and were charged at five different rates, but packed parcels were charged at the highest rate, with 50 per cent. in addition.

The plaintiff's packed parcels were always charged at the above rate, without reference to the contents of the inclosures, which were generally unknown both to him and the company.

The plaintiff tendered evidence to prove that four wholesale houses (not carriers) in London, habitually sent packed parcels, and that they were never charged at the rate paid by the plaintiff for his packed parcels. This evidence was objected to, but was admitted by the judge.

No evidence was given that the company were ever directly informed that any one specific parcel sent by these wholesale houses was a packed parcel, but it appeared that no questions were asked on the subject by the company.

The plaintiff also tendered evidence to prove that at a reference in 1849 evidence was given in the presence of the then solicitor and traffic manager of the company, showing the common practice of wholesale houses to send packed parcels by the company's railway. This evidence was objected to, but was admitted.

The plaintiff also tendered the evidence of a person conversant with the business of carriers, to show that the practice of sending packed parcels had for many years been so general, as to be notorious among carriers. This evidence was also objected to and admitted.

The judge directed the jury that there was evi-

dence on which they might find, "that parcels had been carried by the defendants for other persons, containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for the plaintiff, and also on which they might find that the defendants knowingly and purposely charged the plaintiff more than other persons; and that if the jury believed that the defendants knowingly and purposely charged the plaintiff at a higher rate than other persons upon a packed parcel of goods, they ought to find a verdict for the plaintiff."

A bill of exceptions was tendered to the above ruling, and subject thereto and to the objections to the above evidence, the jury found a verdict for the plaintiff.

In the Exchequer Chamber, it was held (*per* Cockburn, C.J., Byles, Blackburn, Keating, Mellor, and Shee, JJ.; Erle, C.J. *dissentiente*), that the above evidence was admissible, and that the discretion of the judge was right; the verdict for the plaintiff therefore stood.

Against this judgment the present proceedings in error were taken.

The following judges were present at the hearing in the House of Lords: Willes, Blackburn, Keating, and Lush, JJ., and Bramwell and Pigott, BB.

Sir J. B. Karlake, Q. C. (Attorney-General), Field, Q. C., Raymond, and F. M. White, for the plaintiffs in error.

J. Brown, Q. C. and Marshall Griffith, for the defendant in error.

The arguments were similar to those in the court below, reported in 13 L. T. Rep. N. S. 255, 226. The cases and authorities relied on are noticed in the opinions of the judges and the judgment (*post*).

The following were the statutory provisions on which the present judgment turned:—The Great Western Railway Company's Special Act (7 & 8 Vict. c. ciii).

Sect. 50:

It shall be lawful for the said Great Western Railway Company, whenever they shall act as carriers, or shall provide locomotive, or steam power carriages for the conveyance of passengers, animals, goods, wares, merchandise, articles, matters, or things, to charge for such locomotive or steam power and carriages, such sum (not exceeding the sums, if any, limited by recited Acts, or any of them), and that, either per ton, or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they shall think expedient: Provided always that, in whatever way the said charges are made, they shall be made equally to all persons in respect of all animals, and of all goods, &c., and things of a like description and quantity, and conveyed in, or propelled by, a like carriage or engine, passing only over the same portion of and over the same distance along the said railway, and under the like circumstances; and no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person.

The Great Western Railway Amendment and Extension Act 1847 (10 & 11 Vict. c. ccxxvi.)

Sect. 1:

All the provisions, matters, and things contained in the said several recited Acts relating to the Great Western Railway Company, so far as the same are now unrepealed and in force, and are not inconsistent with or altered by the provisions of this Act, and save in so far as the same may be inconsistent with the provisions of the Lands Clauses Consolidation Act 1845, and of the Railways Clauses Consolidation Act 1845, shall extend to this Act, and to the several purposes thereof as fully and effectually as if the same provisions, &c., were repeated and re-enacted in this Act, and had specific reference thereto.

Sect. 2:

The provisions of the Lands and Railway Clauses Consolidation Acts 1845, in so far as the same may be applicable and are not inconsistent with the provisions hereinafter contained, shall be incorporated with and form part of this Act.

Sect. 58:

And with respect to small packages and single articles of great weight, be it enacted that, notwithstanding the rate of tolls prescribed by this Act, the company may lawfully

H. OF L.]

THE GREAT WESTERN RAILWAY COMPANY v. SUTTON.

[H. OF L.]

demand the tolls following, that is to say, for the carriage of small parcels (that is to say, parcels not exceeding 500lb. weight each) the company may demand any sum which they think fit, provided always, that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages.

The Railway Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), sect. 90 :

And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or any particular portions of the railway as they shall think fit; provided, that all such tolls be at all times charged equally to all persons and after the same rate., whether per ton, per mile, or otherwise in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of the railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway.

Lord CAIRNS (then Lord Chancellor) proposed the following question to the judges:—Ought judgment in this case to have been given in the Exchequer Chamber for the defendant in error, or ought a *venire de novo* to have been awarded?

April 22, 1869.—BLACKBURN, J.—I answer your Lordships' question by stating that in my opinion the judgment in the Exchequer Chamber was right. The points in the case are raised by exceptions to the reception of the evidence received by the judge on the trial, and to his direction to the jury what were the inferences which might be properly drawn from that evidence, and as to the legal consequences which would follow from the inferences, if drawn by them. It is therefore necessary to consider the general question as to the rights of persons who, like the plaintiff, carry on the trade of carriers on railways, and of the railway companies, and also the effect of the evidence given in this particular case. I think it will be more convenient to consider what are the rights of individuals carrying on the plaintiff's trade as against railway companies, which is a question of general importance, before inquiring into the validity of those exceptions which only affect this particular case, though those also must ultimately be determined. At common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a reasonable compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable:

(See per Byles, J., in *Baxendale v. Eastern Counties Railway Company*, 30 L. T. Rep. 320; 4 C. B., N. S., 84; and per Willes, J., in *Bramley v. South-Eastern Railway Company*, 6 L. T. Rep. N. S. 459; 12 C. B., N. S., 75.) But when railways came into operation, and it was found that they practically superseded all other modes of transit, it became a question for the Legislature how far they would, when granting numerous persons power to make a railway and act as carriers on that line, impose on them restrictions beyond what the common law imposed on ordinary carriers. At first the Legislature in each special Act inserted such clauses as seemed, to the particular committees, reasonable in each case. Very soon there came to be usual clauses which the then chairman of committees of the House of Lords used to require to be inserted in all railway Bills with more or less modification. They were known by his name as "Lord Shaftesbury's clauses." Finally, in 1845, the Legislature embodied in a general Act (8 & 9 Vict. c. 20) those clauses which it was thought expedient should generally be inserted in Railway Acts. The Act governing the present case is a special Act of the Great Western Railway (10 & 11 Vict. c. ccxxvi.). By the first section of that Act the provisions of the company's previous special Acts (including 7 & 8 Vict. c. iii, which had been passed before the General Railways Clauses Act, 1845) are to have the same effect as if they had been repeated or re-enacted in it; and by the second clause the Railways Clauses Consolidation Act 1845, is incorporated with it. In the 7 & 8 Vict. c. iii, was contained an equality clause (one of Lord Shaftesbury's clauses) sect. 50. And in the Railways' Clauses Consolidation Act 1845, is also contained an equality clause (8 & 9 Vict. c. 20, s. 9). And it is on the effect of those two sections, taken in conjunction with the 53rd section of 10 & 11 Vict. c. ccxxvi., that the rights of the parties in the present case depend. The words of the two sections thus incorporated in 10 & 11 Vict. c. ccxxvi. are not identical, but I think there is no difference in their meaning. The effect of the 53rd section of the 10 & 11 Vict. c. ccxxvi. is, I think, so far as relates to parcels not exceeding 500lb. in weight, to take away any limitation as to rates imposed by the special Acts, and to leave the company free to charge what it thinks fit for such parcels, subject, however, to the effect of the proviso for equality contained in the 90th section of the Railways Clauses Consolidation Act 1845, and the similar proviso for equality contained in the former special Act of this company (7 & 8 Vict. c. 3, s. 50). Then comes the question what is the legal effect of this proviso for equality? I think it appears from the preamble of the 90th section of the Railways Clauses Consolidation Act 1845, that the Legislature was of opinion that the changed state of things arising from the general use of railways, made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And if this be borne in mind, I think the construction of the proviso for equality is clear, and is, that the defendants may, subject to the limitations in their special Acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this, that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge, beyond the limit imposed by the statute on railway companies acting as carriers on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable. The mode of

H. OF L.]

THE GREAT WESTERN RAILWAY COMPANY v. SUTTON.

[H. OF L.]

establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less, is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. Where it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not, it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances. One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever that period might be. I think it would be necessary to show that there was a practice of carrying for some person, or class of persons, at the lower rate. But a single instance would be evidence to prove this practice; and if followed up by showing that the smaller charge was repeatedly made at intervals over a period of time, the jury would, in the absence of explanation, be justified in drawing, and would probably draw, the inference, that the company during the period carried for others at that lower rate, and consequently that the higher charge was extortionate as being beyond the statutable limit of equality. It would be the very essence of the case to prove that the goods were "of the like description and carried under the like circumstances." But I think that this applies to the description of the goods and the circumstances of the carriage, and not to the trade of a consignor or consignee. The consignor in the present case was what has been called an "intercepting carrier," competing with the defendants in one of the most lucrative branches of their traffic. They would have an intelligible motive for wishing to clog his trade, and I do not see that there would be anything immoral or improper in their doing so by any legal means. But I think that the preamble to the 90th section of the Railway Clauses Consolidation Act 1845 shows that the Legislature thought it inexpedient that railway companies should use their powers for such a purpose, and that the intention in passing the equality proviso was to prevent their treating such a person worse than others. The weight of authority is, I think, very much in favour of the view I have above expressed. The first case on the subject was that of *Parker v. The Great Western Railway Company*, 7 M. & G. 253; 13 L. J., N. S., 105, C. P., decided the 12th Feb. 1844. In that case the Court of Common Pleas, consisting of Tindal, C. J., Erskine, Maule, and Cresswell, JJ., had to construe a variety of enactments in the special Acts of the Great Western Railway Company then in force, amongst others the 2 Vict. c. xxvii, s. 24, which was one of Lord Shaftesbury's equality clauses. And in their judgment (*ubi sup.* p. 288) they say, "From these several enactments it appears clearly to be the intention of the Legislature, that the parties incorporated should be empowered to construct the railway, and hold it as their property, and derive certain profits from it, but that every member of the community should have an equal right to use it on the terms prescribed by the Act, and that the payment to be made for such user, whether under the denomination of rates or tolls, or charges fixed by the company, should be reasonable and equal to all persons without reference to the particular advantage to be derived by any individual or class of individuals from such user." And they proceed to hold that where a higher charge was paid in order to induce the defendants to perform that service which, according to that construction of the statutes, they

were bound to perform for the smaller charge, the payment was not to be considered voluntary, and the excess might be recovered back under a count for money had and received. I think it material to call your Lordships' attention to the date of this judgment, the 12th Feb. 1844, as the promoters of the 7 & 8 Vict. c. iii, a Great Western Act, must have been well aware of it, and the Legislature, when framing the Railways Clauses Consolidation Act 1845, could not fail to have a knowledge of it. I think that the Legislature must be taken to have known what effect the Court of Common Pleas had given to one of Lord Shaftesbury's equality clauses. This, I think, bears strongly on the construction of 7 & 8 Vict. c. iii, s. 50, a Great Western Act; and I also think that, when framing a general code for all railway Acts, the Legislature would not have used similar language unless it was intended to have the same effect. And consequently, I think it is a fair inference that the intention of the Legislature, when passing the Railways Clauses Consolidation Act 1845, s. 90, was that all future railway companies should be subject to the restriction which the Court of Common Pleas had decided was imposed on the Great Western Railway. The next cases on the subject were in 1851: (*Parker v. Great Western Railway Company*, 11 C. B. 545, and *Edwards (assignee of Parker) v. The Great Western Railway Company*, Id. 588). These actions were by the same plaintiff, but for new causes of action, and under a new enactment, the 7 & 8 Vict. c. iii, s. 50, having now come into operation. They were brought in the same court, but not before the same judges, who now were Jervis, C. J., Maule, Williams, and Talfourd, JJ. In delivering judgment in *Edwards v. The Great Western Railway Company*, Jervis, C. J., after reading the words of 7 & 8 Vict. c. 3, s. 50, proceeds (*ubi sup.* p. 647): "The arbitrator finds that the only difference of circumstances here arises from the fact of Parker being a carrier, and that if the same goods under the same circumstances in other respects had been tendered to the company, they would have carried them for a less sum. The question, therefore, is this: is the fact of Parker being a carrier a different circumstance? or are the goods carried under different circumstances when they are carried for anybody else? Now, looking at the words of the 50th section of the 7 & 8 Vict. c. iii., I cannot say that they are." And both in *Parker v. The Great Western Railway Company*, and in *Edwards v. The Great Western Railway Company*, the plaintiff recovered the overcharge under a count for money had and received. In *Crouch v. The Great Northern Railway Company*, 9 Exch. 556, in 1854, before the Exchequer, no question arose as to whether an action for money had and received, would lie, the action being for refusing to carry for the plaintiff (a carrier) on the same terms as for the public. This depended upon the construction of the 90th section of the Railways Clauses Consolidation Act 1845. Parke, B. said, "The 90th section of the 8 & 9 Vict. c. 20, is not distinguishable from the 50th section of 7 & 8 Vict. c. iii. The company are bound to charge all persons, and to convey goods under like circumstances equally. They are at liberty to increase their charges according to the increase of the risk and liability incurred, but they cannot make any difference between individuals. The Court of Common Pleas has already decided the point, and we are bound by their decision." In a second action by the same plaintiff in 1856 (*Crouch v. The Great Northern Railway Company*, 11 Ex. 742; 26 L. T. Rep. 293), the opinion of the jury was taken whether, as a question of fact, there was any difference in the circumstances between a packed parcel of a carrier containing inclosures for different persons, and a packed parcel containing several inclosures not belonging to a carrier. The jury found

H. OF L.]

THE GREAT WESTERN RAILWAY COMPANY v. SUTTON.

[H. OF L.]

there was none, and the Court of Exchequer held that the question was rightly left to the jury, and that the verdict was right. Martin, B. gives what seem to me very satisfactory reasons for this decision. In *Piddington v. The South-Eastern Railway Company*, 5 C. B., N. S., 111, in 1858, the jury found that there was no additional risk or expense incurred by the company from the packing of parcels. The Court of Common Pleas, consisting on this occasion of Williams, Willes, and Byles, JJ., decided that a charge of double for packed parcels was in violation of the equality clause, and the plaintiff recovered the overcharge under a count for money had and received. Up to this date, as your Lordships will observe, the opinions of all the numerous judges who considered the questions of this sort agreed. In *Garton v. The Bristol and Exeter Railway Company*, in 1861 (1 B. & S. 112; 30 L. J. 273, Q. B.), the plaintiff sought, amongst other things, to recover the difference between what was charged to him for the carriage of goods and what was charged to other persons for the carriage of similar goods. The Court of Queen's Bench seem to have decided that an action for money had and received would not lie to recover back the unequal charge, unless it was also unreasonable. I was a member of the court which decided that case, but I have no recollection of it, nor can I now state how I came to that conclusion. If we thought that the circumstances were not the same, so that the statutable provision as to equality did not apply, the decision and the reason assigned for it were, I think, quite right. If, as rather appears from the report to be the case, the decision went so far as to say that an action for money had and received would not lie where the overcharge was in breach of the statutable obligation to charge equally as much as if it had been in breach of the common law obligation to charge reasonably, I think the decision was a mistake; and it was overruled, in *Baxendale v. The Great Western Railway Company*, 16 C. B., N. S., 137; 9 L. T. Rep. N. S. 814, by the Court of Exchequer Chamber, which comprised three out of the four judges who took part in deciding *Garton v. The Bristol and Exeter Railway Company*, in the Queen's Bench. In *Bramley v. The South-Eastern Railway Company*, 12 C. B., N. S., 63; 6 L. T. Rep. N. S. 458, in 1862, the first difference of opinion arose. The claim there was to recover back the excess of charges made in France for the carriage of goods from France to London. The whole Court of Common Pleas held that the statutable obligation as to equality of charges was confined to the railway in England, and that the common law obligation on a carrier did not require him to charge equally if he charged reasonably. But Erle, C. J., speaking for himself exclusively, questioned all the former decisions. In *Baxendale v. The Great Western Railway Company* 14 C. B., N. S., 1; 8 L. T. Rep. N. S. 833, in 1868, the same learned judge gave a very elaborate judgment in favour of defendants on every point. The majority of the Court of Common Pleas gave judgment for the plaintiff, resting that judgment solely on the decisions of courts of co-ordinate jurisdiction expressly in point. This was a perfectly sufficient ground for the decision of the Common Pleas; it ceased to be so when the case was taken by appeal to the Court of Exchequer Chamber. There, however (16 C. B., N. S., 137; 9 L. T. Rep. N. S. 814), the former decisions were affirmed. In the case now at your Lordships' Bar, the same learned judge again delivered a dissenting judgment. As far as regards the main question, the majority of the Court of Exchequer Chamber acted on the authority of *Baxendale v. The Great Western Railway Company* (ubi sup.). There is not any decision in your Lordships' House on the question,

and the reason urged by Erle, C. J., must be weighed and considered by your Lordships, as in this House the case can no longer be treated as concluded by authority. It is scarcely necessary to say that I treat the views of Erle, C. J., with great respect, but I cannot but feel that they are based upon an assumption that the railway companies have a moral right to the monopoly of traffic on the lines which they have constructed, and that the Legislature could not intend to deprive the railway companies of the power to throw obstacles in the way of other carriers interfering with this monopoly. I do not think it falls within my province as a judge to inquire whether the Legislature has been politic or not, but for the reasons already given I think it clear that the Legislature did intend this very thing. I now proceed to discuss the particular exceptions in this case. Three of the exceptions are directed to the reception of particular evidence. As to those I have nothing to add to what was said in the judgment of the majority of the Court in the Exchequer Chamber. I think the evidence was all admissible for the reasons there given. Then comes the exception to the direction of the judge that there was evidence on which the jury might find "that parcels had been carried by the defendants for other persons containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for the plaintiff." The objection to this is, as I understand it, two-fold. First, it is said there was no evidence that the goods were of a like description, inasmuch as the plaintiff's parcels contained enclosures of a miscellaneous character, as might be expected in the case of a carrier, whilst the packed parcels of the wholesale houses probably consisted of enclosures of a less miscellaneous nature, and at all events were not shewn in any case to be identical in their contents with any one packed parcel of the plaintiff; but I think that on looking at the tariff of the company set out in the bill of exceptions, it is obvious that the description of goods on which the defendant imposed the higher charge, was a parcel containing packages of whatever kind, whether miscellaneous or homogeneous; and that if the plaintiff had brought a parcel containing packages exclusively consisting of drapery goods, so as to be identical with one of those sent by Messrs. Morley, he would have been charged the higher price. The defendants are authorised to charge what they please for packages under 500lb. weight, and may make the charge according to any description they like. They choose to say "We will charge the same for a package containing five enclosures and weighing 400lb., as for one containing ten enclosures and weighing 450lb.," and they may do so, but whilst they charge by that description, they must charge all goods coming under that description equally to all. In the present case, they have made the description that of packed parcels, and it is the same whatever be the nature of the packages, in their number, or their weight, at all events the jury might well find so, which is the only question on the record. The next objection is, that the circumstances are not the same. I do not think it can be said as a matter of law that they are the same; but I think the jury might, on this evidence, properly draw the conclusion that they were. I have already intimated to your Lordships my opinion that the circumstances must be those relating to the carriage, not to the consignor, and that the fact that the plaintiff was a rival carrier does not in itself make a difference in the circumstances such as to justify a difference in the charge under the statute; it rather makes against the defendants as supplying a motive for an attempt to evade the statutable provision; but I think there were matters in favour of the defendants which

H. OF L.]

THE GREAT WESTERN RAILWAY COMPANY v. SUTTON.

[H. OF L.]

the jury had to consider. Seeing that the plaintiff from the nature of his trade brought all his parcels packed, whilst the wholesale houses brought only about 10 per cent. of theirs packed, it was for the jury to consider whether the failure on the part of the defendants to charge the wholesale houses for their packed parcels were owing to the difficulty of detecting and charging for them or not. I think in the circumstances of the wholesale houses sending nine unpacked parcels along with a packed one, made it so difficult to detect and charge for it, as to make it impracticable so to do; that would be a difference in the circumstances, and I do not by any means say that a verdict for the defendant on that ground would have been wrong; but then it is to be remembered that the defendants had the exclusive means of proving what attempts they had made to try to enforce their tariff against the wholesale houses, and how far they had found it impracticable so to do, and I think the jury might fairly think that there was quite enough proved to call upon the defendants for an answer. I think, therefore, that the judge would not have been justified in directing a verdict for the defendants on this ground. The last exception raises the general question whether the judge was right in directing the jury that "if they believed that the defendants knowingly charged the plaintiff at a higher rate than other persons upon a packed parcel of goods, they ought to find a verdict for the plaintiff on the issue aforesaid." I still entertain the opinion expressed in the Exchequer Chamber, that it is not open to this exception to raise any question as to the forms of the pleadings, which might have been cured by an amendment. And if, therefore, an action for money had and received would not lie, but some other action would, the exception could not prevail. But it seems to me that the plaintiff's cause of action, if stated at length, would be this: "The defendants being bound by the statute to carry for the plaintiff at the rate not exceeding what they charged to others for goods of the like description under the like circumstances refused so to do unless the plaintiff paid them a larger sum, which the plaintiff under protest was compelled to pay in order to procure them to perform their duty, whereby an action had accrued to him to recover back the excess thus extorted from him." This is merely an expanded count for money had and received. The question, therefore, on this part of the exception seems to me to be whether the statute has this effect, on which I have already expressed my views at length. For these reasons, as already said, I answer your Lordship's question in favour of the plaintiff below. In this opinion my brothers Keating, Pigott, and Lush concur.

WILLES, J.—My Lords, I agree with my brothers Blackburn, Keating, Pigott, and Lush, in opinion that judgment ought to have been given in the Exchequer Chamber, as it was given, for the defendants in error, and that a *venire de novo* ought not to have been awarded. One contention on the part of the railway company, the plaintiffs in error, and probably that upon which they really meant to found their defence, was that the enactments imposing upon them equality of charge (7 & 8 Vict. c. iii, s. 50; and 8 & 9 Vict. c. 20, s. 90) are inapplicable to small parcels not exceeding 500lb. in weight, for which, therefore, they are entitled to make any charge they think fit. This, however, is unsustainable, because those enactments are quite consistent with, and are in terms applicable to, and govern, for the benefit of the public generally, whether carriers or not, the small parcels business. They have been so understood and repeatedly so applied for a long period, and the Legislature has not thought proper to undo what has been the under-

stood doctrine of the courts, well established by decision, that, except so far as juries may find (what they have often negatived) that, in point of fact, carriage for collecting carriers imposes greater risk or expense upon the company, such carriers are entitled to have their packed parcels carried upon the railway for the same price as other persons. This gives no preference to rivals in trade; it only puts the carriers upon an equality with the rest of the public as to the price of the same work done for them by the company. The question what is the meaning of the equality clause when it speaks of things of "like description," conveyed under "the like circumstance" ought, I think, to be answered by saying that things of a "like description," when, although their composition and structure are not "identical," which would be expressed by "the same description," not "like description," they are similar in those qualities which affect the risk and expense of carriage, and that they are conveyed under like circumstances where the route, risk, and expense are, in the opinion of a jury the same, otherwise not. For instance, bags of red wheat and bags of white wheat are of like description, and bags of cotton and bags of jute of like weight and value are of the like description, if there be no dis-severing circumstance proved; but if it were super-added that really one was more risky or troublesome to carry than the other, the jury would hold that the goods were of different descriptions, and bags of silk may be suggested as an instance in which a jury would be sure so to hold. Cattle, which would be more troublesome and more exposed to risk than inanimate things, would be an instance of dissimilarity. So of horses, as less manageable than other cattle, and requiring special precautions. In the absence of a tariff the question ought, I think, to be in fact, whether the sort of thing was like or different for the purposes of carriage, that being the subject dealt with. The railway company might, also, make a distinction between the prices charged to all the world for articles not distinguished in this respect, because of there being great traffic in one, and small in another; as, for instance, in the carriage of coals and in the carriage of culm, from a district in which the one was abundant and the other not so, to such an extent that the former employed a greater number of waggons with a less expensive staff, the price of carriage being proved to depend more upon the wages of the staff than upon the wear and tear of the waggons. There are cases in which custom founded upon convenience makes a distinction such as that between "weight" goods, and "measurement" goods, where so much by weight is charged for the one class and so much by space for the other; and I can conceive it possible that the same goods may be so differently packed as to pass from one class to the other, thus ceasing to be of a like description for the purpose of carriage, though their component articles and the structure of each fibre remain the same. So there may be a good distinction between things specifically charged either by custom or tariff and "miscellaneous" goods. There can be no practical difficulty in marshalling the goods under descriptions, and stating the amount of charge that companies choose to make for carriage upon the railway of specified sorts, and the amount they choose to charge for goods not falling within the specified sorts. In the ordinary case of a railway company's tariff, the company makes this distinction, and gives notice of it to the public; nor can any objection be made so long as the charge does not violate the common law by being unreasonable, or the statute by preferring one person to another. It is a question of fact for a jury whether these limitations have been transgressed. In effect, I think the phrase "like

H. OF L.]

THE GREAT WESTERN RAILWAY COMPANY v. SUTTON.

[H. OF L.]

description" is exhausted upon the goods, and "like circumstances" upon the route, expense, and risk of carriage, and that neither can be extended to the personal qualities of the individual who sends the goods. The direction to the jurors was not absolute to find for the plaintiff, but it was that there was "evidence upon which they might find that parcels had been carried by the defendants for other persons, containing goods of a like description and under like circumstances, at a less rate than such goods were carried by them for the plaintiff, and also upon which they might find that the defendants knowingly and purposely charged the plaintiff more than other persons, and that if the jury believed that the defendants knowingly and purposely charged the plaintiff at a higher rate than other persons, upon a packed parcel of goods, they ought to find a verdict for the plaintiff." I am, therefore, at a loss to see what question of amount of evidence here arises. The defendants, having the opportunity of explanation, offer none. They accept the evidence of the plaintiff as true, and unless it can be affirmed that the question of likeness is not of fact for the jury, and that it is no cause of action upon the equality clause that the defendants charged the plaintiff for the carriage of his goods a sum larger than that which they charged at the same time to other persons in respect of goods which they, knowing that they were of a like description and quantity, carried along the same line under like circumstances as to risk and expense, the learned judge's direction is unexceptionable. As to the formal objections, since the Common Law Procedure Act at least, I think the form of action is out of the question. But I must say I have always understood that when a man pays more than he is bound by law for the performance of a duty, which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received. This is every day's practice as to excess freight. As for the formal exceptions to evidence they fail, because the evidence tendered was either to show a practice that a customer of the defendants had his goods carried by the defendants for less than the plaintiff, as in case of the first exception, or knowledge of the general practice acquired by officers of the company, by whom only they can acquire knowledge, as in the case of the second exception, or general usage of the trade, as in case of the third exception. I do not dwell upon them, because for mere superfluity in the sense of redundancy of evidence, I apprehend no bill of exceptions is maintainable, and also the question whether the evidence was admissible, and whether the summing up was sustainable, is substantially the same. With profound respect, therefore, for the opinion of my brother Bramwell, and reverence which I cannot express in words, for that of the dissenting judge in the Exchequer Chamber, whose opinions, even separately, I far prefer to my own, I must answer that judgment was rightly given in the Common Pleas for the defendant in error.

BRAMWELL, B.—My Lords, the question is, whether there was evidence to go to the jury in support of the plaintiff's case; not a mere *scintilla*, but such as ought to have been left to them, and on which they might have acted. It is necessary to see what the plaintiff's case was. He did not say that the defendants had no right to charge him the sums they had charged, provided they charged others equally with him, but he said he was charged more than others, who were knowingly and wilfully charged by the defendants less than he was for parcels of the like description carried under the like circumstances as his, and that, that being contrary

to the statute and to his prejudice, he had a right of action. No question arises as to the form of pleadings or amount of damages. I think the plaintiff's proposition correct in point of law, viz., that if the charge to the public generally, the ordinary charge, is so much for certain goods, and one person is charged more for goods of a like description and quantity, and under the like circumstances, he has a right of action. In the first place it seems to me that the equality clause applies. By sect. 1 of 10 & 11 Vict. c. cxxvi, all provisions, matters, and things contained in former statutes of the company, unless inconsistent, are to extend to that Act. It may be shown that the equality clause and small parcels clause are not inconsistent, by reading them together, the former as a proviso on the latter. Then if one person is charged more than the ordinary charge the statute is infringed, and being infringed to his prejudice, an action lies. Whether if one was charged less than all others, actions would lie by them, and for how long back, or how many being less charged would give such right of action to others, are questions that do not arise, as it seems to me; for there is evidence that the defendants habitually charged the wholesale houses less for packed parcels than they charged the plaintiff; and though those houses are only four in number, yet as there is no evidence that the defendants received packed parcels from persons other than the wholesale houses and the plaintiff, I think there is evidence that the ordinary rate charged for packed parcels was lower than that charged to the plaintiff. There is also evidence that they did this knowingly, and, as they made no effort to do otherwise, I think there is evidence that they did it wilfully. I am far from saying that the jury ought so to have found, for I do not see how the defendants could help themselves; but I think there was a fragment of evidence for the jury on all these points, though I think their verdict wrong on all; consequently it seems to me that the question is reduced to this, whether there was evidence that the parcels of the plaintiff contained goods of a like description as those of the wholesale houses. I think there was no such evidence. It is necessary first to examine the equality clause. I think the construction of the 7 & 8 Vict. c. iii., s. 50, is, that "under the like circumstances" is to be coupled with "conveyed in or propelled," and "passing." The meaning of that section of itself might be doubtful, but it must be the same as 8 & 9 Vict. c. 20, s. 90, as to which there can be no doubt. But this seems to me immaterial, for the following reasons:—If these words do not help the defendants, at all events, they do not hurt. Then read the sections with or without them; 8 & 9 Vict. c. 20, s. 90, recites that the power of varying tolls should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly in the hands of the company, or of particular parties. It then gives the power, to vary, with the equality clauses as a proviso, charges on all goods of the same description; and it enacts that no reduction or advance on any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway. So 7 & 8 Vict. c. iii., s. 50, in like way says, no reduction or advance on any such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person. It seems to me impossible to read these clauses without seeing that they were designed to prevent an attempt at monopoly in the company (which is not here the question, and of which there is no evidence), and a preference of one or more, or a distinction to the prejudice of one or more. The words, "and no reduction, &c., shall be made either in favour of or

H. OF L.]

THE GREAT WESTERN RAILWAY COMPANY v. SUTTON.

[H. OF L.]

against any particular company or person," seem to suppose that there may be a difference, if it is not in favour or against any particular person, as, for instance, that goods bought from town A. might be charged less than the same description from town B. Suppose town B. were much nearer another railway than town A., might not a difference be made, even though both towns used the same station? It seems to me that such differences could be made. It would not be a breach of the equality clause. See *Nicholson v. The Great Western Railway Company*, 5 C. B., N. S., 366 and *Ransome v. The Great Eastern Railway Company* 4 C. B., N. S. 135, 169. It seems to me, therefore, that "under the like circumstances," or some similar expression, is necessarily found in the first part of the equality clause. At all events, there are the words "same or like description or quantity," and any difference is enough to prevent a breach of the proviso against partiality, or favour of or against any particular person. It would be infringed if other packed parcel carriers charged like the wholesale houses, whilst the plaintiff was not. It would be infringed if one wholesale house were charged as the plaintiff is, and the others were not. As it is, it seems to me not infringed. For, what are the facts? The plaintiff is a carrier, and forwards the property of others, never his own. The wholesale houses are not carriers, and principally forward their own goods. The plaintiff forwards all sorts of goods, no doubt principally drapery, but still he does forward all sorts. The wholesale houses do not. All the plaintiff's packages are packed. All those of the wholesale houses are not. According to the evidence of Hill, only 50 to 100 out of 700 to 1000. The plaintiff is paid for what he forwards; the wholesale houses are not. What they do they do for their mutual accommodation, and that of their friends and customers. What the plaintiff does is for profit. How can it be said that the goods the wholesale houses send are of a like description and quantity as those of the plaintiff, or that the circumstances are such that a reduction has been made in favour of the wholesale houses partially, or an advance partially against the plaintiff, within the meaning of the equality clause. These last words show the meaning and intent of the statute. It was to prevent practically the preferences of one person or persons over another or others. Can it be said there is anything of the sort here? Is it supposed that the plaintiff would forward any more goods if the wholesale houses were charged more, or that they would forward less if the plaintiff was charged less? I have said, and I think (though with great doubt), that there was evidence that the ordinary charge of the defendants for packed parcels was that made to the wholesale houses. But suppose it appeared that there were fifty intercepting carriers all charged as the plaintiff is, I should think the defendants would be at liberty to make a difference to the wholesale houses, either in their favour or against them, on account of the difference in the cases. One of the houses is represented to send out 700 to 1000 parcels a day, not all by the defendants' railway, indeed, but probably many; why may not the defendants in favour of such large customers carry a few packed parcels for them without extra charge? It is not done "partially in favour of or against any particular person," within the meaning of the equality clause. It is to be observed that the question is not whether it is reasonable to make a difference in the charge for the plaintiff's parcels and those of the wholesale houses. If there is a difference in the parcel, if it is not of the "like description", if in the circumstances it differs, the defendants have a right to make a difference in the charge. They may make one charge for cast iron, and another for wrought,

though they could give no reason why, provided they charge all alike. An argument has been used which, with great submission, seems to me a strange one. It is said that the defendants, by their tariff, have made all packed parcels of a "like description," by putting them under one heading in their tariff. Now, there is no obligation to have or publish a tariff. The one in use may be changed tomorrow, and it would be strange if the only effect of your Lordships' decision was to make the defendants publish a new tariff, with one heading and rate for packed parcels of drapery and books, and another heading and rate for other parcels. Surely the heading of the tariff does not make a hamper with a clock, a ham, and a barometer, &c., of the like description as 100yds. of flannel and 100yds. of calico. The plaintiff's counsel declared that the result of a decision against the plaintiff would be to ruin his trade. It would not. It might compel him to raise his prices to the public, but it would carry into effect the intention of the Legislature—viz., to give to the defendants the profit, or part of the profit, of the carriage of small parcels, which at present is diverted from them. It is in vain to trouble your Lordships with the decision. The present question comes before your Lordships' House for the first time. It is not pretended that it is so settled as not to be capable of a decision in the defendants' favour, to which it seems to me they are entitled.

July 13.—Lord CHELMSFORD.—My Lords, this is a proceeding in error, upon a judgment of the Court of Exchequer Chamber affirming a judgment of the Court of Exchequer in favour of the defendant in error. The action was brought to recover from the Great Western Railway Company the sum of 961*l.* 13*s.* 1*d.*, being the amount of the alleged overcharges made upon certain parcels of goods carried on the railway for the plaintiff. The declaration contained common counts for money had and received, and upon an account stated, to which the defendants pleaded never indebted. The material facts upon which the judgment of the court below proceeded, are stated upon the bill of exceptions tendered by the defendants at the trial, and the questions to be determined upon the appeal are: First, whether there was evidence to go to the jury that the defendants knowingly and purposely charged the plaintiff at a higher rate than other persons for the carriage of packed parcels of goods? Secondly, whether the judge was right in admitting certain evidence in proof of such different rate of charges? Thirdly, whether, supposing the different rate of charge to the plaintiff and other persons to have been established, an action for money had and received is maintainable to recover back the amount proved to be overcharged to the plaintiff upon packed parcels, by comparison with what was charged to other persons for similar parcels? The plaintiff is a carrier in London, and his principal business is to collect parcels of goods from various wholesale houses, to pack them together in one parcel, and send the parcels so packed by the defendants' railway, to his agents in the country, who unpack and distribute the enclosed parcels of goods to the different persons to whom they are addressed. The carriers of the plaintiff, who convey the parcels to the railway station always take with them a printed form of declaration, with different headings, furnished by the defendants, amongst which are columns for the name and address of the consignee, the description of package and contents, and at the foot of the declaration is the notice that "all parcels of goods and packages, the contents of which are not properly declared by the senders, will be charged with the highest class, and all such parcels of goods and packages not exceeding 500*lb.*

H. OF L.]

THE GREAT WESTERN RAILWAY COMPANY v. SUTTON.

[H. OF L.]

in weight, if the contents shall not be declared, will be considered as each containing different kinds of articles, and each such parcel of goods and packages will accordingly be subject to the regulation relating to 'smalls,' and charged for accordingly. Before the goods leave the plaintiff's office he fills up the different columns of the declaration, except those headed respectively "weight," "paid," and "remarks," and every parcel containing several parcels of different kinds of goods is always described by plaintiff as "packed." The defendants charge for the carriage of goods according to their nature and description, by a tariff headed "Rates from London," "On goods and parcels above 1cwt. and under 500lb. by luggage trains," containing five columns of increasing rates of charge, and a column headed "Class—Packed parcels," stating the charge for them to be "42s. 6d." (being the charge at the fifth, or highest rate) and 50 per cent." All the packed parcels carried for the plaintiff were charged at this rate, which, looking to the plaintiff's parcels only, would be a correct charge. But the ground of the plaintiff's action against defendants is that they have been in the habit of charging the packed parcels of other persons carried by their railway at a lower rate than they charged the packed parcels of the plaintiff, which, he contends, by their Acts of Parliament they have no right to do. For the purpose of proving this difference of charge the plaintiff produced the evidence (which was excepted to) of certain wholesale warehousemen and drapers in London, who were in the habit of inclosing, in one package or hamper, various descriptions of goods, not only for their own customers, but also for the customers of other houses; and he proved that the defendants always charged for the carriage of their packed parcels at the fourth class rate in the tariff, being the rate appropriated to drapery goods, and never charged the extra rate of 50 per cent. on any of their packages. One witness (the clerk of Messrs. Morley, warehousemen) stated that the defendants were perfectly aware of the practice of the house as to packed parcels, but that they could not tell from the outside of any particular parcel whether it was packed or not. The plaintiff also gave evidence (which was excepted to) that in the year 1849, upon an arbitration between another carrier and the defendants, witness proved, in the presence of the defendants, their solicitor, and traffic manager, the practice of houses in London of packing parcels together containing the goods of various persons, and sending them by the defendants' railway, and that the practice of packing parcels had been for the last forty years so general as to be notorious among carriers. Upon this evidence the learned judge directed the jurymen that there was evidence upon which they might find that parcels had been carried by the defendants for other persons, containing goods of a "like description and under like circumstances," at a less rate than such goods were carried by them for the plaintiff, and also upon which they might find that the defendants knowingly and purposely charged the plaintiff more than other persons; and upon this direction the jury found a verdict for the plaintiff. The obligation of the defendants to carry goods "of the like description, and under like circumstances," at the same rate of charge for all persons alike, is imposed upon them by Acts of Parliament relating to their railway. The special Act of the defendants (10 & 11 Vict. c. ccxxvi.) makes all the provisions of the company's previous Acts part of that Act, as if they had been repeated and re-enacted in it; and incorporates with it the Railways Clauses Consolidation Act 1845. By one of the previous Acts of the defendants (7 & 8 Vict. c. iii. s. 50) the defendants are empowered to charge for their locomotive, or steam power, and carriages, either per ton, or

per mile, or by bulk, measure, number, or ad-measurement, or by fixed charges, as they shall think expedient: provided that, in whatever way the charges are made, they shall be made equally to all persons in respect of goods wares, and merchandise, articles, matters, and things, of a like description and quality, and conveyed in, or propelled by, a like carriage or engine, passing over the same portion of, and over the same distance along, the railway, and under the like circumstances. There is a similar provision for equality of charge by railway in the Railways Clauses Consolidation Act, but a little differently worded. The 90th section of that Act gives power to a company to alter or vary the tolls by the special Act authorised to be taken, "provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all goods in the same description, or conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway, under the same circumstances." By the 53rd section of the 10 & 11 Vict. c. ccxxvi. it is enacted that, notwithstanding the rate of tolls prescribed by the Act for "parcels not exceeding 500lb. each, the company may demand any sum they think fit." Erle, C.J., in *Baxendale v. The Great Western Railway Company* (14 C. B., N. S., 25; and 8 L. T. Rep. N. S. 835) said that the incorporating clause of the 10 & 11 Vict. c. ccxxvi. did not, by incorporating former Acts, incorporate therewith the clauses for making equal charges under like circumstances, because, "First, the incorporation of the former Acts is 'only so far as they may be consistent with the clauses of the Act in question;' and a grant of absolute power is inconsistent with a clause which would reduce it to a power restricted by a condition. And, secondly, the equality clause in the former Acts, if they were inserted in the 10 & 11 Vict. c. ccxxvi., would not affect the power granted by the 53rd section of the latter Act, as the equality clauses in the special Acts relate to the powers of charging granted by those Acts; and the equality clause in the 8 & 9 Vict. c. 20, s. 90 (the general Act) relates to a power of varying charges from time to time, and restricts that power by the condition that it shall be exercised impartially, so as to charge equally under like circumstances." With great respect for the learned judge, I cannot help thinking that the reasoning here employed is erroneous. I will not stop to consider whether a provision that a power given to companies to vary their tolls, provided that at all times the tolls be charged equally to all persons, does not almost necessarily imply that, before the variation, the tolls have been charged equally upon all. But the notion that the clauses for making equal charges are inconsistent with the power given to the defendants by the 53rd section of the 10 & 11 Vict. c. ccxxvi., to demand any sum they think fit for parcels not exceeding 500lb. appears to me to be unfounded. The learned judge likens it to a grant of absolute power, afterwards restricted by a condition. But the absolute power to demand any sum the defendants think fit is not reduced to a conditional one by requiring that the tolls shall be equally charged to all persons, nor does this even operate as a qualification of the power itself. The power may be exercised at the discretion of the defendants, but charging one person what they think fit, they must charge the same to others. This does not render the power a conditional one, because the condition only attaches after the power had been exercised. It was argued at your Lordships' bar, as it was held by Erle, C. J. (who differed from the other judges in the Exchequer Chamber), that the extra charge for packing, made lawful by the 53rd

H. OF L.]

THE GREAT WESTERN RAILWAY COMPANY v. SUTTON.

[H. OF L.]

section of 10 & 11 Vict. c. ccxxvi, is not within the 7 & 8 Vict. c. iii, which "authorises charges to be made per ton or per mile, or by bulk, number, or admeasurement, or by fixed charges, and that it cannot be brought within the condition for equality of charge in that section in respect of goods of like description and quantity, as the parcel charge is in part, and may be entirely irrespective both of the description of the goods and of their quantity." But it appears to be too narrow a view of the equality clause, and of the intention of the Legislature in enacting it, to deny its application to the charges made in respect of the carriage of the plaintiff's goods. The enumeration of the different modes in which the defendants may think proper to make their charges for the carriage of goods is evidently intended to cover every case. It is true that the defendants might make an arbitrary charge under the 53rd section, without reference to the description or quantity of the goods. But that is not what they have done. They have charged the plaintiff at the rate of so much per ton, and 50 per cent. in addition. This is, in the first place, a tonnage charge, and it may, perhaps, be considered altogether so, as the 50 per cent. is an addition which depends on the ascertained charge calculated at so much per ton; but, at all events, it must be admitted to be a compound charge at so much per ton, and an additional fixed charge as 50 per cent., and therefore within the express words of the 50th section of 7 & 8 Vict. c. iii. The intention of the Legislature was to place all persons having their goods carried by the railway upon an equal footing; and as by the 53rd section of 10 & 11 Vict. c. ccxxvi, the defendants may charge what they think fit for small parcels (of course within a reasonable limit), there is the stronger ground for assuming that, in this case more than any other, the obligation of equality of charge to all persons alike would be imposed upon them where an opportunity would be afforded (in the words of the 90th section of the Railways Clauses Act) "of prejudicing or favouring particular parties, or of collusively and unfairly creating a monopoly, either in the hands of the company, or of particular parties." It having been seen that both the equality clause in 7 & 8 Vict. c. iii. s. 50, and in the Railway Clauses Act apply, the question arises, what is the meaning of the words "Goods, &c., of a like description and quantity, and conveyed along the railway, and under the like circumstances," in the private Act, and the words "goods of the same description" and "under the same circumstances," in the Railway Clauses Act. It is extremely difficult to understand exactly what the Legislature meant by goods of "a like description," and even by the words "of the same description," though at first sight more capable of interpretation, because the word "same" is constantly used in popular language for "similar." It seems to me that the words "same" and "like" have not different meanings in the two Acts, and that the words must be used, not with reference to the contents of parcels, which the defendants have no means of knowing, but to the parcels themselves, "whether" (as Willes, J., said in answer to your Lordships' question to the judges), "they were like or different for the purpose of carriage." I have felt greater difficulty in ascertaining the meaning of the words "under the same" or "under like circumstances." I do not see, however, how they can relate to anything else than the conveyance of the goods. To say that because the plaintiff is (what has been called) an intercepting carrier, and the other persons using the railway are wholesale dealers, therefore, the goods are not conveyed along the railway under the like circumstances, is an application of the words which I am not able to comprehend. At the trial the learned judge directed

the jury "that the evidence given on the part of the plaintiff was evidence upon which they might find that parcels had been carried by the defendants for other persons containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for the plaintiff." But he gave the jurors no assistance as to the meaning of the words themselves. His direction, therefore, was imperfect, but I understood it to have been agreed upon the arguments at your Lordships' bar, that no objection was to be made to it in this respect, even if any such objection would have been within the exceptions. The exception to the direction of the learned judge to the jury turned entirely upon the insufficiency of the evidence to establish the plaintiff's case. The counsel for the defendants contended that the learned judge ought to have directed the jury "that there was no evidence that parcels were carried by the defendants for other persons containing goods of a like description, and under like circumstances, at a less rate than such goods were carried by them for the plaintiff," and that "there was no evidence of the specific contents of any of the plaintiff's parcels from which the jury ought to infer a specific inequality upon any parcels between the rate charged to the plaintiff and to other persons; and that there was no evidence that the defendants knowingly and wilfully charged the plaintiff more than other persons." It is difficult to see how the plaintiff could prove that the defendants had violated the obligation imposed upon them by the Acts of Parliament, otherwise than by the evidence which he produced. If proof of specific inequality in the rate charged to the plaintiff and to other persons upon particular parcels were necessary, it would prevent the possibility of establishing any case of this description against the defendants. It was proved by persons in the employ of the wholesale houses, which are in the habit of sending packed parcels by the railway, that the defendants could not tell from the outside of the parcels whether they were packed or not. Of course, therefore, the plaintiff, could have no knowledge, or means of knowledge of the specific contents of any particular parcel sent from these houses. The only available evidence to establish the plaintiff's case, was the general proof which he gave that the wholesale houses had for years been in the habit of sending packed parcels by the railway, and that the defendants had long known of this practice, and especially that with respect to one of their houses, (that of Messrs. Morley), the defendants were perfectly aware of their habit of sending packed parcels. The plaintiff also proved knowledge brought home to the defendants through their solicitors and traffic manager, by the evidence of witnesses given in their presence, of the practice of houses in London of packing parcels and sending them by the defendants' railways. This evidence was excepted to; but it appears to me that it was properly admitted for the purpose of proving the knowledge of the practice of the wholesale houses in London to pack parcels, which the defendants learnt by the traffic manager, their agent in all matters relating to the traffic. The whole of the foregoing evidence constituted the proper mode of proving that the defendants knowingly and purposely charged the plaintiff at a higher rate than other persons upon packed parcels of goods. It was argued that as the defendants did not and could not know the contents of any particular parcel sent by the wholesale houses, they could not impose upon them the charge of packed parcels. But as the defendants knew perfectly well that it was the constant practice of those houses to send packed parcels, if they desired to obey the Acts of Parliament, and to avoid inequality of charge, they might have given notice

H. OF L.] *Re* SCHEME OF ARRANGEMENT FILED BY THE POTTERIES, &C., RAILWAY CO. [CHAN.

that every parcel, the contents of which were not declared, would be treated as a packed parcel, and charged accordingly. This would have compelled the senders of parcels of this description to state what parcel contained enclosures of other persons, and what not. It appears to me to be perfectly clear that specific instances of inequality of charge was unnecessary. If it were, the provisions of the Acts of Parliament might be disregarded with impunity, and injustice might be done by the company's favouring one person and prejudicing another, and the party injured would be wholly without remedy. The last subject to be considered is the form of the action: whether an action for money had and received will lie to recover back overcharges made upon the carriage of the plaintiff's goods, not absolutely, but relatively, to the charges made to other persons. It was argued for the defendants that the charge upon the plaintiff's packed parcels being warranted by the 10 & 11 Vict. c. ccxxvi., and being reasonable, and within the absolute discretion of the company, the plaintiff was not injured by other persons being charged less than he was. But this is a fallacious way of viewing the question. The plaintiff's complaint is not that others are charged less than himself, but that the fact that their having been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge. The very fact of the smaller charge to others is the ground of this complaint of an overcharge to himself.

Now, if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, the case falls within the principles of several decided cases, in which it has been held that money which a party has been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in action for money had and received. In the language of the Court of Common Pleas, in the case of *Parker v. The Great Western Railway Company*, 7 M. & G. 259; 13 L. J., 105, C. P., "the payments made by the plaintiff were not voluntary, but were made in order to induce the company to do that which they were bound to do without them." In another case of *Parker v. The Great Western Railway Company*, 11 C. B. 545; 21 L. J. 57, C. P.; and in *Edwards and another (Assignee of Parker) v. The Great Western Railway Company*, 11 C. B. 588; 21 L. J. 62, C. P., the plaintiffs recovered in actions for money had and received overcharges of a similar description to those in the present case. I am unable, from the report of *Garton v. The Bristol and Exeter Railway Company*, 1 B. & S. 112; 30 L. J., 273, Q. B., to understand the ground upon which it was held by the Court of Queen's Bench, whose judgment was delivered by the Lord Chief Justice, that money had and received would not lie to recover back overcharges made in violation of an obligation imposed upon the company by Act of Parliament to charge all persons equally. But in the subsequent case of *Baxendale and others v. The Great Western Railway Company*, 16 C. B., N. S., 140; 9 L. T. Rep. N. S. 814, in the Exchequer Chamber, the Lord Chief Justice of the Queen's Bench, in delivering the judgment of the court, said, "As to the question whether an action for money had and received will lie, which seems to have been one of the numerous points discussed in *Parker v. Great Western Railway Company*, 6 E. & B. 77, we think that if the judgment of the Court of Queen's Bench in that case went the length of holding that it would not, this court ought not to be held bound by it." I am of opinion that the judgment of the Court of Exchequer Chamber, affirming

the judgment of the Court of Exchequer, is right and ought to be affirmed.

Lord COLONSAY and Lord CAIRNS concurred.

Judgment affirmed.

Attorneys for the plaintiffs in error, Young, Maples, Teesdale, and Nelson.

Attorney for the defendant in error, J. C. Dalton.

Equity Courts.

COURT OF APPEAL IN CHANCERY

Reported by T. BROOKSBANK and E. STEWART ROCHE, Esqrs.,
Barristers-at-Law.

Friday, Dec. 10, 1869.

(Before Lord Justice GIFFARD.)

Re THE SCHEME OF ARRANGEMENT FILED BY THE POTTERIES, SHREWSBURY, AND NORTH WALES RAILWAY COMPANY.

The Railway Companies' Act 1867 (30 & 31 Vict. c. 127), ss. 5, 7, 9—Scheme—Filing—Enrolment—Restraining proceedings against the Company—Execution—Application to make it available—Debenture-creditor—Judgment-creditor.

After the confirmation and enrolment of a scheme of arrangement by a railway company with their creditors under the provisions of the Railway Companies' Act 1867, the Court of Chancery has no summary jurisdiction under sect. 7 of that Act to restrain any action against the company by creditors, the power given by that section being only an interim power applicable during the period between the filing and the enrolment of the scheme.

Similarly, after the enrolment of a scheme, there is no ground for a creditor coming to the court under sect. 9 of the Act, for leave to make his execution available against the property of the company.

Before the passing of the above Act, M., a debenture creditor of a railway company, whose debt was overdue, recovered judgment in an action against the company for the principal of his debt together with interest and costs of the action. After the passing of the Act the company filed a scheme of arrangement with their creditors. This scheme became binding on the debenture-creditors of the company, the necessary agents under the provisions of the Act having been given to it. The scheme was duly confirmed by the court, and enrolled. The scheme made no provision for the debts of judgment-creditors. After this had been done, the company having regained possession of their property, M. sued out execution against the company upon his judgment, and the sheriff under the writ seized some of the company's rolling stock. The company then moved, under sect. 7 of the Act, for an injunction to restrain the sheriff from continuing in possession of the property which he had seized, and to restrain M. from proceeding further against the company upon his judgment. M. therefore moved, under sect. 9 of the Act, for the leave of the court to make his execution available against the property of the company, notwithstanding the confirmation and enrolment of the scheme. Malins, V.C. granted the injunction asked for by the company, but declined to make any order on M.'s motion.

Upon appeal, held that, there being no jurisdiction under the Act after the enrolment of the scheme, both motions ought to have been refused with costs.

Semble, however, that, inasmuch as a debenture-creditor does not by recovering judgment for his debt cease to be a debenture creditor of the company, if the company had filed a bill they would have been entitled to the injunction.

CHAN.] *Re* SCHEME OF ARRANGEMENT FILED BY THE POTTERIES, &C., RAILWAY CO. [CHAN.]

Quære as to the correctness of the decision in Bowen v. The Brecon Railway Company, L. Rep. 3 Eq. 541; 16 L. T. Rep. N. S. 6.

This was an appeal from a decision of Malins, V.C., which is reported 21 L. T. Rep. N. S. 545. The facts being there stated, it is only necessary now briefly to recapitulate them.

In Feb. 1867, before the passing of the Railway Companies Act 1867, Mr. Minor, who was a debenture-creditor of the above company, and whose debenture debt was overdue, recovered judgment in an action against the company for the principal of his debt, with interest and costs. He sued out execution upon this judgment, and the writ of *ca. sa.* was placed in the hands of the sheriff, who made a return of *nulla bona*. After the passing of the above Act the company filed, under its provisions, a scheme of arrangement with their creditors. This scheme made provisions for the satisfaction of the debenture debt of the company, and was assented to by the requisite statutory majority of the debenture-creditors, and thus became binding upon all the debenture-creditors. Mr. Minor, however, did not assent to the scheme. The scheme did not profess to make any provision for payment of the judgment-creditors of the company. The scheme was confirmed by the court, and was enrolled on the 13th July 1869. In Sept. 1869, the company having regained possession of their rolling-stock, Mr. Minor again issued a writ of *ca. sa.* upon his judgment, and under this writ the sheriff seized certain carriages belonging to the company. The company then gave notice of motion, under sect. 7 of the Act, for an injunction to restrain the sheriff from continuing in possession of the property which he had seized, and to restrain Mr. Minor from further proceeding against the company upon his judgment. Mr. Minor then gave a cross-notice of motion under sect. 9 of the Act, for leave to make his execution available against the property of the company notwithstanding the enrolment of the scheme. The two motions were heard together by the Vice-Chancellor, and his Honour granted the injunction asked for by the company, but refused to make any order on Mr. Minor's motion. Mr. Minor appealed.

Glasse, Q. C. and C. Locock Webb for the appellant, argued that the Act gave no jurisdiction under the circumstances of the present case to grant the injunction. At any rate it was clear from sect. 5 that the proper court to apply to was the court out of which the writ issued. It could not be that the legal rights of a creditor were destroyed when there were no express words in the Act having such an effect. He had, therefore, a right to put the sheriff in possession, and then the Act said that the leave of the court must be obtained to render the execution available. That leave was the very thing which the appellant was now seeking. The rights of the appellant as a judgment-creditor were distinct from his rights as a debenture-creditor, and in the character of judgment-creditor he was not bound by the scheme. He ought, therefore, to have leave to make his execution available against the property of the company. Indeed it was only as a measure of precaution that Mr. Minor gave his notice of motion, as it was really very doubtful whether sects. 7 and 9 of the Act had any application when the scheme had been enrolled. They cited

Re The Cambrian Railway's Scheme, L. Rep. 3 Ch. 278; 17 L. T. Rep. N. S. 522, 530;

Re The Bristol and North Somerset Railway Company, L. Rep. 6 Eq. 448.

During the argument on behalf of the appellant reference was also made to

Bowen v. The Brecon Railway Company, L. Rep. 3 Eq. 541; 16 L. T. Rep. N. S. 6,

where Hatherley, L. C., then Vice-Chancellor, decided that a debenture-creditor of a railway company, recovering judgment against the company for his debenture debt could only hold the fruits of his judgment as a trustee on behalf of himself and all other the debenture holders of the company who were entitled under the company's special Acts to be paid *pari passu* with himself.

Lord Justice GIFFARD said that he had always doubted very strongly the correctness of that decision. He could understand a debenture holder being prevented from exercising his legal right; but if it were admitted that he could recover judgment against the company, he could not understand why he should be deprived of the benefit of his judgment. If it were necessary in the present case to decide upon the correctness of *Bowen v. The Brecon Railway Company*, his Lordship would not like to dispose of the case without the Lord Chancellor. Indeed, he should like the question to be argued before three judges.

Osborne, Q. C. and Dryden, who appeared for the company, were only called upon to argue the question of the jurisdiction under the Act. They contended that sect. 7 applied to all the creditors of the company after the filing of the scheme.

Without calling for a reply,

Lord Justice GIFFARD said that he should have been glad to be able to deal with the case as if a bill had been filed by the company; but this it was impossible to do without the appellant's consent. It was necessary, therefore, to consider the question of the jurisdiction given by the Act. It was clear from sects. 4 and 5 that the issuing of execution without the leave of the court, was contemplated by the Act. His Lordship had, however, no doubt what was the extent of the jurisdiction conferred by sects. 7 and 9. The view taken by Lord Cairns of those sections was stated by him in his judgment in *Re The Cambrian Railways Scheme (ubi sup.)*, "I think that the object and meaning of these clauses is sufficiently clear. The company is unable to meet its engagements. The scheme is expected to result in the production of new capital or loans wherewith the engagements may be satisfied. But if, while the scheme is maturing, and the requisite assents are being obtained, the company and its property are torn assunder and destroyed by litigation and execution, the remedy proposed by the scheme will come too late. An *interim* power must, therefore, be given to the court to stay actions on proper terms, and execution must be made dependent on the leave of the court." From this it was plain that in the opinion of Lord Cairns the power given by those sections to the court was only an *interim* power. There was no reason why the legal status of the company should be entirely charged by the enrolment of the scheme, but there were very good reasons why the court should have an *interim* power to restrain proceedings against the company. His Lordship was, therefore, of opinion that the summary jurisdiction given by sect. 7, applied only to the period between the filing and the enrolment of the scheme. After the scheme was enrolled the company must, if it wished to obtain an injunction to restrain proceedings by a creditor, make a case by bill, just as anyone else would have to do. His Lordship was of opinion that sects. 7 and 9 were co-extensive in their operation, both applying to the period between the filing and the enrolment of the scheme. Were it otherwise the consequence would be, that at any time, however long, after the filing of a scheme of arrangement by a railway

V.C. S.]

TICHBORNE v. TICHBORNE.

[V.C. S.]

company, any action whatever against the company could be restrained in this summary way, and it would be necessary to come to this court, under sect. 9 of the Act, for leave to make any process available against the property of the company. His Lordship was satisfied that the intention of the Act was only to give the court an *interim* power under these two sections, the object being to enable the company to perfect their scheme. The result was that both the motions in this case ought to have been refused with costs, there being no jurisdiction to grant the injunction, and no necessity for obtaining the leave of the court to make the execution available against the company's property. But the company must have an opportunity of filing a bill, and if a bill had been filed, his Lordship would have considered the case a proper one for granting the injunction. A debenture creditor, though he had recovered judgment for his debt, was not the less a debenture creditor, and therefore bound by the scheme. If the mere fact of obtaining judgment for his debenture debt, put an end to his position as a debenture creditor, a scheme of arrangement would never result in anything. To give the company an opportunity of filing a bill, the order of the Vice-Chancellor would be discharged as from the 16th inst. No costs of the appeal would be given.

Solicitor for Mr. Minor, *D. Aston*, agent for *W. R. Minor*, of Manchester.

Solicitor for the company, *S. F. Noyes*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Feb 17 and 18.

TICHBORNE v. TICHBORNE.

Contempt of court—Publication tending to influence pending litigation—Apology—Motion to commit—Costs.

While a suit was pending to establish the plaintiff's title to a certain baronetcy and estates, there was published in a daily newspaper an article referring to the plaintiff in a manner tending to excite prejudice against him in the minds of the public. Shortly afterwards, there appeared in the same newspaper an apology in very ample terms, and a disclaimer against any intention to disparage or prejudice the plaintiff's case.

On a motion by the plaintiff to commit the printer and publisher of the newspaper for contempt of court:

Held, that the publication amounted to a contempt, but, inasmuch as it was unintentional, and had been apologised for, the only order would be that the respondent bear his own costs of the motion.

This was a motion on behalf of the plaintiff in the above suit for an order to commit the printer and publisher of the *Echo* newspaper for contempt of court for allusions made to the plaintiff in an article published in the newspaper on the 1st Feb. 1870. The facts were as follows:

The bill in the suit was filed for the purpose of establishing the plaintiff's right to the Tichborne baronetcy and estates. In June 1868 an order was made directing the bill to be retained on the file of the court for a year, so that the plaintiff might bring an action of ejectment against trustees who were in possession of the estates, and establish his title to them at law. The period for which the bill was so retained was afterwards extended to the last day of Easter Term 1870. In the mean time proceedings had taken place with respect to the ejectment in the Court of Common Pleas, and also in the Probate Court, in both of which courts the proceedings were still pending. Commissions had been issued for

taking evidence in the Republic of Chili and in the colonies of Tasmania, New South Wales, and Victoria. These commissions had returned, but the result of the evidence obtained under them had not been fully published. In this state of the proceedings the article complained of appeared in the *Echo*.

The article was headed "On Double Lives," and, after referring to the publicity in which persons of the nineteenth century lived, and to a case recently tried before the Lord Mayor, in which a person had claimed to be the Queen of England, proceeded as follows:

For the last two or three years London has been speculating on the personal identity of the gentleman calling himself Sir Roger Tichborne; and now while that *cause célèbre*, though yet unheard, is getting a little stale, and everybody has discussed a thousand times the anecdotes of the dogs, and the locket, and the alleged variation in height, and the supposed imperfect French accent, and the friends who recognised, and the acquaintance who forgot the claimant,—we are kindly furnished with a new and fresh mystery to supply the place of the old. On the present occasion it is not a baronet of ancient race and good estate who has been said to reappear, but "Lord Fitzroy Lennox," son of the fifth Duke of Richmond. Much similarity may be traced, however, between the tales of the two claimants. As the original heir of the Tichbornes was supposed to be lost in a vessel wrecked off the coast of South America, so the scion of the house of Lennox was believed to have perished in the wreck of the *President*. Here were two drowned young gentlemen of high position; and now we have two claimants assuring us that neither Mr. Tichborne nor Lord Fitzroy was really lost at all. By some happy chance or other they both escaped the destruction of their vessels; but, wonderful to relate, instead of hastening to relieve the despair of their friends, they seized the opportunity so offered of retiring into private life, after the manner of the long-missing Mr. Speke. Sir Roger Tichborne exercised, we are told, during a portion of the interval of his "disappearance" the not very attractive profession of a butcher in Australia, and "Lord Fitzroy Lennox" dates his appeal for public support and friendly recognition from "Albert-cottages, Battersea-rise," a locality hardly suggestive of the usual class of residence for the younger sons of dukes. Truly, if this kind of thing is to go on, we sober Britons shall grow accustomed to seeing among us a whole tribe of masculine Proserpines spending half their days forgotten and unheard of in the gloomy shades of the Antipodes, the other half in the sunshine of Pall Mall, the observed of all observers.

These observations were followed by a review of several historical cases of mistaken identity—among others, that of the Princess Olive—and concluded as follows:

Stories without number might be added; but we leave the subject here, with the conviction that those are happiest and most enviable who lead a life clouded with no "double life," with no such concealment from society, without mystery, and without reproach.

Three days after the appearance of this article, on the application of two gentlemen who called at the office of the *Echo*, and saw the editor, but who went without the authority or even the knowledge of the plaintiff, the following paragraph was inserted:

In a recent article, entitled "On Double Lives," our allusion to the case of the claimant to the Tichborne baronetcy has been thought offensive, and improperly dealing with a case still before the courts. We disclaim any intention of commenting upon the case, and certainly regret the unintentional use of expressions in any degree susceptible of such an interpretation.

The plaintiff who had seen the article, but had not seen the apology, which was printed among other paragraphs in the centre of the paper, gave instructions to his solicitors to bring the matter before the court, and caused the publisher to be served with notice of this motion.

Greene, Q. C., Karlake, Q. C. (Dr. Tristram with them) in support of the motion, contended that the general effect of the article was to prejudice and disparage the plaintiff's cause. By classing the plaintiff among the persons to whom it referred, as leading "double lives," it covertly stigmatised him as an impostor. Such an insinuation could not but act prejudicially to the plaintiff on the minds

V.C. S.]

TICHBORNE v. TICHBORNE

[V.C. S.]

of the jurors and witnesses in the case when it came on for trial. It was a clear case of contempt, and as this court was still *Dominus litis* (the suit being still pending) it was a contempt of this court. With respect to the apology, it had not been inserted in a sufficiently conspicuous position in the paper; but even if it had it did not amount to a retraction, and was totally inadequate to repair the damage which had been attempted to be inflicted by the article. They cited

Tichborne v. Mostyn, L. Rep. 7 Eq. 55 (n.);

Daw v. Eley, Ibid, 49;

Littler v. Thomson, 2 Bea. 129.

Jackson for the respondent submitted there was no evidence of any intention to commit an act of contempt of this or any other court. If the insertion of the article amounted to contempt, he repeated the apology which had already been offered. Nothing could be further from the minds either of the editor or the writer than to transgress any rule of the court. [The VICE-CHANCELLOR said that, considering the highly proper course taken by the publisher of the *Echo* in apologising for having used expressions which might be taken to interfere with the course of justice, he wished to relieve Mr. Jackson from arguing the question of actual committal for contempt. But the case was this,—the article contained a reference to litigation and contained disparaging comments on one of the parties in reference to the subject matter of the litigation.] If in anything the article was open to complaint, the apology which had been inserted ought to have satisfied any reasonable man. But he contended that the allusions to the plaintiff in the article itself were merely references by way of illustration to a case of great public interest, and were such comments as a writer had a right to make. [The VICE-CHANCELLOR said he considered that any criticism made until a case had been decided was a contempt of court.] To be a contempt of court the criticism must be either of the conduct of the parties, or comments on the proceedings. If the court interfered in the present instance no newspaper writer would be safe in alluding to any matter pending before the court. Now, looking at the facts, could the plaintiff himself doubt that if he had remained in England, leading the life of an English gentleman, with his position and with the career he had open to him, his life would have been far more enviable, and that he would have saved himself and the court an infinity of trouble? The moral that was drawn by the writer, that those are happiest and most enviable whose life is not a double life, or clouded with concealment from society, who live without mystery and without reproach, was one which the court itself must approve. The plaintiff had nothing to complain of, no bias being shown on either side. The contempt, which at most was merely nominal, ought never to have been brought before the court, and the motion having been made, ought to be dismissed with costs. He cited

Brook v. Evans, 8 W. Rep. 689.

The VICE-CHANCELLOR.—The respondent has endeavoured to show, through the ability and ingenuity of his counsel, that the publication in this case is not a contempt of court. That argument has been supported by reference to other cases, in which publications of a very different kind have been held to be contempts of court. All the cases cited, excepting one, which was cited from a report which is not an authority, were gross and aggravated contempts of court, consisting of publications and comments upon the evidence in those cases while they were pending before the courts, before that evidence had even been presented to the

courts, and cases of that kind are aggravated contempts of the court. But whatever tends to prejudice a case—whatever matter is published to the world referring to the parties to the litigation and to the subject matter of the litigation in such a way as excites a prejudice, is a contempt of this court. Lord Hardwicke, whose judgment has always been considered as an accurate statement of the view taken by the court upon questions of this kind, speaks in these terms: "Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented, nor is there anything of more pernicious consequence than to prejudice the mind of the public against the persons concerned as parties in a cause, before the cause is finally heard." To my mind the publication in this case tends to prejudice the minds of readers against the plaintiff in the cause. The essay, which is said to be an essay with a moral, has been written with very great ability, and the title of it is "On Double Lives." The substance of the essay refers to various cases of gross and known imposture in times past, and mixed up with a reference to those cases of imposture is a mention of the name of the plaintiff in this cause in a manner which, to my mind is a disparagement of his case, and tends to excite a prejudice against him. No man can read this essay, putting a fair interpretation upon it, without coming to that conclusion. But I do not think it an aggravated contempt of court. I do not think that there is any evidence of an intention to prejudice the public against the plaintiff or to disparage his character. It is obvious from what has been stated in the publication, and from what is known to the world generally of the nature of this case, that it is one which would greatly tempt any person who has applied his mind to the subject of the essay, to think of this case. It is, to my mind, a contempt of court, but not an aggravated contempt, and I must take into consideration the fact that the publisher whom I am now asked to commit to prison for contempt, previous to the hearing of this application (indeed, four days before any service of this notice of motion) published in a subsequent number of the same newspaper an apology in very ample terms. The evidence is that the plaintiff did not know of this until afterwards; but that is a circumstance of very small moment. The fact remains, that the public to whom the article was addressed, and in which comments of this case were made, were informed, by a notice in the paper, that the publication was thought to be offensive to the plaintiff, and that the author and publisher regretted the publication, and disclaimed that there was any intention whatever to disparage or prejudice the plaintiff's case. That is the substance of the evidence, and it is needless to read the terms of the apology. The impression upon my mind is that it was a satisfactory apology, and perhaps if that apology had reached the plaintiff he might have refrained from serving this notice of motion. Upon the whole of the case, considering that there has been that apology, and that that apology has been repeated in this court in very satisfactory terms—very satisfactory to my mind—it seems to me that the case, not being one of aggravated contempt, and the plaintiff having come before the court under these peculiar circumstances, there is no pretence for asking the court to inflict the penalty of imprisonment. The only remaining question is as to the costs of this application, and various considerations affect my mind upon this subject; one is that during the argument it was shown that the course of litigation at present is not in this court, the course of litigation is in fact in a court of law, and the prejudice which this publication is calculated to create in some degree—whatever that degree may be—is one which entirely affects the

V.C. M.]

CHETHAM v. HOARE.

[V.C. M

proceedings in the court of law. I wish to point out the importance of that in this case, because I observe in the order by which this bill was retained for a year on the file of this court there has, from some reason not easily explained, been an omission. The order is not in the usual or common form. It is usual in an order retaining a bill for a year to direct that if the plaintiff does not establish his claim at law within that time, his bill shall stand dismissed. This direction for dismissal has, for some reason I cannot account for, been omitted from this order. There is certainly enough to justify the application to this court, because the bill having been retained for a year it is impossible to say that—the time allowed not having expired—substantially the suit is not pending in this court. Substantially, it is pending, though only *pro forma*. But I cannot help looking with some suspicion and reluctance at a motion so brought before this court, because the contempt ought to have been brought before the court against which it was committed, and because the case has been, after an apology, pressed very hardly against the publisher. In that state of things I am not disposed to make the publisher pay the costs of the plaintiff, who comes to a court which I think is not the proper forum. Looking at all the circumstances of the case, that it is a contempt which can barely be called a contempt—an unintentional contempt—a contempt apologised for by the publisher before the matter did, or could, come before the court, I think the purposes of justice will be fully answered by leaving the publisher to bear his own costs. The order will therefore be in these terms. The said Horace Voules, the respondent, having disavowed all intention of committing a contempt of this court, and amply expressed his regret at having published anything which in any way could be considered a contempt of this court, the court, taking into consideration all the circumstances of the case, doth not think fit to make any order other than that the said Horace Voules do bear his own costs upon this application.

Solicitors for the plaintiff, *Walter and Moojen*.Solicitors for the respondent, *Ashurst, Morris, and Co.***V. C. MALINS' COURT.**Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.*Feb. 10 and 11.*

CHETHAM v. HOARE.

*Ejectment bill—100 years' adverse possession—Statute of Limitations, sect. 26—Concealed fraud.**An ejectment bill may be brought in a court of equity in cases where the fraudulent possession is proved.*

The 26th section of the Statute of Limitations (3 & 4 Will. 4, c. 27), must receive the strictest interpretation; and, therefore, in a case where it appeared that a concealed fraud might with due diligence have been discovered within forty years after the event, but no steps were taken to discover it until long after the expiration of the forty years, it was held that the right of proceeding reserved by that section had been lost.

This was a bill filed by James Chetham, suing *in forma pauperis*, to recover possession of estates in the counties of Lancaster and York, worth about 500,000*l.*, which had been in the possession of the defendants and their ancestors for upwards of 100 years.

The plaintiff alleged that he was entitled as issue in tail under certain entails created about the middle of the 17th century, and that one William Chetham, an ancestor of the plaintiff, became so entitled in the

year 1749, but that one Edward Chetham, taking advantage of William Chetham's absence beyond the seas, then wrongfully entered into the possession of the estates, and, in order to destroy all proof of the legitimate descent of the said William Chetham, mutilated and tampered with the marriage register book belonging to Trinity Church, Salford, so that the plaintiff's ancestors had been prevented from procuring evidence of a marriage which was said to have been celebrated in the year 1724, and which was an important link in their title. That in the year 1868 the plaintiff had, by accident, discovered the concealed fraud, and had then found that the page containing the entry of the marriage in question had been torn out of the register book, and also that in an ancient index book to licensed marriages the page on which an entry of the said marriage had been made, had been pasted or fastened to the opposite page in such a manner as to prevent discovery on any ordinary diligent examination of the book.

There were two demurrers to the bill.

Glasse, Q. C. and Wickens, in support of the first demurrer, said that this bill was founded on the 26th section of the Statute of Limitations (3 & 4 Will. 4, c. 27), which enacted that in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land of which he, or any person through whom he claimed, might have been deprived by such fraud, should be deemed to have first accrued at and not before the time at which such fraud should, or with reasonable diligence might, have been discovered. In this case if there had been fraud it might with reasonable diligence have been discovered long ago, and within twenty years after its commission. Also the proceedings for the recovery of the property should have been taken at law and not in equity. They referred to

Petrie v. Petrie, 1 Dr. 371.

Cotton, Q. C. and C. Hall, for the second demurrer, were not heard.

Cole, Q. C., O. Morgan, Q. C., and E. S. Ford, in support of the bill, contended that the time allowed by the statute did not commence to run until the year 1868, when the plaintiff had first discovered the fraud which had been so concealed; that repeated attempts to discover the fraud had been made by some of the plaintiff's ancestors, and it was only discovered at last by the plaintiff by mere accident. They referred to

Trevelyan v. Charter, 4 L.J., N. S., 209, Ch.; 11 Cl. & Fin. 714;*Blair v. Bromley*, 2 Ph. 354.

The VICE-CHANCELLOR said that this was a case of great importance to the public generally, and he desired to express his opinion that there was no doubt whatever that the claim set up by the plaintiff must fail altogether. The bill was to recover possession of certain valuable estates to which the plaintiff said he was entitled as issue in tail under settlements made about the middle of the 17th century, notwithstanding there had been adverse possession for upwards of 100 years. Now the proposition that a title of 100 years could be upset was an alarming proposition, and tended to shake the faith of every one in a long possession of his property. Still if the plaintiff could bring his case within the 26th section of the Statute of Limitations, he would then have a right to recover. By that statute the period of time fixed for giving a person in adverse possession of property a conclusive title against a claimant was twenty years, or, in cases of disability, forty years, unless the claimant could prove a concealed fraud. This was an eject-

V.C. M.]

GILLETT v. GANE.

[V.C. M.]

ment bill, and his opinion was that such a bill could be brought in a court of equity in cases where the fraud was proved; but this 26th section, which in its widest sense would give the right of recovering possession of land upon the ground of fraud, after any number of years, ought to receive the strictest interpretation. A claimant coming after the period allowed by the general law should prove that his case is strictly and literally within the words of the section, which in the case of concealed fraud allowed the time to run from the period when by reasonable diligence the fraud might have been discovered. Now the right of the plaintiff depended solely upon a marriage which was said to have been celebrated in 1724. If that was actually the case, then the property would have gone to the ancestors of the plaintiff under whom he claimed. Owing, however, to the evidence of the marriage having been fraudulently destroyed, the property passed to the ancestors of the defendants. No due diligence, however, was used to discover the alleged fraud till the year 1868, when the plaintiff professed to have made the discovery as stated in the bill. If this fraud had been alleged, as it appeared to have been, within forty years after its commission, there might have been many ways of proving the marriage besides producing the certificate; for instance, common reputation of the parties living together as husband and wife might have been proved. Considering then that the plaintiff's claim rested only on the alleged marriage in 1724, the evidence of which it was said had been fraudulently destroyed, and that this marriage might with due diligence have been proved within forty years after the commission of the fraud, his opinion was that the plaintiff had not brought himself within the 26th section of the statute, and could not sustain his claim. The demurrer to the bill must, therefore, be allowed.

Solicitors for the plaintiff, *Shaw and Tremellen*, agents for *Blair and Binney*, Manchester.

Solicitor for the defendant, *Byrne*.

Feb. 16 and 22.

GILLETT v. GANE.

* *Misdescription of legatee—Will—Construction.*

Devise of an estate to the use of Robert Gillett, the fourth son of G. H. G., in case he should attain twenty-one, but if he should die under that age then to the use of —, the fifth son of the said G. H. G., in case such fifth son should attain twenty-one, but if he should die under that age then to such other son of the said G. H. G., who coming after the said fifth son in birth should first attain twenty-one. Robert Henry Gillett was the third son of G. H. G., and John William Gillett was the fourth son:

Held, that the true effect of the will was to give the estate to Robert Henry, the third son, with a series of executory devises over to the younger sons in succession.

George Gillett, by his will dated 1st Feb. 1859, after devising certain hereditaments to his son the plaintiff, George Henry Gillett, in fee, charged all his freehold estates in the parishes of Biddestone St. Nicholas and Biddestone St. Peter, in the county of Wilts, with the payment of an annuity of 40*l.* to each of his daughters for life, and subject thereto devised the said estates unto Richard Gane and Gabriel Goldney, their heirs and assigns, to the use of the said Richard Gane and Gabriel Goldney, their executors, administrators, and assigns, for the term of twenty-one years from his decease upon the trusts therein declared. The testator then proceeded as follows:

And subject thereto to the use of my son, the said George Henry Gillett, and his assigns for and during his natural life, and from and immediately after his decease, to

the use of Robert Gillett, the fourth son of the said George Henry Gillett, his heirs and assigns, for ever, in case he (the said Robert Gillett) shall attain the age of twenty-one years, but if he shall die under that age, then to the use of —, the fifth son of the said George Henry Gillett, his heirs and assigns for ever, in case such fifth son shall attain the age of twenty-one years; but if he shall die under that age, then to such other son of the said George Henry Gillett, who, coming after the said fifth son in birth, shall first attain the age of twenty-one years; and, in default of any such younger son attaining such age of twenty-one years, then to the use of the said George Henry Gillett, his heirs and assigns absolutely.

At the date of the testator's will the plaintiff, George Henry Gillett, had seven sons living. The defendant, Robert Henry Gillett, was the third son of the plaintiff, but claimed to be the person named in the will as "Robert Gillett, the fourth son of the said George Henry Gillett." The defendant John William Gillett was the fourth son of the plaintiff, and claimed to be entitled to the estate given by the testator to "the fourth son of the said George Henry Gillett."

It appeared from the evidence that the testator had originally made a will devising the estates to the first and second sons of George Henry Gillett, but that in consequence of some family quarrel he made the will now in question, excluding them from all interest in the estates. It was also stated in evidence that the testator knew very little of either of the sons Robert Henry Gillett and John William Gillett, and had never shown any reason for preferring the one to the other.

Cotton, Q. C. and Graham Hastings, for Robert Henry Gillett.—The court must here look at the name and not the description of the legatee. It is clear from the will that the testator knew the name of Robert, but did not know the names of the sons coming after Robert; and it is more probable that he would give his property to the son whose name he knew, rather than to the son whose name he did not know. The omission of Robert's second name Henry is immaterial: the person intended to be benefited is therefore certain, and though there may be an apparent ambiguity in reference to the "fifth" son, you must not allow this ambiguity to upset the clear reference to Robert the third son. But we contend that the "fifth" son means the next son to Robert, that is, the fourth. It is clear from the authorities that when the name is accurate, but the description of quality or position is inaccurate, the name prevails. It is a well-known maxim of law that *veritas nominis tollit errorem demonstrationis*, and we contend that this maxim applies to the present case. They referred to

Hart v. Tulk, 2 De G. M. & G. 300;

Doe v. Hiscocks, 5 M. & W. 363;

Newbolt v. Pryce, 14 Sim. 354;

Adams v. Jones, 9 Hare, 485;

Doe v. Huthwaite, 8 Taunt. 306; 3 B. & Ald. 632;

Bernasconi v. Atkinson, 10 Hare, 345.

De Gex, Q. C. and E. Ford, for the defendant John William Gillett.—This is a case in which the description and not the name must prevail. It is clear from the evidence that the testator knew very little of either of the sons. He did not know who the third son was; but whoever he was he was to be excluded, and the property was to go to the fourth son, and so on in regular order of succession. There is nothing to show that the name was more in the testator's mind than the order of birth. The rule, *veritas nominis tollit errorem demonstrationis*, is not an inflexible rule; and before you can apply it you must show that there is an error of demonstration. We contend that this will shows on the face of it that the description was the ruling idea in the testator's mind, and not the same. They referred to

Drake v. Drake, 8 H. of L. Cas. 172;

V.C. M.]

CROXTON v. MAY.

[V.C. J.]

Lord Camoys v. Blundell, 1 H of L. Cas. 778 ;
Bradshaw v. Bradshaw, 2 Y. & C. 72.

Feb. 22.—The VICE-CHANCELLOR, after reading the portion of the will above stated, said:—The defendant, Robert Henry Gillett, was the third son of the testator's son, George Henry Gillett, and the defendant, John William Gillett, was the fourth son. The question to be decided was whether Robert Henry or John William took under the devise. No question was raised or could properly be raised as to the right of Robert Henry to take under the name of Robert only, if there was no other difficulty in the way. The real question was whether the testator had mistaken the name or the description of the devisee. If this had been a simple devise to Robert, the fourth son, not followed by limitations over to younger sons of the testator's son, the case would, in his opinion, have been free from difficulty: the maxim *Veritas nominis tollit errorem demonstrationis* would have applied, and Robert Henry would have taken. The case of *Newbolt v. Pryce*, 14 Sim. 354, was a distinct authority on that point. In that case there was a bequest to John Newbolt, the second son of William Strangways Newbolt. The second son was Henry Robert, and the third son John Pryce; and Sir L. Shadwell held that John Pryce Newbolt was entitled to the legacy. The strong inclination of the court to adhere to the name rather than to the description of the devisee or legatee was shown by the case of *Bernasconi v. Atkinson*, 10 Hare, 345, where, under a gift by a testator to his first cousin, Vincent Bernasconi, the son of his late uncle, Peter Bernasconi, the present Lord Chancellor, when Vice-Chancellor, decided that George Vincent Bernasconi, the son of a deceased uncle of the testator named Joseph, took on the ground that the testator was mistaken in the description rather than in the name of the legatee, and also upon evidence that George Vincent Bernasconi frequently visited and dined with the testator, who usually called him Vincent. *Adams v. Jones*, 9 Hare, 485, was a case in which the description prevailed over the name. The bequest was to Clare Hannah Adams, the wife of Thomas Adams. The wife of Thomas Adams was named Hannah only, but he had an infant daughter, aged two years, whose name was Clare Hannah. The Vice-Chancellor Turner decided that the wife took. [The Vice-Chancellor then read the judgment in that case and continued:] That case had clearly no application to the present, where one son was as likely to be the object of the testator's bounty as the other.* *Bradshaw v. Bradshaw*, 2 Y. & C. 72, which was much relied upon by Mr. De Gex as counsel for the fourth son, was another case in which the description prevailed over the name. There the devise was to Robert Blagrove Bradshaw, the second son of the testator's daughter. Robert Blagrove was in reality the eldest son of the daughter; and it was held by Lord Abinger that the second son took, as well by the intention of the testator, to be collected from the face of the will, to provide for the second son of his daughter, as by the parol evidence of intention which he admitted. In the present case the parol evidence, consisting of the affidavit of the plaintiff, the son of the testator—which was read without objection—showed a motive on the part of the testator for passing over the first and second sons of the plaintiff, but did not show any motive for passing over the third son. Apart, therefore, from any difficulty caused by the subsequent limitations over to "—, the fifth son" of the testator's son, and to the other still younger sons, he thought it quite clear that Robert Henry, the third son, was intended, though the testator had mistakenly called him the fourth son. Although,

at the argument of the case, he thought these subsequent limitations over caused some difficulty, upon further consideration he did not think they did. If, as he was bound to conclude, Robert Henry was the son intended to take, and the testator erroneously considered him to be the fourth son, and the intention was that if he died under twenty-one, the estate should go to the next son in order of birth, the same error which led to Robert being called the fourth son would necessarily lead to his brother being called the fifth. The true effect of the will was therefore, in his opinion, to give the estate to Robert Henry, the third son, with a series of executory devises over to the younger sons in succession, if Robert Henry or those succeeding him should die under twenty-one. The result was that as Robert Henry had attained his majority, the absolute fee simple had vested in him and there must be a declaration accordingly. The cases of *Doe v. Huthwaite*, 3 B. & Ald. 632: and *Doe v. Hiscocks*, 5 M. & W. 363, which were cited upon the argument, turned upon the admissibility of parol evidence for the purpose of ascertaining the intentions of the testator, and could not, therefore, influence the decision of this case, which he decided without any regard whatever to the parol evidence.

Solicitors for the plaintiff, *Underwood and Coleman*.

Solicitors for the defendants, *Lewis, Wood, and Street*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET, Esq., and Hon. ROBERT BUTLER, Barristers-at-Law.

Monday, Jan. 24.

CROXTON v. MAY.

Wife's equity to a settlement—Form of ultimate trust—Spirett v. Willows, L. Rep. 1 Ch. 520; 4 Ch. 507, followed.

In framing the settlement of a fund belonging to a wife in pursuance of her equity to a settlement, the court declares the ultimate trust of the whole fund in default of issue to be in favour of the husband, whether he survive his wife or not.

The plaintiff in this suit was married in April 1861, and in the autumn of the same year she and her husband separated, owing to unavoidable circumstances, and through no fault of either party, and have lived apart ever since. In 1863, the plaintiff was left a legacy of 1000*l.*, the interest on which was regularly paid to her by the executor of the will until the 26th Dec. 1867, when the husband claimed the legacy.

The plaintiff then filed her bill against the executor and her husband, praying that the 1000*l.* might be settled on herself. The question was, whether in the settlement the ultimate trust should be for the husband whether he survived his wife or not, or whether his ultimate interest was contingent on his surviving his wife.

De Gex, Q. C. and *A. G. Marten*, for the plaintiff, cited *Carter v. Taggart*, 1 De G. M. & G. 286, in which case the Lords Justices said that they were of opinion that the provision in the settlement giving the capital to the lady, in the event of there being no children and her surviving her husband, was right.

E. E. Kay, Q. C., *Shaw*, and *G. N. Colt*, for the defendant, the husband, contended that the case of *Carter v. Taggart* had been overruled by *Spirett v. Willows*, L. Rep. 1 Ch. 520.

De Gex, Q. C. in reply. *Carter v. Taggart* was

V.C. J.]

Ex parte JOHN BATEMAN.

V.C. J.

followed in *Watson v. Marshall*, 17 Beav. 363; in *Ward v. Yates*, 1 Dr. & Sm. 80; and in *Re Suggitt's Trusts*, L. Rep. 3 Ch. 215.

The VICE-CHANCELLOR said.—In this case I am of opinion that the proper form of settlement to be made is that which was adopted in *Spirett v. Willows*. The principle of the court seems to me to have been accurately expressed by Lord Cairns in *Re Suggitt's Trusts*, where his Lordship says:—"Then with respect to the form of the settlement, the principle upon which the court acts is to let in the equity of the wife and children, and to that extent to exclude the husband's marital right; but as soon as that equity is satisfied the provision of the settlement ought to end, and the marital right ought to return." It is said that in the case of *Carter v. Taggart* there was a deliberate opinion of Parker, V. C. which is inconsistent with this. Parker, V. C. proceeded on his knowledge of the existing practice in the master's office, which was to exclude the husband altogether, and he deliberately affirmed and adopted that practice, going to the extent of absolutely excluding the husband from all right and interest in his own property, which was taken from him for the purpose of making a settlement upon his wife and her children. When that case came before Lord Cranworth he recognised that the fund was the husband's property, and laid down a principle which, I think, would have gone further than the decision of the court in that case, that principle being that the legal right was to prevail as soon as the provisions made for the wife and children had been satisfied, or had failed. But, as it seems to me by a little inaccuracy, he considered that the legal right in a fund of this kind would belong to the husband if he survived, and to the wife if she survived, treating the fund as a fund which had been intercepted by the court, and which the husband had consequently failed to reduce into possession. That seems to me to be very hard upon the husband, his legal right being a right to have everything belonging to the wife, subject to this, that if it be a *chose in action* he must reduce it into possession during the coverture. That being the husband's right, the court intercepts it, and Lord Cranworth in that case acted upon this view; that that interception by the court was equivalent to the husband not having reduced it into possession. I do not follow that line of reasoning, and I think that the principle laid down by Lord Cranworth in *Carter v. Taggart* ought to have led to the result which Lord Chelmsford came to in *Spirett v. Willows*. In *Spirett v. Willows*, Lord Chelmsford considered the case, it seems to me, in accordance with the true principle, that after you have satisfied the interest of the wife and children the fund ought to go back to the husband, whose property it really was. That case came very recently, in April last, before Wood and Selwyn, L.JJ. The point must have been one which attracted their attention. It is true that the case came before them after it had been dealt with by Chelmsford, L.C., and they must have considered the point settled by the order of Lord Chelmsford. But what they did would certainly have rendered it necessary that they should make some observations upon Lord Chelmsford's decision if they had considered it to be inconsistent with the law of the court, because what they did was without expressing any disapprobation whatever of Lord Chelmsford's order to enlarge the ultimate interest so as to give a greater and more beneficial interest to the assignee who represented the husband in that case. Then it is said that *Spirett v. Willows* is inconsistent with what was actually done in *Re Suggitt's Trusts*. In *Re Suggitt's Trusts* it does not appear to me that there was any argument or any decision upon the

ultimate form of the settlement. It seems to have been considered as the legitimate and logical result of the principle which was laid down by Lord Cairns. In my opinion that is not so. I think that the principle laid down by Lord Cairns (which, to my mind, expresses more accurately the principle upon which this court ought to proceed), is, that you ought not to interfere with the marital right more than is necessary to give effect to the equity of the wife and her children—that is to say, the right of the wife and children to have a provision out of the fund. The marital right ought not to be interfered with more than is necessary for that purpose. The logical and proper result of that principle is that the husband is to have the ultimate reversion, subject to the provision for the wife and her children. The equity is not confined to the children of the marriage, but extends to the children of her present or any future marriage. That was, I think, the form in *Spirett v. Willows*. My opinion on these cases is, that if it be considered that there is a conflict of authority between two judges, constituting the Court of Appeal, then I have to act according to my view of what the rules of law and equity are and ought to be, and my view entirely coincides with the view taken by Lord Chelmsford in *Spirett v. Willows*.

Solicitors for the plaintiff, *Thomas and Hollams*.
For the defendants, *Kingsford and Dorman*, agents
for *W. J. Cowper*, Newbury.

Tuesday, Feb. 8.

Ex parte JOHN BATEMAN.

Practice—Writ of prohibition—Consistorial Court—Jurisdiction.

This court will grant a writ of prohibition out of term to restrain a Consistorial Court from trying the rights to pews in a church, as the courts of common law have no jurisdiction to issue such writs except during term.

This was an application on the part of John Bateman, a person of unsound mind, for a writ of prohibition to restrain the Consistory Court of Llandaff from trying the question, whether the present applicant was entitled to certain pews in Llantrissant Church, to which he laid claim by prescriptive right as appurtenant to a mansion house, of which he was tenant in tail, in the parish of Llantrissant.

This application was rendered necessary by the fact that the churchwardens of the parish of Llantrissant had applied to the Consistorial Court of Llandaff, for a faculty for repairing and repewing the church, and if the intended alteration were carried out it would involve the removal of the pews claimed by John Bateman. This prescriptive right on the part of John Bateman to these pews was pleaded in the Consistorial Courts and traversed by the churchwardens, and it was for the purpose of restraining the Consistorial Court from trying this issue that this writ was applied for.

Cracknall, in support of the motion, referred to
Com. Dig. "Prohibition;"
Seton on Decrees, 951;
Re Foster, 24 Beav. 428.

The VICE-CHANCELLOR made the order for the writ to be issued, and remarked that he did so, the matter being urgent, and the courts of common law having no jurisdiction to issue such a writ of prohibition, except during term, otherwise the application should have been made to a court of common law.

Solicitor: *H. White*.

V.C. J.]

Re SAVINI; SAVINI v. LOUSADA.

[V.C. J.]

Feb. 14 and 15.

Re SAVINI; SAVINI v. LOUSADA.

Custody of foreign infant—Undertaking of English guardian as to religion—New guardian.

An order appointing two persons who had been named by the adoptive mother of an Italian infant to be her guardians, on an undertaking by their solicitor that the child should be brought up as one of their own, and her religion respected, was discharged, and new guardians appointed on the application of the guardians appointed by the Italian Court on proof of circumstances shewing the undertaking had not been observed.

This was an application to the court on behalf of Sophia Pia Gori Savini, an infant, and a native of Italy, by James Robert Hope Scott, her next friend, for the discharge of an order whereby the Earl and Countess of Dundonald had been appointed guardians of the infant, or that they should be removed from being such guardians, and that Dr. Nobili, the tutor of the infant, appointed by the Pretor's Court at Florence, should have the exclusive right to the custody of the infant, and that proper directions should be given for her return to him in Italy, or in case of her remaining in England, that proper directions should be given for her education as a Roman Catholic, and that the Marchioness of Lothian and James Robert Hope Scott should be appointed guardians of the person of the infant, either alone or jointly with Lord and Lady Dundonald. The plaintiff Sophia Pia Gori Savini was born in Florence on the 5th March 1857, and was the illegitimate daughter of Count Cesare Gori Savini, an Italian. Lady Katherine Fleming, the sister of Lord Dundonald, who was herself a Roman Catholic, adopted this infant and educated her as a Roman Catholic, and the infant had received her first communion in that faith.

Lady Katherine Fleming died on the 25th Aug. 1868, and by her will bequeathed to the infant between 10,000*l.* and 12,000*l.*, and by the same will expressed a wish that the infant should be brought up in the family of Lord Dundonald.

The infant being an illegitimate child of Italian parents was subject to the Pretor's Court and to the Italian Council of Guardianship which it appointed. The guardian appointed by this council was Dr. Ferdinando Nobili.

Negotiations took place between Lord Dundonald's solicitor and Dr. Nobili, which ended in the infant being sent to England, but previous to sending her Dr. Nobili, by the authority of the council, stipulated that the nationality and religion of the infant should be respected.

On the 29th Jan. 1869 Dr. Nobili received a letter from Lord Dundonald's solicitor, in which there was an express promise that the religious belief of the child should not be tampered with.

The infant came to England in May 1869, but instead of being allowed to reside in Lord Dundonald's family, she was sent to a Protestant school at Clapham.

On the 23rd July 1869 a bill was filed, and the infant made a ward of court, and Lord and Lady Dundonald were appointed guardians of her person, and to have the care of her education.

On these facts being discovered the present application was made.

Kay, Q. C. and W. H. Bagshawe were for the plaintiff, and cited

Nugent v. Vetzera, L. Rep. 2 Eq. 704.

Amphlett, Q. C. and Montague Cookson, for Lord and Lady Dundonald.—The Italian guardians abdicated their rights when they offered to give up,

and Lord Dundonald agreed to accept, the guardianship of the infant. No attempt was made to influence the child's mind on controversial religious questions. It is plainly for the benefit of the child that she should remain under Lord and Lady Dundonald's care.

The following cases were cited:—

Johnston v. Beattie, 10 Cl. & F. 42;

Stewart v. Marquis of Bute, 9 H. of L. Cas. 440;

Colston v. Morris, Jac. Rep. 257.

Kay, Q. C., was not heard in reply.

The VICE-CHANCELLOR said—This is a very plain and simple case, and my duty is equally plain and simple. This young lady is an Italian by birth, and the adopted child of an English Roman Catholic lady; her brother Lord Dundonald was not, however, of the same religion. The child was originally brought up in all respects as a Roman Catholic, having been baptized, and confirmed, and having received her first Communion in the Roman Catholic Church, and she is at that time of life at which it is peculiarly advisable that her religious faith should not be shaken. The lady who adopted her expressed an earnest wish to her brother and sister-in-law, both in her life time and by her will, that they should be the adoptive parents of the child, and expressed a hope that the child should be brought up with their own. The child was an Italian subject and was placed under the care of the Italian laws, a council of guardianship being appointed, acting under the jurisdiction of the Italian court. I am bound to respect the rights and authority of that court, as if our position were reversed I should expect the Italian court to respect mine. Communications were opened with Lord and Lady Dundonald; there was clearly nothing in them to affect the child's nationality, and they stipulated that her religion should be respected. As to that a positive engagement in writing was given by the earl through his solicitor that the religious education of the child should receive no prejudice; that engagement was in terms absolutely binding and is in no way altered, qualified, or recalled by anything which took place subsequently. As to what followed there is considerable misunderstanding and misapprehension. A positive undertaking to respect the nationality of the child was required, which was different from that as to her religion. By nationality was meant, recognising the authority of the Italian guardians. Lord Dundonald, by a letter which I believe did reach Florence, refused to pledge himself as to the nationality of the child, but there was nothing in that which interfered with his pledge as to her religion. Very soon after the child arrived in England questions arose, and it is clearly seen that the Italian guardians did not consider that they had abdicated their authority. I am bound, without exercising any authority of my own, to recognise that of the Italian court. They are dissatisfied, and have directed Dr. Nobili to ascertain the circumstances under which the child is living. The dissatisfaction of the Italian authorities has been expressed so early that no laches can be imputed to them or to the Italian guardians. They do not require that the child should be removed to Italy, they only ask that she should be placed under the immediate care of Lady Lothian and Mr. Hope Scott, and to this I am bound to accede. If I were merely dealing with this as the case of an English ward I should be very dissatisfied with what has been done by Lord Dundonald, which is not consistent with his undertaking that the child should be brought up in his own family without prejudice to her religion. What he did was to send the child to a school kept by a Protestant governess, where she was made to go to

V.C. J.] *Re SANKEY BROOK COAL CO.—NORTH-EASTERN RY. CO. v. LOCAL BOARD FOR LEADGATE.* [Q. B.]

church and read the scriptures with the other scholars. It is not sufficient to say that no attempt was made to engage the child in controversy; in my opinion she ought never to have been sent to that school. I must therefore comply with the request of the Italian guardians, and order the infant to be delivered to Lady Lothian, and appoint her and Mr. Hope Scott to have the care of her person. The order appointing Lord and Lady Dundonald must be discharged, and Lady Lothian and Mr. Hope Scott must be appointed guardians in this country, without prejudice to the authority of the Italian guardians or the Italian court. The costs of all parties to come out of the infant's estate.

Solicitors for the plaintiffs, *Sills*.

Solicitors for Lord Dundonald, *Price, Bolton, and Filder*.

Tuesday, Feb. 15.

Re SANKEY BROOK COAL COMPANY (Limited.)

Company—Future calls—Assignment of borrowing powers.

The directors of a company had power by the rules of the company to mortgage, pledge, or charge all the estate and effects of the company.

They assigned the proceeds of a call which they were about to make to meet certain promissory notes coming due.

Held, that the assignment was valid.

Semble, otherwise, if they had assigned all future calls, or all calls for an indefinite period of time.

This was a summons to ascertain whether the Alliance Bank of Liverpool were entitled to certain calls made upon the shareholders of the above company, the amount of which calls was to have been deposited with the Alliance Bank, to await the maturity of certain bills which would shortly become payable to the bank from the company.

It appeared that in August 1869 the company were indebted to the Alliance Bank to the amount of 10,000*l.*

On the 3rd August 1869 the bank wrote a letter to the company and agreed to renew the company's promissory notes for 6000*l.* falling due on the 6th August, and for 4000*l.* falling due on the 31st August, by two promissory notes for 5000*l.* each, at two and four months' date respectively from the 6th August, upon the understanding that a resolution should be passed at the meeting on the 9th August, calling up 5*s.* per share of the company's uncalled share capital. The proceeds of this call were to be deposited with the bank to await the maturity of the notes.

The two promissory notes for 5000*l.* each were signed by two directors on behalf of the company, and deposited with the bank.

A call had been made, and about 3000*l.* paid into the Alliance Bank, when on the 17th Sept. 1869 a resolution was passed to wind-up the company voluntarily, and liquidators were appointed, who gave the shareholders notice to pay what was still unpaid of the last call to them, and not to the bank. The bank asserted that they ought to have their debt paid in full, or at all events, that they should have the entire balance of the call last made, and on petition they obtained an order that the winding-up of the company should be under the supervision of the court. The present application was for the purpose of having the balance due on the call paid to the bank.

E. E. Kay, Q. C. and *W. F. Robinson*, for the bank, submitted that as the articles of association gave to the directors a power to mortgage, pledge,

or charge all the estate and effects of the company, they were clearly acting within their powers when they made this assignment.

Re Humber Ironworks Company, 16 W. R. 474, 667; 14 L. T. Rep. N. S. 216;

Watts v. Porter, 3 E. & B. 743.

E. Fry, Q. C. and *Finch*, for the official liquidator, contended that the directors had no such power to assign a future call, and cited in support of their argument—

Re the British Provident Life and Fire Insurance Society; ex parte Stanley, 32 L. J., N. S., 535; 7 L. T. Rep. N. S. 234;

King v. Marshall, 33 Beav.; 10 L. T. Rep. N. S. 557.

The VICE-CHANCELLOR was of opinion that this case was not governed by those in which a company assigned all future calls, or all calls for an indefinite period, or assigned all its estate and effects, and the question has been whether such assignment comprised future calls. The principle decided by those cases was that calls should be made at the discretion of the directors, and an assignment of calls prevented such discretion being exercised; but here the call assigned was one which had been already determined on, so that the discretion of the directors was not interfered with. In fact, there was nothing to distinguish this case from the assignment of the arrears of a call already made. The application of the bank must, therefore, be granted.

Solicitors: *Sharpe, Parkers, and Pritchard; Bateson, Robinson, and Morris*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Wednesday, Jan. 26.

NORTH-EASTERN RAILWAY COMPANY (apps.) v. THE LOCAL BOARD FOR THE DISTRICT OF LEADGATE (resps.)

Railway rateability—Local Government Act 1858 (21 & 22 Vict. c. 98), s. 55—“Land used only as a railway constructed under the powers of any Act of Parliament for public conveyance.”

The enactment in sect. 55 of the Local Government Act 1858 (21 & 22 Vict. c. 98) that “the occupier of any land . . . used only . . . as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof,” applies only to land which is still used as a railway, which railway was originally constructed under the powers of an Act of Parliament for public conveyance.

Therefore, where a railway was originally constructed over land, without purchase, under contracts to pay way leaves, by a company without any Parliamentary powers, for the purpose of working certain limestone quarries and coal mines, and for the carriage of coals, limestone, and other articles of merchandise, and several years afterwards, under various special Acts, the line of railway became vested in the North-Eastern Railway Company, and was widened, and most of the land over which it ran was purchased, it was

Held, that the railway, not having been constructed under the powers of an Act of Parliament for public conveyance, did not come within the exemption mentioned in the above section.

This was an appeal by the North-Eastern Railway

Q. B.] NORTH-EASTERN RAILWAY COMPANY v. LOCAL BOARD FOR DISTRICT OF LEADGATE. [Q. B.]

Company to the quarter sessions of the peace, holden in and for the county of Durham, against an assessment for a general district rate made on the 27th Dec. 1867, by the local board for the district of Leadgate, under the powers of the Local Government Act 1858.

The North-Eastern Railway Company duly gave notice of appeal against the said assessment, and by consent of the parties and by order of Willes, J. the following facts were stated in the form of a special case for the opinion of the court.

In the year 1834, by deed of settlement dated 3rd Feb. 1834, a company, called the Stanhope and Tyne Railroad Company was established for the purpose of working certain limestone quarries near Stanhope, in the county of Durham, and certain coal mines in the parish of Lanchester, in the same county, called the Pontop and Medomsley Collieries, and for the carriage of coals, limestone, and other articles of merchandise along a railway then in course of formation by the said company, and called the Stanhope and Tyne Railroad. The line of the said railway commenced at certain lime quarries in the parish of Stanhope, and passed through a point called the Carr House at Pontop, and from thence to the River Tyne, in the town of South Shields, the whole length of the line being thirty-five miles, or thereabouts.

In the year 1834 the Stanhope and Tyne Railroad Company completed the construction of their intended railroad, and it was opened for use in the month of September in that year. The company had no powers conferred upon them by Act of Parliament to enable them to construct the railway, and it was not by virtue of any powers conferred by Act of Parliament that the railway was constructed. The land upon which the railway was constructed was not the property of the company, and the company did not obtain by purchase or otherwise the property in the said land, nor had the company any right or title to use the same, except as hereinafter mentioned. The company before and at the time of construction of the railway entered into agreements with the owners of land upon which the railway was constructed, by which agreements in consideration of half-yearly payments made by the company to the said owners, the company obtained leave to use on certain terms and for certain periods the said land for the purposes of the railway. The whole of the said railway was constructed upon lands which the company obtained leave to use by virtue of such agreements, except a portion within the district of Leadgate, which was constructed upon what was then and is used as a public highway.

The Stanhope and Tyne Railroad Company, which, besides the said railway, also constructed staiths with suitable machinery for loading and unloading vessels in the river Tyne, used the said line of railway for the purposes aforesaid, and also for the conveyance of passengers and goods from the month of September 1834, down to the year 1839. In the latter year the said company ceased to use that portion of the said railway which lay between Stanhope and Carr House, being a distance of about eleven miles (herein called "the upper part of the railway"), but down to the year 1842 continued to use that portion of the said railway which lay between Carr House and the river Tyne (herein called "the lower part of the railway").

On the 5th Feb. 1841 the said company having become embarrassed was, under the powers of the said deed of settlement, declared to be and was dissolved, and on the 18th May 1842 an Act of Parliament was passed (5 Vict. sess. 2, c. 27) whereby, after reciting (amongst other things) that it was intended that so much of the said railway as lay between Stanhope and Pontop, being the part herein called "the upper part of the railway," and such other

parts of the lands of the Stanhope and Tyne Railroad Company as were not to be used for the purposes of that Act, should be sold, and that it would be of great public and local advantage if the said railway from Pontop and Medomsley to the River Tyne, being the lower part of the railway, with the staiths and works connected therewith, were kept open and regulated under the provisions thereafter contained, but that the aid of Parliament was requisite for effecting those objects. It was enacted (sect. 1) that certain persons should be and they were thereby incorporated by the name of "the Pontop and South Shields Railway Company," and should have power to purchase and hold lands within the restrictions therein contained for the purposes of the said undertaking. By the same Act it was enacted (sect. 6) that immediately after the passing of the Act the said Stanhope and Tyne Railroad, and all works attached thereto, or made or provided for the purposes thereof, or by or for the use of the said Stanhope and Tyne Railway Company and all lands, tenements, hereditaments, easements, powers, and privileges of or to which the said company were seised, possessed, or entitled at law or in equity, should be vested in and belong to the said Pontop and South Shields Railway Company for their absolute benefit, but subject to the payment of the several annual and other rents and sums of money, and to the performance of the several covenants and agreements which, by the grants or leases, or agreements for grants or leases, under which the premises respectively were held, were reserved and made payable, and were to be performed, and subject also to such mortgages and other securities for moneys, liens, and charges as were then affecting the premises or any of them at law or in equity, and subject also to certain provisions for indemnity in the said Act contained.

By the said Act (5 Vict. sess. 2, c. 27), it was further enacted (sect. 143), that it should be lawful for the Pontop and South Shields Railway to agree with the owners of the lands over which the said line of railway intended to be carried on by virtue of the said Act passed, or which they were thereafter authorised to purchase for the absolute purchase for a consideration in money of any such lands and all estates or interests in such lands. And it was enacted (sect. 144), that it should be lawful for certain persons under disability to convey such lands as aforesaid to the said Pontop and South Shields Railway Company, subject to certain provisions in the said Act contained. And further (sect. 145), that it should be lawful for all persons by the said Act capacitated to sell lands to the said company, and for all other persons, to grant, demise, and lease to the said company, for any term not exceeding ninety-nine years, to take effect in possession, any lands upon or over which the said railway was constructed, or which might be required for the more convenient use thereof, and that such leases might contain all the terms usually inserted in leases of way-leaves in the county of Durham, so that upon every such lease there should be reserved the best and most improved rent to be had for the same, and a condition or power of re-entry in case the rent be unpaid by the space of forty days; and that the said company should execute counterparts of such demises, leases, grants, and enter into such covenants for the paying of the rents reserved, and for regulating the use and enjoyment of the liberties and privileges granted and demised as the persons making such demises, leases, and grants should deem expedient. And by the said Act it was further enacted (sect. 166), that nothing therein contained should authorise or empower the said company to take, use, damage, or prejudice the lands of any person without the licence or authority in writing of the owner and

Q. B.] NORTH-EASTERN RAILWAY COMPANY v. LOCAL BOARD FOR DISTRICT OF LEADGATE. [Q. B.]

occupier, or other person by law entitled to give or grant such licence or authority first had and obtained.

For the purpose of making provisions respecting the sale of lands purchased or acquired by the said Pontop and South Shields Railway Company under the provisions of the said Act, but which should not be required for the purposes thereof, it was by the said Act enacted (s. 165) that the last-mentioned company should sell all such superfluous lands in such manner as they might deem most advantageous, and convey the same to the purchasers thereof by deed under the common seal of the company.

The said Act of 5 Vict. sess. 2, c. 27, contained provisions (ss. 176–185, both inclusive) empowering the said Pontop and South Shields Railway Company to levy and demand tolls for (amongst other things) the use of their railway; and by sect. 186 of the same Act it was enacted that neither the said company nor any person using the railway as a carrier should at any time demand or take a greater amount of toll, or make any greater charge for the carriage of passengers or goods than the said company were by the said Act authorised to demand; and that, upon payment of the tolls from time to time demandable, all persons should be entitled to use the railway, with engines and carriages, subject to regulations as therein provided; and by sect. 187 it was enacted that the said company should convey along the said railway all goods, coals, and waggons offered to them for that purpose, and that if the demands made upon them for conveyance were beyond what they had the power of complying with, they should then afford to all companies and persons so applying to them for the conveyance of goods, coals, and waggons equal facilities and advantages in proportion to the trade of such companies or persons to be brought on the said railway; and by s. 248 it was enacted that nothing in the said Act contained should be deemed or construed to exempt the said railway between Pontop and South Shields, being “the lower part of the railway,” from the provisions of any general Act relating to railways which might pass during the then present or any future sessions of Parliament.

On the 23rd May 1844 another Act of Parliament passed (7 Vict. c. 26), whereby the Pontop and South Shields Railway Company did from the year 1842 to the year 1846 keep open and regulate the lower part of the railway and the said staiths and works, and did widen “the lower part of the railway.”

By an Act of Parliament, passed the 3rd Aug. 1846 (9 & 10 Vict. c. 330) it was enacted (sects. 12 and 14) that upon the happening of certain events, and the due execution of a certain deed of conveyance therein mentioned, the said Acts of the 5th and 7th years of Her Majesty Queen Victoria, save and except as thereby otherwise declared, should cease and determine, and that the Pontop and South Shields Railway Company, being “the lower part of the railway,” and the lands, stations, houses, and other buildings, staiths, and conveniences, easements, rights, and appurtenances whatsoever, of or to which the said Pontop and South Shields Railway Company were seized, possessed, or entitled at law or in equity, should belong to, and be absolutely vested in, the Newcastle and Darlington Junction Railway Company, and that the undertaking of the said Pontop and South Shields Railway Company should thenceforth become and form part of the undertaking of the Newcastle and Darlington Junction Railway, subject, nevertheless, and without prejudice to the several mortgages, charges, and incumbrances which at the time of such vesting should have been upon or effecting the said Pontop and South Shields Railway Company, and

also subject to the usual rents, conditions, provisions, and agreements under, and subject to which, the said Pontop and South Shields Railway Company held the same.

The said Act 9 & 10 Vict. c. 330, contains provisions similar to those contained in the before mentioned Act of 5 Vict., sess. 2, c. 27.

The deed of conveyance mentioned in the said Act of 9 & 10 Vict. c. 330, was duly executed on the 10th Aug. 1849, and in that year the events referred to in the second last paragraph happened.

Under the provisions of the said Act of 9 & 10 Vict. c. 330, and of divers other Acts of Parliament, the name of the Newcastle and Darlington Railways Junction Railway Company was successively changed first to the York and Newcastle Railway Company, and then to the York, Newcastle, and Berwick Railway Company, and lastly to the North Eastern Railway Company, who are the appellants herein, and all the railways, property, estate, and effects which belonged to or were vested in the Newcastle and Darlington Junction Railway Company, either as proprietors or lessees became vested in the appellants.

From the time of the passing of the aforesaid Act of the 5th Vict. sess. 2, c. 27, hitherto, “the lower part of the railway” has been worked and used for public traffic under the provisions of that Act, and the several other Acts hereinbefore mentioned, which relate thereto, and subject to such provisions of the general statutes for regulating railways in England as are applicable thereto.

The said Pontop and South Shields Railway Company before the passing of the Act next hereinafter mentioned, under the provisions of the said Act of 5 Vict. sess. 2, c. 27, sold all their interest in that portion of the line of the Stanhope and Tyne Railway Company hereinafter described as “the upper part of the railway,” and all rights, privileges, and easements to which they were entitled in connection with the said portion of the said railway to Joseph Pease, of Darlington, Esq., and four other persons, and from and after such sale “the upper part of the railway” became and was known as the Wear and Derwent Railway.

On the 22nd July 1847, an Act of Parliament passed (10 & 11 Vict., c. 292) whereby, after reciting (sect. 1) that the said Joseph Pease, of Darlington, Esq., and four other persons were or claimed to be the owners of the said Wear and Derwent Railway, and that it would be convenient if the said Wear and Derwent Railway, and certain other railways in the said Act mentioned, were placed under the management and control of a certain railway company called [the Wear Valley Railway Company, to accept and take for such consideration, either in gross sums of money or annual rents as they should think proper, the said Wear and Derwent Railway, together with the hereditaments and appurtenances belonging thereto or therewith held used, or enjoyed, and all their rights, powers, and privileges in relation thereto or otherwise belonging to them, and that every such lease and purchase of the Wear and Derwent Railway should be valid and effectual during the continuance of such lease, or during the continuance of the present or any future leases of the lands and hereditaments upon and over which the said Wear and Derwent Railway had been constructed for the purpose of enabling the said Wear Valley Railway Company to use and enjoy the line of railway, and to exercise the rights, powers, and privileges of the said owners of the the said Wear and Derwent Railway.

Under the provisions of the said Act, 10 & 11 Vict. c. 292, and immediately after passing the same, the said Wear and Derwent Railway, and all the lands, tenements, and hereditaments, rights, easements, and appurtenances, of or to which the

Q. B.] NORTH-EASTERN RAILWAY COMPANY v. LOCAL BOARD FOR DISTRICT OF LEADGATE. [Q. B.]

said owners of the said Wear and Derwent Railway were by any means seised, possessed, or entitled, became and were absolutely vested in the said Wear Valley Railway Company, for such term, estate, and interest, and subject to such terms, conditions, annual or other rents and payments, and to such rights, liberties, powers, and easements, as the same were theretofore vested in the said owners; and the undertaking of the Wear and Derwent Railway thenceforth (subject as in that Act mentioned) became and formed part of the undertaking of the Wear Valley Railway.

By sect. 11 of the last-mentioned Act it was enacted that nothing in the Act should be construed to extend to vest in the said Wear Valley Railway Company any greater estate or interest in the said Wear and Derwent Railway than was at the time of the passing of the now reciting Act, or at the time of the payment of the purchase-money vested in such owners as aforesaid.

Under the provisions of the Wear Valley Railway Act 1845, and of the said Act of 10 & 11 Vict. c. 292, the Stockton and Darlington Railway Company became lessees of the Wear Valley Railway, and continued such lessees until and at the time of passing of the Act hereinafter mentioned.

On the 3rd July 1854 the Stockton and Darlington Railway Act 1854 passed, whereby after reciting that the Stockton and Darlington Railway Company were such lessees of the Wear Valley Railway as aforesaid, and that some parts of the Wear Valley Railway, which were originally the Wear and Derwent Railway, and of a certain other railway respectively were held only in way leaves, and it was expedient that the Stockton and Darlington Railway Company should be authorised to purchase or take on lease the lands on which those portions of the Wear Valley Railway were made, it was enacted (sect. 3) that, subject to the provisions of that Act, the Companies Clauses Consolidation Act 1845, the Lands Clauses Consolidation Act 1845, and the Railways Clauses Consolidation Act 1845, should be and the same were incorporated with that Act; and by sect. 60 of that Act it was further enacted, subject to the proviso therein contained, that the said Stockton and Darlington Railway Company from time to time might take the lands specified in the schedule B to that Act annexed, or such parts thereof, as they might think fit. Provided always, that unless the Wear Valley Railway Company, by writing under the common seal, otherwise consented, the Stockton and Railway Company should take those lands, subject to the rights affecting the same of the Wear Valley Railway Company.

The lands specified in the schedule (B) annexed to the Stockton and Darlington Railway Act 1854, included (amongst others) the lands on which those portions of the railway belonging to the Wear Valley Railway Company then under lease, the Stockton and Darlington Railway Company, which was formerly called the Wear and Derwent Railway, and the works and appurtenances thereof were situate.

On the 23rd July 1858, the Stockton and Darlington Railway Amalgamation Act 1858, passed. Whereby, after reciting the said Act, entitled the Wear Valley Railway Act 1845, and the before-mentioned Act of 10 & 11 Vict. c. 292, those two Acts (ss. 7 & 8) were, except as in the now reciting Act is excepted, repealed, and all the railways and other works and conveniences, lands, building, estate, plant, property, effects, claims, and demands of or to which the Wear Valley Railway Company was seised, possessed, or any way entitled at law or in equity, were, with other railways and works vested in the Stockton and Darlington Railway Company as their original undertaking, subject to the provisions of the said reciting Act, and

after the passing of that Act such railways and other works, &c., continue vested as aforesaid in the Stockton and Darlington Railway Company, and until the passing of the Act next herein-after mentioned.

By the North-Eastern and Stockton and Darlington Railways Amalgamation Act 1863, which was passed the 13th July 1863, the Stockton and Darlington Company was, on the passing of that Act, dissolved, and it was thereby enacted (sect. 58) that on such dissolution the undertaking of that company, and all the railways, buildings, lands, easements, works, and conveniences, property, and effects of or to which they were seised, possessed, or entitled at law or in equity, and the benefit of all contracts, agreements, and proceedings in any way relating thereto, and all the estate, right, title, interest, powers, and privileges whatsoever in over and with respect to those premises should be vested in, and belong to, and be held, used, exercised, and enjoyed by the appellants.

From the time of the passing of the said Act of the 22nd July 1847 (10 & 11 Vict. c. 292), hitherto "the upper part of the railway" has been worked and used for public traffic under the provisions of that Act, and several other Acts relating thereto, and subject to such provisions of the general statutes for regulating railways in England as are applicable thereto.

In the year 1866 the Local Government Act was duly applied to and adopted for the district of Leadgate in the county of Durham, and on the 29th Dec. 1867 the local board for that district made an assessment for a general district rate for that district for defraying such expenses as were by the Local Government Act 1858, "charged upon that rate and such other expenses of carrying into execution the said Act in the said district as were not provided for by any other rate, or chargeable upon the district fund after the rate of 6d. in the pound upon the several occupiers and other parties liable by law to be assessed thereto, to commence and be payable on the 31st Dec. 1867.

Parts of "the upper part of the railway" and of "the lower part of the railway," and used only as railways, are within the said district of Leadgate.

In pursuance of the provisions contained in the Acts of Parliament hereinbefore mentioned, the lands upon which "the upper part of the railway" was constructed by virtue of agreements for way-leaves as aforesaid have by various purchases by private contract entered into at divers times with the owners of the said lands, become vested in the appellants. These lands are exclusively used for the purposes of the railway.

Part of the land over which "the lower part of the railway" passes in the district of Leadgate is the property of the appellants. The remainder of such land (with the exception of a portion which forms part of a highway) is held by the appellants under leases or agreements for way leaves, as before mentioned, which have been from time to time renewed, and under which the appellants still pay half-yearly rents for the use thereof.

Since the time when "the upper part of the railway" and "the lower part of the railway" became vested in the Wear Valley Railway Company, and the appellants respectively, as hereinbefore stated, the Wear Valley Railway Company and the Stockton and Darlington Railway Company, and the appellants respectively have expended large sums of money in widening, levelling, repairing and improving the same.

The appellants, before and at the time of the making of the said assessment, possessed and occupied, within the district of Leadgate, houses used as dwelling houses by the railway company's manager and servants, and a warehouse.

Q. B.] NORTH-EASTERN RAILWAY COMPANY v. LOCAL BOARD FOR DISTRICT OF LEADGATE. [Q. B.]

In the said assessments the appellants were assessed, not only in respect of the said houses and warehouses, but also in respect of the said parts of "the upper part of the railway," and of "the lower part of the railway," which are so within the said district of Leadgate, and used only as railways as aforesaid upon the full net annual value thereof. The appellants admitted their liability to be so assessed in respect of the said houses and warehouse, but contended that in respect of the said parts of "the upper part of the railway," and "the lower part of the railway" which are so within the said district of Leadgate, and used only as railways as aforesaid, they are only liable to be assessed in the proportion of one-fourth part only of the nett annual value thereof.

Copies of the following Acts, namely, 5 Vict. c. 27, s. 2; 7 Vict. c. 26; 9 & 10 Vict. c. 330; 10 & 11 Vict. c. 292, the Stockton and Darlington Railway Act 1854, the Stockton and Darlington Railway Amalgamation Act 1858, and the North Eastern and Stockton and Darlington Railway Amalgamation Act 1863, accompanied and formed part of the case; and any Acts recited in them or relating to the several companies hereinbefore mentioned were to be referred to by either the appellants or the respondents.

The question for the opinion of the court was whether the appellants were liable to be assessed in respect of those parts of "the upper part of the railway" and of "the lower part of the railway" which are within the said district of Leadgate, and used only as railways as aforesaid upon the full nett annual value thereof, or only in the proportion of one-fourth part of such nett annual value thereof, or in respect of any and what part of those parts. It was agreed that judgment in conformity with the decision of the court, and for such costs as the court might adjudge, should be entered on motion by either party at the session next, or next but one after the decision should be given.

Sect. 55 of the Local Government Act 1858 (21 & 22 Vict. c. 98) enacts—

That the general district rates shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property ascertained by the rate (if any) for the relief of the poor made next before the making of the assessments under this Act, subject, however, to the following exceptions, regulations, and conditions. . . . The owner of any tithes, or of any tithe commutation, rentcharge, or the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof.

Mellish, Q.C. (with whom was Kemplay) for the appellants, contended that the appellants' railway came within the exception in sect. 55 of the Local Government Act 1858, of "land used only as a railway constructed under the powers of any Act of Parliament for public conveyance." The intention of the Legislature was to exempt from full rateability any land which is *de facto* used as a public railway; it was never intended to deny the exemption to a railway which is now so used, on the ground only that it was not in the first instance constructed under the powers of an Act of Parliament. The possibility of such a case in all probability never occurred to the framers of the Act. [COCKBURN, C. J.—The simple question is whether we can substitute the word "used" for "constructed" in the section.] In order to carry out the obvious intention of the Legislature, the court should give a very liberal construction to the language of the section; but if the court should not feel justified in doing

that, then a very narrow construction should be given to it, and the words "as a railway constructed under the powers of any Act of Parliament for public conveyance," should be taken together as describing merely the manner in which the land is now used. In this sense the land on which the appellants' railway is constructed is at present "used" as, or in the same manner as "a railway constructed under the powers of an Act of Parliament," &c. The words "constructed under the powers of an Act of Parliament" should be taken to mean simply "used as a public railway," and not as a mere private railway. Whether the railway was originally a private one can make no difference; the ground of exemption from full rateability, which is public convenience, applies to all cases of railways which are now used for public conveyance. From 1847 the upper part of the railway has been used for public traffic, subject to the provisions of the general statutes regulating railways in England. [COCKBURN, C. J.—There seems to be nothing to prevent the appellants, by taking up the rails of this railway and simply putting them down again, making it now a railway "constructed under the powers of an Act of Parliament."] It is found as a fact in the case that since the upper and lower parts of the railway became vested in the Wear Valley Railway Company and the appellants, the railway has been widened as well as levelled, improved, and repaired. The governing word in sect. 55 of the Local Government Act 1858 is, it is submitted, the word "used," meaning now used; and the railway of the appellants consequently comes within the exemption intended to be made.

Manisty, Q.C. (with him G. Bruce) for the respondents.—The court cannot put upon the words of sect. 55 of the Local Government Act 1858, the construction contended for by the other side without omitting altogether the word "constructed." The exemption from liability to full rating is expressly given only to railways which have been "constructed under the powers of an Act of Parliament for public conveyance," which the appellants' railway clearly was not. The words "constructed under" are often found in the General Acts, and are employed as contra-distinguished from "used as" or "used under." In 3 & 4 Vict. c. 97, s. 21, it is enacted that "wherever the word 'railway' is used in this Act it shall be construed to extend to all railways constructed under the powers of any Act of Parliament." In the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, s. 1, the word "railway" is for the purposes of that Act defined to include "every station of or belonging to such railway used for the purposes of public traffic;" and the expressions "railway company," "canal company," and "railway and canal company," are defined as including "any person being the owner or lessee of, or any contractor working any railway, or canal, or navigation constructed or carried on under the powers of any Act of Parliament," where the distinction between "constructed" and "carried on" is clearly expressed because intended. The words employed in sect. 55 of the Local Government Act 1858, are well known to the Legislature, and they must be construed in their plain and obvious sense. The railway of the appellants was originally a private railway, not constructed under the powers of any Act of Parliament for public conveyance, and the appellants were, therefore, properly assessed in respect of it upon the full net annual value thereof.

COCKBURN, C.J.—I very much regret being obliged in this case to come to a conclusion adverse to the contention of Mr. Mellish, for I cannot suppose that the Legislature intended to make a distinction between a private railway, which has been brought within the provisions of the Act of Parliament and

Q. B.]

NORBURN v. HILLIAM.

[C. P.]

a railway constructed under powers given by an Act of Parliament in the first instance, for that purpose. I regret, therefore, that I cannot in this case, put such a construction on the words used by the Legislature as would meet the equity of this case. I have no doubt that those who passed the statute, if they had this case in their minds, would have made its language different, and would have granted the same exemption from full rateability to such a railway as this, as has been granted to those originally constructed under the powers of an Act of Parliament. The difficulty I find in the matter is this. Sect. 55 of the Local Government Act 1858 (21 & 22 Vict. c. 58), provides that the occupier of any land "used only as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one fourth part only of the net annual value thereof." Now Mr. Mellish asks us to read the words "as a railway" as though the words "constructed under the powers of an Act of Parliament" were not there, or to interpret the latter words as if they were "used under the powers of any Act of Parliament," which would be exactly the present case. I do not think, however, that we can reject the word "constructed," and that we must construe the exemption as extending only to land used as a railway which has been constructed under the powers of an Act of Parliament, the terms adopted in the section being made use of to show that the land must still be actually used for the purposes of the railway; so that, although the railway may have been originally constructed under the provisions of an Act of Parliament, yet if the land has ceased to be employed for the purpose, and the railway has fallen into disuse, it can no longer claim exemption from full rateability. I think we can read the section only in one way, namely, as referring to land at present in use as a railway, which railway has been constructed under the powers of an Act of Parliament. I do not think we should be justified in striking out the word "constructed," or, by altering the language which the Legislature has used, in giving to the section any other interpretation than the one I have mentioned.*

* MELLOR, J.—I have not the least doubt that it was not meant to exclude the case of such a railway as the present from the exemption given by sect. 55 of the Local Government Act, 1858. But I am also bound to say, on reflection, that I think we cannot read the section in the manner which Mr. Mellish desires without neglecting altogether the word "constructed," which the Legislature has inserted in that section. I don't think it was intended to make such a distinction as that which the words of the section raise; still, on consideration, I feel myself unable to put any other construction upon it.

LUSH, J.—I also share in the regret expressed by the other members of the court, because I cannot think it was intended by the Legislature to deprive of the privilege of exemption from full rateability, such a railway as the present. However, I can only collect the intention of the Legislature from the language which it has used, and I cannot read the 55th sect. of the Local Government Act 1858, in any other sense than as prescribing two conditions of this exemption—(1) that the land should be used as a railway, and (2) that the railway should have been constructed under the powers of an Act of Parliament. I cannot adopt the view contended for by Mr. Mellish without rejecting or putting a strain upon some of the terms used, a thing which I do not feel justified in doing.

Judgment for respondents.

Attorneys for appellants, *Williamson, Hill and Co.*
Attorneys for respondents, *Pattison, Wigg and Co.*

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING,
Esqrs., Barristers-at-Law.

Friday, Jan. 28.

NORBURN v. HILLIAM.

Withdrawal of a juror upon terms—Repudiation of terms—Rehearing the cause—Costs.

An action of trespass commenced in a Superior Court was by order tried before a County Court judge and a jury; in the course of the trial a juror was withdrawn by consent, the parties agreeing to abide by the decision at which the judge might arrive after viewing the premises; before the judge delivered his decision the defendant declined to be bound by it, and the judge, considering he had no power to enforce it, declined to give it:

Held, upon a rule calling upon the County Court judge and the defendant to show cause why the judge should not proceed to give his judgment, or appoint a day for a re-hearing of the cause:

Per Bovill, C. J. and M. Smith, J., that a repudiation by either of the parties of any part of the agreement was a repudiation of the whole, and that the judge should rehear the cause:

Per Brett, J., that the court had not power to interfere, and that the plaintiff's remedy was by action against the defendant upon the agreement entered into between them in the course of the trial.

Costs were granted to the plaintiff, although not asked for in the rule.

This was an action commenced in this court, but sent for trial to the County Court of Northampton. Beasley for the plaintiff had obtained a rule nisi calling upon Francis Ellis McTaggart, Esq., the judge of the County Court of Northampton, holden at Oundle, and the defendant, upon notice of this rule to be given to them or their attorneys, to show cause why the said judge should not proceed to give his judgment in this action, or appoint a day for a rehearing of the said cause.

The following was the affidavit of W. F. Law, the plaintiff's attorney, upon which the rule was granted.

1. The writ in this action was issued on the 28th April 1868.

2. The declaration was delivered on the 28th May 1868, the venue being laid in Northamptonshire, and the first count of the declaration was as follows: "For that the defendant broke and entered a close of the plaintiff, being the site of a wall at Oundle, in the county of Northampton, and abutting on the east side thereof on land of the defendant, and a wall of the plaintiff then standing upon the said close, and broke down and destroyed a part of the said wall, and took and carried away and converted to his own use a great quantity of the materials of the same." And the second count of the said declaration was as follows: "For that the defendant took and broke another close of the plaintiff at Oundle aforesaid, and abutting on the east side thereof on land of the defendant, and stopped up a stench trap of the plaintiffs in and upon the plaintiff's last mentioned close, and erected a fence thereon, and by the said fence prevented the plaintiff from passing along her last mentioned close, whereby the plaintiff was damaged, and her occupation of the said close became of less value to her, and by reason of the said trespasses the plaintiff claimed 100*l.*"

3. The defendant pleaded in the said action on the 17th June 1868 several pleas, namely, 1. Not guilty. 2. To first count not possessed. 3. To second count not possessed. 4. To the whole, *liberum tenementum*, with an allegation that the stench trap was parcel, &c.

4. On the 22nd June 1868 the replication was delivered, and thereby the plaintiff joined and took issue on the defendant's pleas respectively.

5. On the 5th April 1869 an order was made by the Hon. Mr. Justice Mellor that the issues joined therein should be tried before the judge of the County Court of Northampton, holden at Oundle.

6. Notice was sent by the registrar of the said County Court that the 18th May 1869 was appointed for the trial of the issues joined in this action before the judge of the County Court of Northampton, holden at Oundle, and on the application of the plaintiff a jury was summoned to try such issues.

C. P.]

NORBURN v. HILLIAM.

[C. P.]

7. I attended the trial of the said issues at the County Court at Oundle aforesaid on the said 18th May 1869, on the part of the plaintiff, and after the plaintiff's case had been concluded, Francis Ellis McTaggart, Esq., the judge of the said County Court, suggested that a juror should be withdrawn, and that he should take a view of the locus in quo, and decide the matter. To this course both parties assented, and a juror was withdrawn, and both parties subsequently accompanied the said judge upon his view, when he said he would take time to consider, and would give judgment at the next County Court at Oundle, being the court to be holden on the 22nd June last.

8. On the 22nd June last I attended at the said court, and the defendant's attorney also attended, and the said judge then stated that he had rather not give any decision on the matter. I thereupon stated to the said judge on behalf of the plaintiff that I wished to have his judgment; but the defendant's attorney having stated his wish that the said judge should not give his decision on the matter, the said judge thereupon declined to give any judgment.

9. On the 20th July last I attended before the said judge, and in the presence of the attorney for the said defendant I applied to the said judge to reconsider the matter and give his decision thereon, but the said judge refused to do so, or to render me any assistance in the matter; at the same time, stating that in his opinion the judge had no power to make the order for the trial before him, and that the cause ought never to have been sent to him.

The following affidavits were produced in answer to that of the plaintiff's attorney:

I, Francis Ellis McTaggart, judge of the County Court of Northamptonshire, holden at Oundle, make oath and say as follows:

1. I have read the affidavit of the attorney for the above-named plaintiff, sworn on the 15th Nov. last and I say that the statements in paragraphs 1, 2, 3, 4, 5, and 6 of the said affidavit are true.

2. The said cause came on for trial before me in the County Court of Oundle on the 18th May 1869, before a jury, the said W. F. Law appearing as attorney for the plaintiff, and R. Richardson as attorney for the defendant. After the plaintiff's case had been concluded, and the defendant's case had been begun, I stated that in my opinion an adjournment would be necessary for the production of certain evidence on both sides before the case could be submitted to the jury. I then stated that, as an adjournment at that stage of the case would be inconvenient and expensive, I was willing, if the parties and their attorneys consented, for the purpose of preventing further litigation and expense, to view the place where the alleged trespasses were said to have been committed (which place was close to the court house), in the presence of the parties and their attorneys, and to give my opinion as to what, if anything, ought to be done by the said parties, or either of them, in respect of the said wall, the said stench-trap and the said fence in the declaration mentioned.

3. It is not true that I offered to decide the matters then in issue between the parties, nor had I any power to decide them, they being then in course of trial before a jury. On the contrary, my offer was made for the purpose of preventing, if possible, the necessity for these matters being decided at all.

4. The attorneys for the said parties (who were I believe also present) thereupon stated that they were willing that I should view the premises and give my opinion as aforesaid, and they further stated that they were willing that their clients should carry out what, if anything, I should advise to be done by them, and were willing that the cause should not be further tried. No further or other agreement of any kind in that behalf was made by them to the best of my knowledge and belief; I then suggested that a juror should be withdrawn by consent of both parties. This was accordingly done, and such withdrawal was duly entered in the minutes of the court.

5. I then proceeded to view the premises in the presence of the parties and their attorneys, and after viewing them stated that I would give my opinion at the next court.

6. At the next court, on the 22nd June last, I was ready and willing to give my opinion as aforesaid, but the defendant's attorney then stated that for reasons which had since arisen, and which he did not state, his client was no longer willing to abide by my opinion. I then said that under the circumstances it would be useless to give it; that it was to be regretted that the cause had not been tried out, but that the plaintiff must now either take out a fresh writ, or with the defendant's consent issue a plaint and try the cause before me in the first instance. The plaintiff's attorney then pressed me to pronounce my opinion, but I declined, giving as my reason that there were no means by which I could compel either party to adopt it.

At the court holden the 20th July last the plaintiff's attorney made the same application, which I again refused for the same reason.

7. I was served by the plaintiff's attorney with a copy of this rule on the 13th day of Dec. last, and I then again stated to him that my only reason for having declined to give such opinion as aforesaid was that the defendant's attorney had stated that his client declined to be bound by

it. And I further stated that if the defendant would now consent to be bound by it I was ready and willing to give it.

The plaintiff's attorney then said that he would see the defendant's attorney, and endeavour to procure such consent.

At the court holden at Oundle, on the 21st day of Dec. last, the plaintiff's attorney informed me that he had been unable to procure such consent.

8. I have always been and am ready and willing to give my opinion, as aforesaid, if the parties will consent to abide by it, and my only reason for not giving it has been and is that, till they do so consent, it is useless for me to give it, inasmuch as I could make no order in the matter or compel either party to do what I might advise to be done.

9. I stated at the time of the trial that the order under which the cause was sent down for trial did not sufficiently show in the face of it that the cause was so sent down under the County Courts Amendments Act, 1867, under which only it could be and I presume was sent; but it is not true that I stated then or at any time that the case was one which could not be or ought not to be sent down for trial before me, I did in fact, as I have stated, hear the said cause until a juror was withdrawn by consent, as hereinbefore mentioned.

I, Robert Richardson, of Oundle, in the county of Northampton, gentleman, the attorney in this cause for the above-named defendant, make oath, and say as follows:—

1. That I have read the affidavit of the attorney for the plaintiff in this action, sworn on the 15th Nov. last, and filed and used for obtaining the rule nisi in this cause.

2. That the trial of the issues joined in this cause having been sent down from this honourable court to the County Court at Oundle for trial, the same came on for hearing at the said County Court on the 18th May 1869, before Francis Ellis McTaggart, Esq., the judge, and a jury, when the said Mr. Law appeared as the attorney for the said plaintiff, and I as the attorney for the said defendant; and after the case on behalf of the plaintiff was concluded, and some evidence had been given on behalf of the defendant, the judge intimated his opinion that an adjournment would be necessary for the purpose of some further evidence being adduced.

3. The judge then stated that if instead of the trouble of having an adjournment he could act as mediator between the parties (they being close neighbours), or adopt any other suggestion by which further proceedings could be put an end to, he would be happy to do so: to which offer both parties (who were then present in court) and their attorneys agreed, and expressed their desire that the judge would proceed with them at once for the purpose of inspecting the premises, the subject of the present action, such premises being almost close to the court-house. He consented to do, and did so, a juror having first, by consent of both parties been withdrawn at the judge's suggestion, and such withdrawal having by consent been entered on the minutes of the court. The judge then said that if it was the wish of both parties, he would at or previously to the holding of the next court state his opinion as to what (if any) alteration should be made by the plaintiff or defendant to the building the subject of this action.

4. That I was present at the next court held on the 22nd June 1869, when Mr. Law, as the plaintiff's attorney, made an application to the said judge to state his opinion as to what should be done in this case, when I stated that in consequence of some information my client had obtained since the day of the trial (or words to that effect), he then declined to be bound by any decision which might be come to by the said judge, and the judge then said, as he had only consented to suggest to the said parties what (if any) steps should be taken by either plaintiff or defendant, and as it appeared that both parties were not then willing to abide by his suggestion, he had no further power or right to interfere, and that he must leave the parties to take any further proceedings or not, as they might be advised or think proper to do.

5. And I further say that the said judge was not appointed arbitrator to settle the differences between the said parties in this cause, and that my client, the said defendant, on the same day that the said cause had been partly heard, and almost immediately after the said judge had viewed the locus in quo, stated to me his determination not to be bound by any suggestion which the judge should make in the matter, and I accordingly, at the court held on the 22nd June last objected on the defendant's behalf, as stated in the fourth paragraph of this my affidavit.

The Attorney-General and Archibald showed cause against the rule on behalf of the County Court Judge, and relied upon his affidavit and the case of *Gibbs v. Ralph*, 14 M. & W. 804, in which the court stayed proceedings in an action for the same cause as that of another action in which a juror had been withdrawn by consent. Pollock, C.B., said, "It must be taken as a positive rule of practice that when the parties to a cause agree to withdraw a juror, that puts a final end to the litigation between them, and no future action can be brought for the same cause." There was, therefore, no means by

C. P.]

NORBURN v. HILLIAM.

[C. P.]

which the Judge could enforce his decision, and he was right to refuse to give it.

Grantham showed cause for the defendant. The judge can give no decision by which he can compel the defendant to abide. The proceedings were absolutely at an end when the juror was withdrawn. Perhaps there may be an action against the defendant upon the breach of the agreement — [BRETT, J.—I think there is]—or the plaintiff may try to obtain a new trial from the County Court Judge; the defendant contends only that this application is for a remedy which is not open to the plaintiff.

Beasley supported the rule. The judge was probably right in believing he had no power to enforce his decision. This application to the court, therefore, is the only remedy open to the plaintiff. The order to remove this case to the County Court must have been made under 30 & 31 Vict. c. 142, s. 16, and this application is rightly made to this court. [BRETT, J.—You may take it that the defendant has scandalously broken his agreement; but how can you show that the action is not at an end, or how have we a right to interfere?] The withdrawal of a juror may be set aside, in consequence of the subsequent conduct of the parties. A new action upon the agreement could only give damages to the plaintiff; it would not determine the merits of the dispute between the parties. This action was not absolutely concluded by the withdrawal of a juror; it was a conditional proceeding, and the condition has been broken. It was said by the court in *Everett v. Youells*, 3 B. & Ad. 349, that an action was no more ended by discharging the jury than it would have been by withdrawing a juror.

BOVILL, C. J.—No doubt it is the understanding of the Profession that an agreement to withdraw a juror during a trial is the termination of all litigation between the parties, and I should be sorry to interfere with that impression. Here, however, there was not only an agreement to withdraw a juror, but also, as part of the arrangement, it was agreed by both sides that no decision should be given upon the legal rights of the question between them, but the judge undertook to express his opinion of what ought to be done, and the parties agreed to abide by his determination. There was in truth a substitution of one tribunal for another, and the judge was to act as arbitrator upon all matters in dispute. The juror would not have been withdrawn except as part of the whole arrangement. The reason has not been disclosed, but it seems that the defendant thought fit to repudiate that arrangement so far as it related to the submission to the judge's decision; in my opinion the repudiation of a part of such an arrangement must necessarily be held to be a repudiation of the whole. I am further of opinion upon the affidavits that the defendant seems not to have acted in good faith; at all events, there was a failure in carrying out the arrangement agreed to; and upon either party's rescinding, repudiating, or refusing to carry out a part of this arrangement the court cannot enforce any part of it. We are called upon to prevent any such proceeding. If a verdict had been given, and afterwards bad faith had been established, or it were shown that a mistake had been made, the court would clearly have power to set aside the verdict and grant a new trial; here, much rather than in the case of a verdict, it seems to me that the court should interfere. Cases have often occurred in which disputes have taken place about special cases which have been the conditions of verdicts; and when the arrangements have failed from such a cause the courts have frequently upon application granted new trials. Under the circumstances, I have no hesitation in holding that the plaintiff should be placed now in

the same position as he was in before the defendant by the repudiation of the agreement, deprived him of his right. Before the agreement to withdraw a juror had been entered into, it was clearly in the power of both parties to bind themselves to submit to the judge's decision, and if it turned out that his decision could not be enforced, there could be no reason why he should not go on with the trial. The judge did not think he had power to do anything; there is no suggestion that he acted improperly; his own affidavit fully explains his reason for refusing to give his order. Mr. Grantham presses upon us to say that the plaintiff must bring his action afresh, but the court will not allow the defendant, by means of bad faith, to put an end to the course adopted by the plaintiff to obtain justice. The application by the plaintiff so far as the judge's proceeding to give judgment, is concerned, fails; but, as the previous trial was abortive, the rule will be absolute so far as it calls upon him to appoint a day for a re-hearing of the cause.

M. SMITH, J.—I am of the same opinion. There is no ground to complain of the judge for not proceeding to judgment. After the arrangement was made the judge became the arbitrator between the parties upon all the matters in difference. He was willing to decide in accordance with that arrangement, but he was prevented by the defendant's refusal to abide by it. The first part of the rule should, I think, be discharged; but the second part requiring the judge to proceed to hear the cause should be made absolute. Beyond question the withdrawal of a juror by consent generally puts an end to a litigated matter, and the court would stay proceedings, not only in that action, but also in another, if the plaintiff should commence one for the same cause; but if an agreement be made to abide by terms upon a verdict or nonsuit, and either party runs away from the terms, the court can say that the whole proceeding is abortive if he will not carry out any part of the terms. Instances may be suggested of the courts setting aside arrangements between parties upon the bad faith of either; e.g., a difficulty in settling a special case. In fact the courts habitually set aside proceedings, and even final judgment, if obtained against good faith. That being so, we may surely exercise our jurisdiction in this case, and say the proceedings ought not to have terminated as they have done. It was entirely against good faith on the defendant's part that the arrangement upon which this settlement was agreed to has been broken through. It is said that the effect merely is the end of this particular action, and another action might be brought; if the agreement to conclude the litigation were pleaded to a new action, and that agreement were overruled on the ground of bad faith so that the new action would not be stopped, I cannot see why we should not now say that the whole agreement was bad. The court ought to permit such a course to be adopted, if by coming to the same decision now which they would adopt by and bye they can save expense and delay to the plaintiff. Mr. Beasley's objection to the action, which it was suggested might be brought upon the agreement itself, seems to me to be a strong one; in such an action damages only could be claimed, and the merits of the question between the parties could not be settled. I think there is a discretionary power in the court which will be properly exercised in this case by setting aside the agreement to withdraw a juror.

BRETT, J.—I am glad the other members of the court have seen their way to adopt the most efficacious remedy for a scandalous breach of faith by the defendant, but I am still of opinion that the defendant has the law on his side. The agreement

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KNOWLES v. BOVILL AND ANOTHER.

[Ex.]

was to put an end to the cause, and it is not alleged that this agreement was procured by fraud; the universal understanding is, that the withdrawal of a juror is the end of a cause, and when this is done by consent it should be binding upon the parties, and without their consent I think the court has no power to set it aside. The only remedy, as it seems to me, is to bring an action upon the agreement. I think the court has no jurisdiction in the matter, and the rule ought to be discharged.

Rule absolute.

Beasley asked for the costs of the rule against the defendant.

Grantham objected on the ground that there was no application for costs in the rule itself.

BOVILL, C. J.—The defendant is clearly in fault, therefore we make an order against him for costs.

Attorneys for plaintiff, *Wright, Bonner, and Wright*, for *W. F. Law*, Stamford.

Attorneys for defendant, *Rooks, Kenrick, and Harston*, for *R. Richardson*, Oundle.

Attorney for the County Court judge, *The Solicitor to the Treasury*.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Thursday, Feb. 10.

KNOWLES v. BOVILL AND ANOTHER.

Failure of consideration—Money had and received.

The plaintiff was the holder of a licence to use a certain patented invention from the patentee. The patentee intending to apply for a prolongation of this patent, and also for a patent for a new invention of a similar description, the plaintiff agreed to give him 150*l.* for the free use for ever of the former patent, as well as for the free use for three years of the new patent which the patentee was about to take out. The 150*l.* was paid to the patentee, but he died almost immediately afterwards, and in consequence of his death no application was ever made for a renewal of the former patent, or the grant of one for the new invention. The plaintiff brought an action against the patentee's executors to recover back the 150*l.*, on the ground that the consideration for it had totally failed:

Held, that he was entitled to maintain the action on the ground that on the true construction of the contract between the parties he had bought the right to have an application for the patents made, not merely the right to have the benefit of it if it should happen to be made, and the consideration had, therefore wholly failed.

The plaintiff was a mill owner and miller carrying on business at Nuneaton, in the county of Warwick. The defendants were the executors of the late Geo. Hinton Bovill, an engineer and patentee of certain improvements in the manufacture of wheat and other grains into meal and flour. Letters patent bearing date the 5th June 1849, were granted to the said Geo. Hinton Bovill for the said invention for the term of fourteen years from that date.

Afterwards further letters patent bearing date the 6th June 1863, were granted to the said Geo. Hinton Bovill for the extension of the patent for the said invention for the term of five years from and after the expiration of the said original letters patent. In the month of March 1864 the plaintiff purchased from one Thomas Hollick the mill wherein he has since carried on his said business, together with the goodwill and the stock and effects thereof.

Shortly after the plaintiff had purchased the said mill, actions were commenced by the said Geo. H.

Bovill against the said Thomas Hollick and the plaintiff respectively for infringement of the said patent by the user, in the said mill, of certain machinery alleged to be an infringement of the said patent.

The said actions were settled by payment to the said G. H. Bovill of 500*l.*, and by an agreement for the purchase of the right or licence to use the said letters patent at the said mill for the residue of the term of the said letters patent for the sum of 560*l.*, and on the 6th March a deed was executed for the purpose of carrying out the arrangement for a settlement of the said action. On the same day the said 560*l.* was paid to the said G. H. Bovill and a receipt given.

The plaintiff having heard that G. H. Bovill was about to take measures for the purpose of having the said invention protected for a further period, instructed his solicitors, Messrs. Hall and Janion, to communicate with Mr. Bovill on the subject, and they accordingly, on the 15th April 1868, wrote the following letter to the said G. H. Bovill:

Sir,—You may perhaps remember that we had a correspondence with you some time ago, we acting on behalf of Mr. Knowles, relative to an infringement by the late Mr. Hollick of your patent at his mills at Nuneaton. You will also probably recollect that Mr. Hollick paid your claim, and the matter was amicably adjusted. Both Mr. Hollick and Mr. Knowles declined to join in the Millers' Association. We are now informed that it is your intention to apply for an extension of your patent, and though we are given to understand that your application will be opposed, Mr. Knowles wishes us to say on his behalf that he has no wish to be a party to such opposition provided he can make a satisfactory arrangement with you in the event of your patent being renewed, and we should therefore be glad to hear from you on the subject.

A correspondence ensued, and finally the following letter was written by plaintiff's attorney to the said G. H. Bovill:

Dear Sir,—The prevailing opinion of millers in this part of the country is, that you will not succeed in obtaining a renewal of your patent, and having regard to the uncertainty on this point, Mr. Knowles is not disposed to give so much as 250*l.* down, but he will give 150*l.* for the free use of your patent for ever, and of the improvement you contemplate making in it as mentioned in your previous correspondence.

To this letter Mr. Bovill wrote the following answer:—

In reply to your favour of yesterday, as I do not wish to have any opposition to my prolongation, I will accept Mr. Knowles's offer of 150*l.* for the free use for ever of the 1849 patent for whatever time it may be further prolonged or not prolonged, as well as the free use for three years as mentioned in my letter (say until the 1st May 1871), of the new patent for milling, which I am about to take out as soon I am well enough to return to business.

The plaintiff paid the sum of 150*l.* in accordance with the arrangement contained in the above correspondence, and Mr. Bovill signed the following receipt:—

Received from Mr. John Knowles the sum of 150*l.* for the free use for ever of my existing patents relating to and as applied to corn mills, and also for the free use for the period of three years from the grant thereof of a new patent for milling, which I am about to take out.

The said G. H. Bovill died on the 9th May 1868, a few days after the receipt of the 150*l.*, and in consequence of his illness and subsequent death, neither he nor the defendants, his executors, ever took or have taken any measures for obtaining a prolongation of the said letters patent for a further period, nor did he take out, nor have the defendants ever taken out, the said new patent for milling previously referred to, but the said G. H. Bovill had been engaged from the latter end of the year 1867 up to the time of his last illness and death in perfecting his improvements for which he proposed to take out the new patent.

Upon the death of Mr. Bovill, the plaintiff's attorneys wrote the following letter to his executors:—

In May last we on behalf of Mr. John Knowles of Nune-

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KNOWLES v. BOVILL AND ANOTHER.

[Ex.]

eaton, paid the late Mr. Bovill 150*l.* for the free use for ever of the 1849 patent, for whatever time it might be prolonged, as well as the free use for three years of the new patent for milling, Mr. Bovill was about to bring out. Unfortunately Mr. Bovill died a few days after the money was paid, and we suppose no application has been, or will now be made for a prolongation of the 1849 patent, and that our client will lose the benefit of the new patent which Mr. Bovill intended taking out. This being so it appears to us that the consideration in respect of which Mr. Knowles paid the sum of 150*l.* wholly fails, and that Mr. Bovill's executors will not object to repay that sum to Mr. Knowles.

To this letter the defendant's attorneys sent the following answer:—

The executors of Mr. Bovill have handed us your letter of the 28th inst. We do not agree with your construction. Your clients made a bargain for better or worse; if the application had been refused, would you then have claimed a return of the money? There is no covenant nor agreement by Mr. Bovill to apply. The consideration was only partly for the 1849 prolongation if granted, the chief consideration was for another invention of Mr. Bovill's. Had this been secured by him, your client might have received a very large benefit at a very nominal sum and so the right to call on Mr. Bovill for a licence of such new invention, if brought out, was an ample consideration, and of great value. Put the very frequent case of a person taking a licence without a warranty of validity, and the patent being subsequently upset, and that too within a year of the licence, which may, for argument's sake, have been for fourteen years. It has been held, over and over again, that the licensee must continue his payments. He has had all he bargained for. Here Mr. Knowles has had all he bargained for, the right to call upon Mr. Bovill practically to give him for nothing a very valuable right. We see no ground morally or equitably, upon which your client can ask for a rebate or return of the 150*l.* It was clear Mr. Knowles thought the renewal was of a very questionable nature, but he bargained with Mr. Bovill for the 150*l.* to shut out every contingency.

The question for the court was whether the plaintiff was entitled to the return of the 150*l.*

Quain, Q. C., for the plaintiff.—Assuming that by Mr. Bovill's death the obligation to make any application for the extension and grant of the patents was at an end, then clearly there is a total failure of consideration, and the plaintiff is entitled to recover back the money he has paid. It is said that he bought only the chance of the application being made. But both parties must take the chance; there is no reason why the risk should be thrown on plaintiff alone. It must be implied in the contract that if Bovill died, and in consequence no application could be made, then, granting on the one hand that death might excuse from making the application, on the other clearly there must be a return of the purchase-money. The consideration that the matter depends on Bovill's life probably in fact never occurred to the parties, but if an implication is to be made on one side, it must be made also on the other. It may be, as the defendants contend, that if the applications had been made and failed, the plaintiff could not have recovered back his money, but he was entitled, under the contract, to have them made, and as they never were made there is a total failure of consideration.

Taylor v. Caldwell, 32 L. J. 164 Q. B.; 8 L. T. Rep. N. S. 356;

Appleby v. Myers, L. Rep. 1 C. P. 615; L. Rep. 2 C. P. 651; 14 L. T. Rep. N. S. 595; 16 L. T. Rep. N. S. 669;

Wright v. Newton, 2 C. M. & R. 124;

Russell v. Ledsam, 14 M. & W. 574.

Garth, Q. C. (with him *J. C. Mathew*) for defendants.—The plaintiff bought a contingent right, viz., the right to have the benefit of the application if made. If it failed when made, he could not have recovered back the money; what difference does it make that it has failed in another way, viz., by never having been made. He preserved himself by his payment from the possibility of being left without the right to use the patented machinery in case the application were granted. It is clear that the value of a right to use a patent prospectively before

it is granted or prolonged, may be very different from that of the right to use it when already granted or prolonged. The plaintiff cannot now turn round and say, "Repay me the price," for he has had what he bought; at any rate there has been no total failure of consideration, and therefore he can have no right to recover what he has paid. Unless there has been a breach by Bovill of his contract, the plaintiff can have no right to recover; and if there had been, his remedy must be by action for that and not to recover the purchase-money.

MARTIN, B.—In my opinion the plaintiff is entitled to our judgment. The true test in this case is the question, What did he buy? In my opinion he bought an application for the grant of one patent, and the prolongation of the other. By the contract he was to take the chance of the failure or success of such application. But what he bought was an application. The result is that the consideration in this case wholly fails, because it is admitted such application never was and now never will be made. The law in some cases implies a contract when the parties have not expressly made one. In cases of the total failure of consideration for a simple contract, it implies a contract to repay the money which has been paid for the consideration that has so failed. If I thought Mr. Garth's contention were correct, and that plaintiff only bought the chance whether an application would be made and prove successful, the case might be different, but I do not think that is the true meaning of the contract.

BRAMWELL, B.—I am of the same opinion. The plaintiff manifestly paid his money for the right to have an application made for the renewal of the one patent and the granting of the other. It cannot be doubted that if Mr. Bovill had lived and no application had been made, the plaintiff would have been entitled to recover his money. From this it is perfectly clear he bought the right to have such application made. In point of fact it was not made. Then why is his claim not well founded? Mr. Garth invokes a rule of law; he claims to read such a contract with a qualification implied by law that Mr. Bovill is only bound to make such application if he lives; he is to be excused by death. Mr. Quain may fairly say then, "I am entitled to add a qualification to that qualification, viz., that if he dies the money shall be returned." I am strongly of opinion that the law ought never to imply terms in a contract unless the justice or necessity of the case obviously and imperatively demands it. But if a party contends that there is such a qualification when the engagement is of a personal character, how can he object to the qualification being qualified as I have pointed out? Can anything be more obviously just and reasonable? Why should the contractor's death be a benefit to his estate, and inflict a loss on the other party? In such a case the court only introduces a term which it is satisfied, not, perhaps, that the parties intended, but that they would have intended if they had contemplated the circumstances which have arisen.

PICOTT, B.—I am of the same opinion. It is quite clear that the intention of the parties was that there should be an application for these patents, and that such application formed the consideration for the payment of the money. There never was any such application, and consequently the consideration wholly failed.

CLEASBY, B.—It is clear that what plaintiff bought was the chance of Mr. Bovill being successful in his application or not, not the chance of his making it or not; that would have left it in his option to make it or not, whereas it was admitted

ADM.]

THE GANGES.

[ADM.]

if he had lived and not made it the plaintiff would have recovered.

Judgment for plaintiff.

Attorneys for plaintiff, *Bower and Cotton.*

Attorneys for defendants, *Harrison, Beal, and Harrison.*

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister at-Law.

July 1 and 20, 1869.

THE GANGES.

Salvage—Agreement for distribution—Merchant Shipping Act 1854, s. 182—Merchant Shipping Act Amendment Act 1862, s. 18.

By 17 & 18 Vict. c. 104, s. 182, it is enacted that "every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative."

By 25 & 26 Vict. c. 63, s. 18, the above section is declared not to apply "to the case of any stipulation made by the seamen belonging to any ship which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship."

Plaintiff, while acting as temporary master of a tug, the property of the G. Y. Tug Company, which carried on a towage and salvage business, rendered services to a vessel in distress, and a certain sum was allotted for the services of the tug. It was the custom of the company to pay a fixed rate of poundage to all their seamen on all sums received for salvage, and the master, for whom plaintiff acted, served under these terms. Of all this plaintiff was aware, and gave no notice to the owners that he was not serving under their usual conditions. He now claimed an apportionment, refusing the allotment of poundage.

Held, that the effect of the above quoted sections was to place agreements of this class on the same footing as they stood before any legislation on the subject, and in nowise to fetter the discretion of the court; and that, under the circumstances of the present case, the custom was not inequitable, and plaintiff was bound by it.

This was an application to the court on behalf of a single salvor for salvage remuneration. He was the temporary master of a steam-tug called the *Sailor*, of Yarmouth, which rendered salvage services to a large steamer called the *Ganges*, whilst she was in distress near the Hasborough Sands, and instituted his suit for apportionment of salvage against the owners of the steam-tugs *Sailor* and *Pilot*, who were also salvors of the said vessel. The *Sailor* was a steam-tug of twenty-five tons, and thirty-two horse power, belonging to the Great Yarmouth Standard Steam-tug Company, and was manned by a crew of three men, viz., by the plaintiff as master, an engineer, and a stoker, and during the progress of the services in question, she took on board two extra men. The services of the *Sailor* began at one o'clock p.m., of Friday, the 23rd Oct. 1868, and lasted till four o'clock p.m., of the Sunday following, and it was admitted in the answer that the services were performed with much difficulty and some risk, and that by means of the said services, and those of other salvors, the *Ganges* was rescued from a position of great danger.

The other salvors were the tugs *Pilot* and *Andrew Woodhouse*, and the *Caistor* lifeboat, also belonging to Yarmouth. A sum of 2000*l.* was paid by the owners of the *Ganges* and of her cargo, which was accepted as covering the claims of all the salvors, and the amount due to the *Sailor* was fixed at 410*l.*

10*s.*, distributable among the owners, master, and crew of that tug, and of this sum 3*l.* 15*s.* was set apart as the portion to be paid to the plaintiff, and was tendered to and refused by him.

Butt, Q. C. and Pritchard for plaintiff.

Dr. Deane, Q. C. and Clarkson for defendants.

The cases and statutes cited, with the arguments, fully appear in the following judgment:

July 20.—Sir R. J. PHILLIMORE (having summarised the facts as above). This sum would certainly, upon the general principles upon which salvage is distributed, be a very inadequate remuneration to the plaintiff, who was the temporary master of the *Sailor*. This particular allotment, however, is defended upon the ground of special custom and agreement. It appears from the defendants' pleadings, and from the evidence that the Great Yarmouth Steam-tug Company carries on a business with the steam-tugs the *Sailor* and the *Pilot*, and two other tugs. This business consists in great part "of rendering salvage services and towage services in the nature of salvage services to vessels in distress; and their tugs are expressly provided and constantly kept up at a great cost with a view to rendering such services, and but for the remuneration obtained for such services, they would be unable to work their tugs at a profit." The secretary of the company, Mr. Freeman, was examined. He explained that they had a business of towing and salvage; and that there were many cases of towage of distressed vessels for which sums under 10*l.* were received; that the simple towage remuneration would not enable the company to keep up their tugs; the masters and crews are allowed by the company 5*l.* per cent. on all towage, and upon salvage where the sum earned was over 5*l.*; besides this, they had their wages, and, when away from port, 1*s.* 6*d.* a day for victualing money. During the fishing season there was a towage of fourteen or fifteen boats a day; each tug had a crew of three men, and one large rope on board; and the company had carried on this business since 1862, during which time only one man had demurred to the system of poundage. It appears, however, that the tugs were laid up for nine months in the year. It appears also from the evidence that the remuneration is the same to each of the crew, however different the degree of merit, and also that the tug or tugs not employed in the service share equally with those that are employed. The plaintiff deposed that he had been master in the service of the defendants for about thirty months, and "for two fourteen months," as he expressed it, he had been master of the *Sailor*; that he was perfectly aware of the custom of poundage, and had always acquiesced in it; that when he took Butterfield's place as temporary master of the *Sailor* for a few days he was aware that this custom prevailed, and he gave no notice to the owners that he was not serving upon the ordinary terms of poundage remuneration; he admitted that Butterfield had taken his place when he (the plaintiff) was in the service of the company on the same terms. Some evidence has also been offered to the court tending to prove that the arrangement in question does operate, on the whole, beneficially for the seamen who are employed by this company. Upon the general question as to whether any agreement of this kind shall be maintained I have had considerable doubt. On the one hand, there is a tendency to set aside the principles upon which salvage remuneration is awarded, to remove the stimulus which that principle affords to individual exertion, and to reduce the various degrees of merit which may arise to one dead level. On the other hand, I

ADM.]

THE PANAMA.

[ADM.]

think I must infer from the evidence before me that one principal object of salvage remuneration is advanced by this agreement, namely, the having in readiness vessels peculiarly fitted for the preservation of life and property, and crews accustomed to the navigation of them. I have considered various cases which have been decided by my predecessors 5 on this subject, viz., *The Red Rover*, W. Rob. 150; the *Margaret Kay*, referred to in *The Zephyr*, 2 W. Rob. 48; and *The Beulah*, 2 N. of Cas. 64; 1 W. Rob. 477. In the *Beulah* the words of the judge are remarkable: "I cannot consider myself bound by any arrangement that the owners might make with the mariners, because I apprehend that the latter are entitled to the judgment of this court as to what it thinks equitable, and as to the principles which ought to govern each particular case. At the same time, I must confess that I should be exceedingly reluctant indeed to disturb an arrangement hitherto carried on with satisfaction to all parties, and which, as far as I find, has been productive of nothing but a harmonious result. I cannot lay out of my consideration an important fact which makes a material difference in a case of this kind, namely, that it has been sworn, and not contradicted, that the persons on board these steamers receive their wages whether in sickness or health, and they are therefore in a very different situation, in many important respects, from ordinary mariners. I wish it to be understood that if, unfortunately, any such case as this should occur again, I undoubtedly shall make an exception to any arrangement which has been formed between the parties, not only where there has been great risk, but also where there has been extraordinary labour; but these are the only cases in which I shall do it. Where there is no great risk or extraordinary labour, I shall think it my duty to adhere to the arrangements with respect to quantum which have hitherto been acted upon by the parties." These cases were decided before the enactment of the Merchant Shipping Act, to certain sections of which I will now refer. The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), contains the following clause (sect. 182): "Every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative." The *Enchantress*, Lush. 95; 2 L. T. Rep. N. S. 575, was decided after the passing of this Act. In that case the learned judge said (p. 96, after quoting the 182nd section), "The court has held, and must hold, that not all agreements barring salvage are wholly inoperative, but that agreements limiting the proportion of salvage money are to be maintained only so far as they are really equitable. I am of opinion that the alleged agreement in this case is open to the objection that it is inequitable, and that, even if made, it is not binding upon the plaintiffs." Since this decision the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) has provided as follows, by sect. 18: "It is hereby declared that the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships." I do not construe these statutes as in any way fettering the discretion of the court upon the subject of these agreements; the joint effect of the two clauses is simply to render such agreements not illegal, and to place them on the same footing on which they stood before any legislation on the subject. This I am glad to find was the opinion of my predecessor in the last case to which I shall

refer. *The Pride of Canada*, in Bro. & Lush. 208, reported more fully in the Mar. Law Cases, vol. 1, p. 406, the circumstances of it were very similar to the present case. Having regard to these circumstances, especially to the facts, that the salvor in this case was perfectly aware he was acting for a person bound by this arrangement which I cannot pronounce upon the evidence before me, to be inequitable; that no extraordinary exertion or peril accompanied the salvage service in this case which was mainly effected by the vessel, I think I shall act in accordance with the principles which have guided my predecessors in this court in pronouncing for the validity of the arrangement in the case now before me. I have considered the argument which has been addressed to me with respect to the apportionment of salvage to this individual under the assumption of the agreement, and I have come to the conclusion that I ought not to interfere with that matter. I pronounce, therefore, against the prayer of the plaintiff, but I shall give no costs.

Proctor for plaintiff, *G. R. Longden*.

Proctors for defendants, *Shephard and Skipwith*; agents for *C. H. Chamberlin*, attorney, Yarmouth.

July 20 and 30.

THE PANAMA.

Bottomry bond—Validity—No notice to owner.

Where a vessel was in distress at Cuba, and it became necessary to have recourse to bottomry, the agents there of the charterers telegraphed to the charterers at Liverpool, and received their authorisation to make the necessary advances on a bond. The owner, however, also resided in Liverpool within the knowledge of the charterers, but he being insolvent they gave him no notice; nor had the master communicated with him, as they also knew. Moreover, they also, being second mortgagees, had not communicated with the first mortgagee, who was close at hand:

Held, that in the absence of notice to the owner, under the circumstances, the bond was invalid.

This was a petition in objection to the registrar's report in a cause of bottomry, brought by Charles Barron and Thomas Harrison, the holders of two bottomry bonds, against the vessel *Panama*. The owner did not appear, but the validity of the bonds was opposed by Mr. Stewart, a mortgagee, and it was agreed by the plaintiff and defendant that the bonds should be referred to the registrar, assisted by merchants, "to report the amount due thereon, but without prejudice to any question as to their validity."

At the reference before the registrar, the first bond was abandoned, and as to the second, the registrar reported that it was invalid, on the ground that the bondholder had not communicated with the owner, although he was in the same town, and might have conferred with him whenever he pleased, and was aware that the master had not communicated with him. The registrar reported that all the charges were "quite proper," that the "bottomry premium was not excessive," and that "he was not aware that any of the items could have been struck out."

The petition of appeal alleged the report to be erroneous, because the registrar had no power to decide upon the validity of the bond, and because the facts did not warrant the report that the bond was invalid. It was subsequently agreed between the parties that the court should be asked to decide the question as to the validity of the bond, as if the question were mooted before it in the first instance, and that the remainder of the report should be accepted. The facts of the case are stated at length in the judgment.

ADM.]

THE ELIZABETH; THE ADALIA.

[ADM.]

Butt, Q. C. and *Pritchard*, for the bondholder, objected to the report, and contended that the necessity for a bottomry bond may be complete without notice to the owners, and in such a case notice is unnecessary, and that in the circumstances of the present case the duty of the bondholder to communicate with the owner before entering into the bond, was taken away by the fact of the well-known insolvency of the owner.

The Bonaparte, 3 Wm. Rob. 298; 7 N. of C. Sup. 55.

Clarkson contra.

Cur adv. vult.

July 30.—Sir R. J. PHILLIMORE.—The first bond has been abandoned, and I have only to deal with the second bond, which is dated the 2nd Dec. 1868. It was signed at Cardenas, in Cuba, and given to cover [two sums respectively of 378*l.* 3*s.*, and 250*l.* and with a bottomry premium of 30 per cent. on the former sum, amounts to the sum of 741*l.* 12*s.*; but the sum of 250*l.* has been withdrawn from the claim by the counsel for the bondholder, on the ground that it was originally advanced on the security of the freight; so that the claim of the bondholder in this court is limited to the principal sum of 378*l.* 3*s.*, and the bottomry premium of 113*l.* 9*s.* The owner of the *Panama*, Mr. Fincham, does not dispute the validity of the bond, but he has been examined as a witness by the defendant. The bond was entered into by the master, who was Fincham's son-in-law; the owner is insolvent, and was so at the time when the bond was given. A first mortgagee, Mr. Stewart, appears to contest the validity of the bond. And it is important to observe that the bondholders held a second mortgage on the vessel. The bond does not affect the cargo; and according to the finding of the registrar, with which I agree, the expenses which the bond was given to cover were quite proper. The owner, as I have said, was insolvent, and the master had no credit, and recourse to a bottomry bond appears to have been a matter of necessity; the time which it takes to write a letter from Cuba to Liverpool and obtain an answer is six weeks in the ordinary course of post. The master has not been produced as a witness by either party. The facts which I have now stated are not disputed. I will now consider more closely those which relate to the execution of the bond. On the 23rd Aug. 1868 the *Panama* left Cardenas, and arrived at Trinidad de Cuba in Sept., and took on board a cargo of mahogany and cedar, the freight on which, it appears, amounted to 1100*l.*, or 1200*l.* On the 12th Oct. 1868 the *Panama* left Trinidad for London, but having suffered injury from tempestuous weather, she put into Cardenas. She was surveyed on the 6th Nov.; the master applied to the agents of Messrs. Finlay and Co., which latter gentlemen were the agents of Messrs. Barron and Harrison, for an advance of money, which was refused. He then went to Havannah and attempted to obtain the money from Messrs. Finlay and Co. themselves; he was again refused, and returned to Cardenas. It appears he then applied to the owners of the cargo for money, and on their refusal, threatened to sell a portion of the cargo. The master had for some time been distrusted, both by Barron and Harrison, and it would also seem by Fincham the owner; and Messrs. Finlay and Co., taking alarm at the threat to sell a portion of the cargo, resolved to get rid of him; and on the 24th Nov. telegraphed to Barron and Harrison in the following words: "*Panama* wants 200*l.* to clear, also 160*l.* claimed by Mantle for wages; are ready to advance all, but he must leave vessel to captain appointed by consul. See owner: answer." To this Messrs. Barron and Harrison answer also by telegram on the 25th of the

same month: "Do best our interest, appoint new master, secure advance, bottomry." On receipt of this telegram Messrs. Finlay and Co., with the assistance of the British consul at Havannah, remove the master, Capt. Mantle, and put another master in his place; but before Capt. Mantle leaves, they get him to sign the bottomry bond, which is the one in dispute in this case. At the time when Mr. Barron telegraphed back this answer, he was resident in Liverpool. Mr. Fincham, the owner, resided in that town or close to it, and continually attended at an office in the town. Of this fact Mr. Barron was perfectly aware; he was also perfectly aware that Mr. Stewart was first mortgagee of the vessel, and resided in Liverpool. Mr. Barron had no communication whatever with the owner upon the subject of this bottomry bond, and the question arises whether in all these circumstances he had a right to instruct the master, through his agents, to bottomry the ship as a security for his, the bondholder's, advance of money. It is not necessary to assert, as a proposition of law, that in all cases the bondholder, or even the master, must communicate with his owner before a bottomry bond be entered into; or that it is necessary that the bondholder should communicate with the first mortgagee. Neither of these propositions is required to sustain the judgment which I am about to pronounce, and which is confined to the particular facts and circumstances of this case. Having regard to them, I think there was a duty incumbent upon the bondholder of communicating with the owner before the bond was entered into, and that this duty was not taken away by the fact that the owner was insolvent, a fact which was much pressed upon me by the counsel for the bondholder. For the owner might have thought it expedient to endeavour to raise the money, either through his creditors, or from the first mortgagee who was close at hand, or from some other source; and I cannot lay out of my consideration the fact that by this bond the second mortgagee, who is a lender, does practically render the vessel liable to pay a premium of 30 per cent. before the first mortgagee can be satisfied. I pronounce against the validity of this bond, with costs.

Attorneys, *Wright and Venn*, agents for *W. Norris*, Liverpool, for bondholders.

Proctors, *Clarkson, Son, and Greenwell*, for defendant

Feb. 7 and 8, 1870.

THE ELIZABETH.

THE ADALIA.

Collision in river—Vessel aground—Duty of approaching vessel.

Where a steamer coming up a river during a high spring tide, and late at night, after passing a schooner also coming up the river, took the ground, and whilst aground was subsequently run into by the schooner:

Held, that, even assuming the steamer to have been 300 yds ahead when she grounded, it was not the duty of the schooner, under the circumstances, to have dropped her anchor, with the view of avoiding the collision, and that the steamer was solely to blame.

This was an appeal from a decree made by Mr. R. M. Kerr, the Judge of the City of London Court, in a cause arising out of a collision in the river Thames, between the brigantine *Elizabeth* and the screw steamer *Adalia*. The court below having held the *Elizabeth* solely to blame, she now appealed from that decision.

Dr. Deane, Q. C. and *Edwyn Jones*, for appellants.

ADM.]

GALWAY (TOWN) ELECTION PETITION.

Butt, Q. C. and Webster, for respondents.

The facts of the case are fully set out in the judgment.

Sir R. PHILLIMORE.—I entirely assent to some observations made by Mr. Butt, that with regard to all these appeal cases, the course which the court ought to pursue is, where there is a nice balance of evidence, and the court above may be of opinion that it preponderates one way, while the court below, in giving judgment, considers it preponderates the other, the Superior Court should be very reluctant indeed to disturb the sentence of the inferior court; and where the question is to be determined with any reference to the demeanour or conduct of the witnesses, again the appellate court should be reluctant to interfere with the judgment of the court below. It appears that the *Elizabeth* was going from Hartlepool to London with a cargo of coals. She had a crew of seven hands, all told. She had four men in a boat, which, I think, when somewhere below the Fishguard, she put out for the purpose of keeping the ship with steerage-way. She had a waterman at the helm, the captain was forward on the deck, and the mate and a lad were on deck. There was a high spring tide running at two knots which is an important point in the case. The wind was S.S.W. The length of the *Elizabeth* was 80 or 90 feet. The *Adalia* that evening had taken a pilot on board at Gravesend, and she first sighted the *Elizabeth* rather below Woolwich Pier. The *Adalia* drew 15ft. forward and 17ft. aft. Her exact speed perhaps it is rather difficult to gather from the evidence, but she was going about a knot and a-half faster than the *Elizabeth*, which was going a knot and a-half. She passed the *Elizabeth* somewhere below Woolwich Pier, by the School Ship, on her port hand, and by misfortune ran into the shoal on the opposite side of the river. It was eleven o'clock at night, in the month of June. She said that she took down her side lights, and remained with her masthead light up, in order to signify that she was not lying in a condition to move. The *Elizabeth* ran into her in the following manner, as stated in the *Adalia's* log: "She ran into her starboard gangway, carrying away several stanchions, 10ft. moulding, bowsprit, and all the gear attached, and other damage." After coming starboard side to starboard side—that is to say, the stern of the *Elizabeth* to the stem of the *Adalia*—she came round under her bowsprit, and for some little time was port side to port side. What became of the boat is not exactly clear, but somehow or other the rope was parted, and she got away from both the vessels. Upon the evidence laid before him, the learned judge, and the assessors who assisted him with their advice, have come to the conclusion that the *Elizabeth* was alone to blame for this collision. One of the nautical assessors appears to have differed upon what was considered a very material point in the court below—viz., the distance at which the *Adalia* was ahead of the *Elizabeth* just before the collision happened, after she had run ashore on the other side. The learned judge of the court below founded his decision, as it appears to me, upon this view of the law, that from the facts which were tendered, according to the evidence which he believed on behalf of the *Adalia*, it was the duty of the *Elizabeth* to have dropped her anchor, and thereby to have avoided the collision. The learned judge of the court below acted upon the belief that there was 300yds. distance, and between eight and ten minutes in point of time, which separated the two vessels from the time when the *Adalia* ran aground to the time of the collision. It is not my disposition at all to adjudicate upon this case with reference to minute and exact measurement either of time or

distance; and though I have been furnished with a very careful statement from the nautical gentlemen who assist me on this occasion, which would lead to a contrary inference from that which was adopted by the learned judge and the assessors in the court below, I am not about to decide the case before me upon those grounds. I will assume that there was the distance which the *Adalia* alleged, that she was 300yds. ahead of the brig when she grounded, the tide was a high spring tide, and the *Elizabeth* was advancing all the while. It appears to me that, upon the state of facts sworn to by the witnesses on behalf of the *Adalia* with respect to the distance, it was an error in law to hold that it was the duty of the *Elizabeth* to perform the manœuvre which I have mentioned, and thereby, as it is alleged, to have avoided the collision. It is just possible that in the most auspicious circumstances, in broad daylight, and with a full knowledge of what was going to happen, the *Elizabeth* might have been in that condition, with regard to her crew, that by dropping her anchor she might have avoided the collision, though on that point the Elder Brethren of the Trinity House who assist me are extremely doubtful; but when it is remembered that the steamer had passed the brigantine in the way which I have described, at eleven at night, and, at a very short distance from her, had run aground on the opposite side, there was no obligation whatever upon the *Elizabeth* to make the manœuvre in question. She had received nothing which could be considered, at least having regard to the circumstances of the case as a warning of the condition in which the steamer was placed, nor, as I have said, if she had received that warning, could she, in the state in which she naturally was at that time, have avoided the collision by dropping her anchor. The learned judge seems to have been of opinion that there was not a proper look-out kept on board; but, looking at the evidence, the court would come to a different conclusion. I am wholly unable to see upon what grounds it was that the learned judge concluded there was not a look-out on board the *Elizabeth*. He seems, indeed, to have rather inferred there was not a proper look-out from the fact of her not dropping her anchor, which he thought it would have been her duty to have done if she had had a proper look-out. Having regard to all the circumstances of the case, and having the full assent and approbation of the Elder Brethren of the Trinity House, I find myself compelled, assuming the facts to have been such as the learned judge proceeded on, to pronounce in favour of the appellants in this case, and to reverse the sentence of the court below, with costs.

Solicitors for the appellants, *Lowless and Nelson*.
Proctors for the respondents, *Dyke and Stokes*.

Irish Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

GALWAY (TOWN) ELECTION PETITION (a).

(Before KEOGH, J.)

Thursday, Feb. 25, 1869.

General intimidation—Undue influence of ministers of sects—Legitimate and illegitimate clerical influence.

A general refusal by bishops and clergy of the solemn rites of the church to persons on account of their voting or not voting in a particular way, will avoid an election.

But the court recognised the full right of the Roman

(a) This case concludes the series of Election Petition Reports for 1869.

GALWAY (TOWN) ELECTION PETITION.

Catholic clergy to address their congregations; to advise them to canvass the merits of the candidates; to tell them that one man is for the country and another against it; that one man is for a church which they think ought to be disestablished—so long as there is no play upon the superstitious feelings of the people.

The ruling in the Dublin case affirmed, namely, that general bribery and general treating will invalidate an election, though not directly traceable to the candidate; and that general intimidation, whether lay or ecclesiastical, will upset every election at which it is practised.

The case of Huguenin v. Baseley (coram Lord Eldon 1807) cited and applied.

This was a petition against the return of Lord Lawrence and Sir R. Blennerhassett, and contained twenty-eight clauses. The question ultimately resolved itself into a single issue respecting clerical intimidation, upon which judgment was given as follows:

KEOGH, J.—I now come to what has been not improperly called by my learned friend Dr. Seeds the great constitutional question in this case, that is, the question of undue influence practised, in the words of the Act of Parliament which I shall read, on behalf of the sitting members. The words of the Act are most precise, not leaving things at large or in any uncertainty, but going into the most specific detail. I refer to the 5th section of the 17 & 18 Vict. c. 102. I had to consider this question very anxiously in another place, at the Drogheda election, in which, beyond a doubt, undue influence was practised by laymen and by ecclesiastics, and I so declared. "Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of or threaten to make use of, any force, violence, or restraint, or inflict or threaten the infliction by himself or by or through any other person, of any injury, damage, harm, or loss, or in any other manner practise intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted at any election, or who shall, by abduction, duress, or any fraudulent device or contrivance, impede, prevent, or otherwise interfere with the free exercise of the franchise of any voter, or shall thereby compel, induce, or prevail upon any voter either to give or to refrain from giving his vote at any election, shall be deemed to have committed the offence of undue influence, shall be guilty of a misdemeanor, making him liable to the punishment of fine and imprisonment, and shall also be liable to forfeit the sum of 50*l.* to any person who shall sue for the same, together with the full costs of suit;" and, by a clause in another Act of Parliament, "shall render the seat of the member void on whose behalf that undue influence is used;" and if it is used, and is found by the judge trying the offence to have been used (as it was found by me in the case of the trial of the election petition for the borough of Drogheda) by himself or his agents, the member is incapacitated from again seeking the suffrages of that constituency during the then existing Parliament. That is the definition of undue influence given in the Act of Parliament. My learned friend Dr. Seeds reminded me that in the case of the trial of the election petition for the city of Dublin, I had given a short exposition of what I considered to be the law upon these subjects, and on referring to them I find that I said this: "I say that general bribery will invalidate an election, even though it be not directly traceable to the candidate. I say that general treating will invalidate an election, even though it be not directly traceable to the candidate and I say, above all things, that general

intimidation and undue influence, whether it is lay or ecclesiastical, whether it is the ecclesiastic of one persuasion, or whether it is the ecclesiastic of another; whether it is the Protestant Episcopalian minister, or the Presbyterian minister, or the Roman Catholic priest, or the minister of any other of those innumerable sects which I believe are to be found existing over the face of the world, will upset every election at which it is practised." I see no reason to qualify in any way a single word which I stated in that judgment. That I believe to be the law, as laid down by the greatest authorities, and of that I believe no happier exposition was ever given than in the celebrated argument of Sir Samuel Romilly, in the case of *Huguenin v. Baseley*, in the year 1807, before Lord Eldon, in the Court of Chancery of England, as to which I think it is recorded that Lord Eldon, years afterwards, stated that the words of that great jurist were "still ringing in his ears." It will not, therefore, be out of place that I should adopt the splendid language and diction of that great jurist, as containing a true and admirable exposition of that which constitutes undue influence when practised by ecclesiastics. The case of *Huguenin v. Baseley* did not, of course, relate to an election, but it was a suit brought in Chancery to set aside a settlement made voluntarily by a widow upon a clergyman and his family. That settlement was set aside as having been obtained by undue influence and abused confidence by the clergyman as an agent undertaking the management of this lady's affairs, and it was so set aside upon principles of public policy and utility. Sir Samuel Romilly speaks in his argument of this undue influence. I adopt his words as marking what I conceive to be the limit between due and undue influence, and I shall proceed, when I have read those words, to refer them to the case now in question. "Undue influence will be used if ecclesiastics make use of their power to excite superstitious fears or pious hopes, to inspire, as the object may be best promoted, despair or confidence" (that is, to inspire despair or confidence, in order to obtain their own objects, be they what they may), "to alarm the conscience, by horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness—that good or evil which is never to end." Now, what is the necessary consequence if that is a true version of influence? Is it that the influence of the clergy is to be excluded? I say not. A question was put to the Bishop of Galway by the learned counsel who cross-examined him: "Did you say that if the people were estranged from their clergy, and were not obedient to their clergy, they would escape from all legitimate authority?" And the answer is, "I did." I say so too. Differences of religion will prevail to the end of the world, as they have prevailed from the very first hour of Christianity; but, I say, it is idle to put forward the proposition that it is desirable in any country that the people shall be free from the influence of their clergy. To be a good citizen there must be a religious sentiment; and if you release the people from the influences, I say the legitimate influences, of their clergy, you set them at sea upon the billows of every kind of infidelity; and they will become as indifferent to the civil as they have been to the religious authority. Those are my sentiments; they are perfectly consistent with, they are ingrained in, authority itself; and so far from shaking the edifice of temporal power, and of temporal peace, they go to maintain both. But the question is, has undue influence been used, and has influence been unduly used? And there is no more difficulty in answering that in the case of ecclesiastical than of civil influence. The same test must be applied to it, and that the reasoning of the human mind. Then

GALWAY (TOWN) ELECTION PETITION.

let me approach this particular case, and let me ask myself this question, Has there been undue influence? In the first place it was said rather hastily, and I am sure without meaning to argue such a proposition, that if the priest uses influence at all the election will be void. The Roman Catholic bishop in this country is not represented at the council table, where I frequently have the pleasure of meeting archbishops and bishops of the Protestant Establishment; the cassock and the lawn sleeves of the House of Lords are not worn by him; he is and remains in the eye of the law a commoner, and as a commoner he must find his representative. The Legislature and the law have given him a vote, and have entitled him to vote, and he has a right to exercise that privilege. The minister of the Protestant Episcopal religion has the same right, and no less; the minister of the Presbyterian religion has the same; the landlord has his vote, and his tenants have their votes; and is it to be said that the landlord is to use no influence with his tenants? I deny the proposition altogether. I say it is right and becoming that a landlord should use his influence with his tenants; and so long as he does not exercise that influence in an illegitimate manner, no steadier, or safer, or more legitimate influence can be used. The public press, which is now almost one of the estates of the realm from its great and amazing power, from day to day and from hour to hour exercises its influences upon every constituency; and no one would presume to say that the public press should not put forth its tremendous powers, to advise, to lecture, often to control the people; because if you were to place limits upon that power the public benefit would be disregarded, and the freedom of the press would be destroyed. Then, I ask, are the only persons in the community who are not to be at liberty to exercise their legitimate influence the bishops and clergy of the Roman Catholic Church? I meet with a positive negative any such assumption; but, as I said before, that influence must be legitimately exercised. I hold in my hand the report of a case in which the election for a neighbouring county, the county of Mayo, was contested in Parliament before a committee of the House of Commons, in the year 1853. There certain electors for that county petitioned against the return of the present member for that county, Mr. George Henry Moore, and the late member for that county, Colonel Gore Ouseley Higgins. The seat was contested, evidence was given, and the committee came to this resolution: "That it appears from evidence given before the committee, that there was great abuse of spiritual influence on the part of a great body of the Roman Catholic priesthood during the last election for the county of Mayo." That committee was composed of no ordinary men; the chairman was Lord Harry Vane, a most distinguished member of Parliament; one of the members was Mr. John George Phillimore, the member for Leominster, one of the ablest lawyers in the House of Commons, and another was Mr. Clive, a very able man; and they arrived at the resolution which I have read, "that there was great abuse of spiritual influence on the part of a great body of the Roman Catholic priesthood during the last election for the county of Mayo," and yet they declared the members to have been duly elected as knights of the shire. I do not mention this as expressing my concurrence in the decision. I think that if I had come to the conclusion that there was great abuse of spiritual influence on the part of a great body of the Roman Catholic priesthood, I should have also arrived at the conclusion that the representatives were not duly elected. Amongst that committee there was not one single Roman Catholic gentleman, all the members being of the Protestant persuasion; and yet they, having had

that evidence before them, did not think that that abuse of spiritual influence had gone the length of invalidating the election. I come now to a case of an opposite kind. In the year 1857 Colonel Gore Ouseley Higgins was the unsuccessful candidate for the representation of the county of Mayo; he petitioned against the sitting member, Mr. George Henry Moore, and the petition complained of every description of intimidation, and of every description of undue influence. A very full report of the case is given in 1 Wolferstan and Dew's Election Cases, 1857—8. [The learned judge referred fully to the particulars of that case, and proceeded:] Upon that evidence the committee came to the conclusion "that George Henry Moore, Esq., was, by his agents, guilty of undue influence at the last election for the county of Mayo. That undue influence and spiritual intimidation prevailed to a considerable extent at the last election for the county of Mayo. That in the exercise of such undue influence and spiritual intimidation the Rev. Peter Conway and the Rev. Luke Ryan were so prominently active, that the committee deem it their duty specially to report their conduct to the House in order that such steps may be taken as may seem to the House to be proper and necessary." Of course, the gentleman who was so unseated was unable to offer himself to the electors again during the whole of that Parliament. There is a case of undue influence proved to the satisfaction of any man on earth, and there is a case in which it was acted upon by the House of Commons, not shilly-shallying with resolutions condemning spiritual undue influence, and leaving the member to hold his seat, but finding undue influence to have been exercised, and arriving at the legitimate and logical conclusion that the member should not retain his seat. Looking at it in that light, let us approach this case. Has there been such undue influence as ought to avoid the election in this case? If there has, the higher the person who used it the more fearlessly he ought to be dealt with. I care not whether he be curate, parish priest, administrator, bishop, or archbishop. I cannot go higher than that in this country; but if undue influence at an election were proved before me to have been exercised within the limits of the law and of my own reason, consulting as to the proper deductions to be drawn from the facts, I would, without the slightest hesitation in the world, find that to have been an undue election; and let the persons who have brought that state of things about, whenever it occurs, deal with the consequences. In this case every description of charge has been made against the Roman Catholic clergy. They have been charged, in the statement of my friend Mr. Heron, with having refused the rites of the Church, in order to influence votes at this election. If that had been proved in a single case, I would have avoided this election; I would not have hesitated one moment about it. If a single elector—the most miserable freeman that crawls about this town—had been refused the rites of the Church in order to compel him to vote, or because he had voted, or because a member of his family had voted, in a particular way, I would have avoided this election without the least hesitation; but I have never known of such a thing being done in this country. I am perfectly satisfied that the eminent ecclesiastic who gave his testimony so frankly upon that table would countenance no such procedure. I said when the bishop was examined that whatever inferences we might draw from the testimony of the right reverend prelate, no man could deny him the justice of saying that he had frankly told what was passing in his mind, without regard to consequences. I am certain that he would never let near him the abominable idea of making the sacred rites and mysteries of his Church subservient

ELECT. PET.]

MORRIS v. WRIGHT.

[CHAN.]

to political purposes. But the charge was made, and a more fearful charge I know not of; and let me say that it was one which ought not to have been hazarded without a belief in its truth, and that it would be supported in proof. In these petitions I make every allowance for human frailty and for human passion; but I say that where a great body of men, holding a position of the highest importance in the midst of a Roman Catholic congregation, headed by a bishop distinguished for great talent, refuse the most solemn rites of the Church to persons on account of their voting or not voting in a particular way, such action on their part will, and ought to, avoid an election. But I say that such a charge against such men, or against any men, ought not to have been hazarded unless there was forthcoming some evidence of it; and in this case there was not one particle of evidence offered to prove the statement. It was said that the clergy threatened privation of the rites of the Church. There is not a particle of evidence of anything of the kind, not a suspicion of it. The intimidation is divided by Dr. Seeds into spiritual intimidation practised by the bishop upon his clergy, and by the clergy, under his dictation, on the people. I am not here as a censor of the manners of the ecclesiastics of my own or any other church; that is not my province. I have merely to inquire, just as any other judge would do, no matter what his religious belief might be, whether the spiritual influence of the Roman Catholic clergy was brought to bear unduly upon the minds of their congregations, so as to deter them from the free use of their franchise? I may entertain, and I do entertain, opinions about some of the transactions disclosed in this case; and I must say that they do not coincide with those which evidently were entertained by a bishop of my own church. I do not approve of the most sacred mystery which is known to the Roman Catholic Church, or to every Christian in the Roman Catholic Church—that sacred and solemn mystery in which every true Roman Catholic believes that the sacrifice of Calvary is repeated in the atoning blood of our Saviour—being suspended to deliver a political discourse—of the devout minds, whose hopes and expectations are bent upon the celebration of that sacred rite, being diverted or confused by the brawl of an election battle. But, exercising my own opinion, I gave it there; it is due to the right reverend prelate to say that he never preached himself until the sacrifice of the mass had been concluded; but not so with other clergymen. It is described, as we Roman Catholics all understand, that after the first Gospel, the celebration of the mass was suspended, in order to lecture the people upon the subject of the conflicting claims of the different candidates. I think it would be well, even, if the House of God were not made a place for delivering political discourses at all; but I pass that by as a matter of trifling importance. I recognise the full right of the Roman Catholic clergy to address their congregations; to advise them to canvass the merits of candidates; to tell them that one man is for the country, and that another man is against the country; and to tell them that this man is in favour of a church establishment which they think is more for the benefit of the people to have disestablished; to tell them that another man, though a Roman Catholic in profession, is yet playing the game of another candidate who is against the interests, in that respect, of the Roman Catholic population; nay, more, I would not hold a very hard and fast line as to language which, in excited times, might be used by Roman Catholic ecclesiastics or by civilians. They may be impatient; they may be zealous; they may be wrathful, provided they do not surpass the bounds of what is

known to be legitimate influence. I heard nothing, as reported in the discourse of the right reverend prelate, which at all surpassed those bounds. There was no threat to suspend or refuse the rites of the church; there was no play upon the superstitious feelings of the people.

The learned judge found, therefore, that the respondents were duly returned, and that corrupt practices had not extensively prevailed.

Equity Courts.

COURT OF APPEAL IN CHANCERY

Reported by T. BROOKSBANK and E. STEWART ROCHE, Esqrs.,
Barristers-at-Law.

Friday, Jan. 14.

(Before Lord Justice GIFFARD.)

MORRIS v. WRIGHT.

Copyright—Directory—Compilation—Piracy—Injunction—Motion for, before publication of defendant's work.

Although the law is, as laid down in Kelly v. Morris, 14 L. T. Rep. N. S. 222, that in such works as a Directory a later compiler is bound to set about doing for himself that which the first compiler must have done, and must, in the case of a road-book, have counted the milestones himself, and in the case of a map of a newly discovered district, must have gone through the whole process of triangulation, and may use a previous work only to verify his own calculations, and as in Morris v. Ashbee, 19 L. T. Rep. N. S. 550, that the compiler of a directory may not cut a series of slips, or take the names, from an earlier work, and use them in printing his own, even though he send persons with the slips to the several addresses to ascertain their accuracy, yet when slips were cut out of the plaintiff's book only to guide the defendant as to the persons on whom he should call, it was

Held, that the defendant was doing no more than he was authorised to do

And where a defendant had for a time made an improper use of the plaintiff's prior publication, and was so using it at the date of a decision in another suit which established the illegality of such use, and upon that decree desisted therefrom, but proceeded with preparations for publishing his own work, of which preparations the plaintiff became aware by means of information derived from a person who had been in partnership with the defendant, and the plaintiff thereupon at once and before any publication by the defendant filed a bill and moved for an injunction, it was

Held (affirming the decision of James, V. C.), that no interlocutory injunction could be granted, as on publication it might appear that no improper use had been made of the plaintiff's work.

This was an appeal by the plaintiff against an order of James, V.C., dissolving, on the motion of the defendants, an injunction which had been granted restraining the defendants until the hearing of the cause, or further order, "from printing, publishing, selling, delivering, or otherwise disposing of the said projected book, called the Handbook or Manufacturers' and Exporters' Directory of Great Britain, or any part thereof, or any other book in the compilation of which cuttings from the plaintiff's book called the Business Directory of London have been used, or any copy or copies thereof, and from printing or copying any editions of the plaintiff's said book, or any part thereof, and from in any manner using the same, or any copy thereof, or extract therefrom, in the preparation of any future

CHAN.]

MORRIS v. WRIGHT.

[CHAN.]

edition of their said projected book, or any other directory, handbook, or similar work."

The bill stated that in the year 1862, the plaintiff composed and printed and published a book called the *Business Directory of London for 1862—1868*, containing the names, addresses, and trades, or occupations of the merchants, traders, and other persons carrying on business or residing in London and parts adjacent; that the production of this book had cost the plaintiff much study and labour, and a large sum of money, many persons being necessarily employed by him to ascertain by personal inquiry the particulars mentioned; that in every year since 1862 he had published a new edition of that book, and had in the year 1868 added an appendix of merchants, traders, and manufacturers in the provinces; that his book was made the medium for advertisements by manufacturers and tradesmen in London and the provinces, and that of these persons such as desired to have a further description of their trades or businesses than was given in the general heading under which they were classed were entitled to have such fuller description called "extra lines" inserted immediately after their names upon payment of an equivalent sum to the plaintiff, and they would also advertise their goods or wares at the end or in the body of the work upon payment; that by these "extra lines" and advertisements the plaintiff had made a large profit, and that the copyright of all the editions of the book vested in the plaintiff as the registered proprietor, and he had entered such editions at Stationers' Hall; that amongst the persons employed by the plaintiff as canvassers for the edition of 1868, were one William Henry Franklin, and the defendants, George Taylor Wright, and Frederick Wadkin Sternberg, all of whom had for some time been in his service, and were acquainted with the plan of the plaintiff's book, and his method of canvassing for subscriptions and advertisements; that soon after the edition of 1868 was published, the three persons last named left the plaintiff's service, and in April 1868 entered into partnership as directory compilers and publishers under the style of "Wright and Co. of Bristol," and commenced canvassing for a new directory to be published by them to be called the *Western Shipping and Commercial Directory*, but the title of which was soon afterwards changed to the *Handbook or Manufacturers' and Exporters' Directory of Great Britain*; that the plaintiff began his preparations for his edition of 1869 on the 21st July 1868, but that his canvassers found reason to believe that Messrs. Wright and Co., guided by cuttings from his 1868 edition, had called on a very large number of his customers, and forestalled a large number of his orders, but that the plaintiff was unable to obtain at that time legal evidence of the manner in which they were operating; that he had, however, recently discovered as a fact that Wright and Co. had printed his book in preparing their own by cutting up into slips copies of the plaintiff's book for 1868 with its provincial appendix, and these slips containing names and addresses were pasted on printed canvassing forms issued by Wright and Co., and were taken by them or their canvassers as guides to the houses named therein, and the persons or firms named in such slips were solicited by Wright and Co. to pay to them their charges for reprinting such slips in the projected directory and for extra lines and advertisements, and also to purchase the said projected directory; that in this way Wright and Co. had received sums of money, instances of which were mentioned in the bill; that in a similar way Wright and Co. had used slips from a work published by Messrs. Ashbee and Co., which was itself printed from the plaintiff's work, and had been restrained by a perpetual injunction in Nov. 1868: (see *Morris v. Ashbee*, 19 L. T. Rep.

N. S. 550); that the slips thus pasted on the forms were afterwards written out, and the manuscript or copy from which the projected directory was to be printed was thus prepared, and the plaintiff charged that Wright and Co.'s projected directory was a gross piracy of his own work, and that it was impossible to sever the parts which were original from those which were pirated; that Franklin had ceased to be a member of the firm of Wright and Co., who were "preparing for the speedy publication of the projected directory," and had in fact an edition of 1500 copies in the press. The bill prayed an injunction in the terms above mentioned, and an account of sales.

The affidavit of the plaintiff supported the statements of his bill, and Franklin detailed the mode in which the plaintiff's work was used by Wright and Co., and stated that the materials for their directory had been supplied to a great extent from cuttings taken from the plaintiff's book and the work of Messrs. Ashbee and Co., and another witness exhibited some of the cuttings so used by the defendants.

The affidavit of the defendant Wright after questioning the copyright of the plaintiff in his work, and stating that his firm had begun an independent canvass for the country in June 1868, and for London in Nov. 1868, proceeded as follows:

13. Before the decision in this honourable court made in the case of *Morris v. Ashbee*, and knowing the usual practice of the plaintiff, and the instructions which were uniformly given to his canvassers by him, we had no doubt but that we had a right to use cuttings from any copyright directory or other work for the mere purpose of guiding ourselves or our canvassers to the houses of the different manufacturers and traders, so long as we made no other use of such cuttings, and obtained from such persons themselves their names and addresses and any additional entries or other matters which they might wish to have published in our projected work—that is to say, so long as we abstained from copying any part whatever of such other works into our own work, and inserted in our own work nothing but matter obtained originally from our subscribers and patrons.

In paragraph 14, he stated that his firm arranged that lists should be made out of the principal manufacturers and merchants of the different towns to be canvassed, to be supplied to the canvassers, "but we gave strict directions to our canvassers to use the lists supplied only as guides to the residences of the persons therein named, and for no other purpose whatever." He said that the lists were taken from different sources including the works of the plaintiff and of Messrs. Ashbee, as to which latter no adverse decision had then been given; but he said that the names taken from those two works were very few, and that the entries of names in Wright and Co.'s work were far more numerous than those in the said two works.

In paragraph 15, that on the decision on the 11th Nov., 1868, in *Morris v. Ashbee*, he and his partners resolved "to abstain altogether in the future from using cuttings for any purpose whatever;" that instructions were accordingly given to their servants, and that to the best of his belief no cuttings whatever were afterwards used in connection with their projected work.

The 16th paragraph was this:—

§ The course of business of myself, my partners, and our canvassers respectively, was, upon calling on the different persons canvassed, to show them a form printed on the back of a specimen of our intended work, and to canvass them for an order to insert their names, business, descriptions, or other matters proposed to be printed in our work, and, if successful in getting an order, to get the person or persons giving the same to fill up the form presented to him or them, or to furnish a bill-head, circular, or card of his or their own firm, from which such names and extra matter were to be taken. If such persons declined to pay anything they were requested to give authority to insert their names only in one work, for which we required no payment, and were asked to give a card as evidence of such authority having been given. [Then he produced two bundles of papers, which were the forms used as aforesaid and filled up

[CHAN.]

MORRIS v. WRIGHT.

[CHAN.]

by the persons canvassed, or filled up by the canvassers respectively from information directly given by the persons canvassed, and also four boxes of cards were produced containing some thousands of cards received from the canvassers, and he proceeded:—I superintend the compilation of our intended work, and to the best of my knowledge, information, and belief not a single name, or any additional matter of any kind, has been copied for the manuscript of our work from the said work of the plaintiff, or from the said work of Messrs. Ashbee and Co.; where in the manuscript of our said work the names only of persons appear, such names have been copied from the cards received as aforesaid, and where the names appear with additional matter, such names and additional matter have been copied from entries made on our own forms, or on cards and other documents supplied and obtained in manner aforesaid.

17. Only a very small portion of our projected work was canvassed for upon the system which we at first adopted. The bulk of the work, that is to say about seven-eighths thereof, was canvassed without any cuttings at all.

The defendants produced affidavits from several of their customers in corroboration of the foregoing statements as to the manner in which Wright and Co.'s directory was canvassed for.

Franklin, in an affidavit in reply, stated that the manuscript for Wright and Co.'s work was formed up to 1868 to a very great extent from cuttings from the plaintiff's and Messrs. Ashbee's works, and that after that date the said cuttings were used to a very large extent; that the bulk of the defendants' work had indeed been canvassed for before the injunction in *Morris v. Ashbee*.

The plaintiff having obtained an injunction *ex parte*, the defendants moved to dissolve it, and on the 25th Nov. 1869, James, V.C. gave judgment as follows:—"This case is substantially distinguishable on the materials before me, which alone I can deal with for the purposes of this interlocutory application, from *Kelly v. Morris*, and *Morris v. Ashbee*. The case of the plaintiff is, 'You contemplate in a book that you are going to bring out an invasion of my copyright,' and the bill is filed *quia timet*. The plaintiff's case is that the defendants have taken his book, and used it for purposes which were said by the court in those two cases to be an illegal and improper use of it. The accomplice (Franklin) says they used those slips in that way, and that that makes up the sum and substance of the book which is about to be published; the defendants admit that they did use these slips to a great extent for a purpose which they thought at the time was legitimate, for the purpose of canvassing and going round to different people; but when the court decided that what Ashbee was doing was illegal, they determined that they would entirely abandon all use of these slips, and they have not used them for any purpose since that time. I think the balance of evidence is in favour of the defendants. It seemed to be argued on the part of the plaintiff, that if the defendants had for a day, or a week, or a month, or had once done wrong, they never afterwards could do right; that they never afterwards could print any directory, because they had once to some extent availed themselves in a manner not sanctioned by this court of the work of the plaintiff. If they really do what they say they were going to do—to bring out a work in which they do not intend to copy any part of the plaintiff's book—I do not see that I can prevent them, because they at one time used slips for the purpose that has been stated. It is not immaterial to consider that, from all that appears in the affidavits, the sole use of the slips was to obtain orders for paid insertions, which appears to me to be a perfectly legitimate use of them, provided they are not afterwards used for printing, and that ordinary and *bona fide* steps are taken by them to make the book their own directory. Beyond what I have said, it seems to me that the defendant's book is a different book from the plaintiff's. . . . This question is one which may be more accurately determined at the hearing; but, as the case now stands, I do not feel myself jus-

tified in interfering, not knowing how I could compensate the defendants in damages if the plaintiff should turn out to be wrong. But if the defendants, when the whole matter is before the court, and we have the advantage of seeing the book itself when it is ultimately put into shape, do anything wrong, they and their printer will always be liable to make full compensation to the plaintiff, and I think there would be no difficulty in ascertaining the amount of compensation to be paid to him." His Honour, therefore, dissolved the injunction, and the plaintiff appealed.

G. Osborne Morgan, Q. C. and H. H. Cozens-Hardy supported the appeal, relying upon

Kelly v. Morris, L. Rep. 1 Eq. 697; 14 L. T. Rep. N. S. 222;

Morris v. Ashbee, L. Rep. 7 Eq. 34; 19 L. T. Rep. N. S. 550; and

Lewis v. Fullarton, 2 Beav. 6.

Kay, Q. C. and Mark W. Hunter, for the defendants, were not called upon.

Lord Justice GIFFARD said:—It is to be regretted that the plaintiff should have brought the case here at the present time; because I have no doubt that at the hearing full justice will be done, and that at the hearing, if he makes out a case, he will get any relief to which he is entitled. But what I have to consider is not what he may or may not have done at the hearing of this cause. Nor should I wish to do anything which would prejudice the decision that may be come to at the hearing. As far as regards the facts of the case, all I have to consider is, whether at this moment an injunction ought to be granted; or, in other words, whether the Vice-Chancellor ought to have dissolved the injunction which he had previously granted. If one considers the exact state of things at this moment, I have no hesitation in saying that the Vice-Chancellor was quite right in dissolving that injunction. The costs, as I understand it, were to be costs in the cause. The plaintiff, if he is right, will have all he is entitled to, and I have no hesitation in saying also that I ought not now to grant an injunction.

Just observe how the matter stands. First of all, there has been no publication; secondly, no book ever was printed, about seven printed pages and no more have been produced; and thirdly, if this book, compiled as the plaintiff alleges it to have been compiled, was put in a shop window to-morrow, the plaintiff beyond all question, if that book contained that which he says it does contain (the book itself would show the advertisements and so on which he complains of) would get an injunction, and he was in that state that, resting upon the Vice-Chancellor's opinion, no possible prejudice could happen to him. The bill itself was filed in Sept. 1869. The evidence relied upon is that of Mr. Franklin, and great stress has been laid upon Mr. Wright's letter to Mr. Franklin of the 18th Nov. 1868. It is to be observed that *Morris v. Ashbee*, had been decided on the 11th Nov., and that up to that time the parties took a different view of the law to that which was laid down in *Morris v. Ashbee*, and what Mr. Wright writes in that letter is this: "You have the Sheffield papers; look over them and see if any of them are from his cuttings; if they are, mark them, and I must write to the parties and get them to fill up a fresh form. I must have all of them as you promised," and so on. That letter of the 18th Nov. 1868, is unquestionably the letter of a person who knew the position in which he stood with reference to those cuttings, and who at the time was desirous, if any of those Sheffield cuttings had been used bodily, as they were used in *Morris v. Ashbee*, that that should

CHAN.]

MORRIS v. WRIGHT.

[CHAN.]

be set right, and that the cuttings should be put aside; that distinct questions should be put to the parties, and that the parties should give their own special instructions about them; but am I to infer (because that is what I am called upon to do), at this stage of the cause, there being a direct conflict of evidence between Mr. Franklin and Mr. Wright, that it was Mr. Wright's intention to do the very thing which, by the letter of the 13th Nov. 1868, he expressed his intention not to do, or, in other words, to do an illegal act which, if found out, would make him undoubtedly liable? Whether he has or has not done so is a question to be tried at the hearing. I have no doubt whatever that in November 1868 it was his intention, at all events, to bring himself within the 13th and 16th paragraphs of his affidavit, and I do not think it will be very easy to arrive at any conclusion as to whether he has done so or not, without getting those documents which are not produced at present, and with reference to the contents of which, if not produced, I cannot at this stage of the cause at all speculate.

That being so, let us see what the contents of the 13th and 16th paragraphs of his affidavit are, and see whether there is anything in *Kelly v. Morris* or in *Morris v. Ashbee* which would render that which Mr. Wright, I agree, admits in the 13th and 16th paragraphs of his affidavit that he has done, illegal. If there is nothing illegal in doing that which he speaks of in the 13th and 16th paragraphs of his affidavit, taking into consideration the state of things in this case, with, as I have said, no book in the market, no intention on the part of the defendant to do anything beyond what has been done, as stated in the 13th and 16th paragraphs of his affidavit, and certainly if a book were published to-morrow which disclosed on the face of it that it was to any substantial extent copied from the plaintiff's book, he would be in no degree prejudiced by his delay, he would at once get his relief. [His Lordship then read the 13th and 16th paragraphs, and proceeded.] Those two paragraphs are perfectly specific, and no doubt the defendant admits that he used the slips that were cut from the book for the purpose of guiding him to the residences of the persons who were canvassed. That he admits, and nothing more. He denies that there was any copying of any kind or description.

Now first of all if one wanted a definition of "copyright" at all, it could be found in one or two decided cases. I believe that it was said in the House of Lords, that the true definition of "copyright" is "the sole right of multiplying copies." That of course means you must not copy either with or without colourable alterations. That is a general definition of a copyright.

Now let us see what it was that was laid down in *Kelly v. Morris*. I may observe that both in *Kelly v. Morris* and in *Morris v. Ashbee* there was the most direct copying that possibly could be. Not only were the slips used for the purpose of canvassing, but the course pursued really was, when a slip was presented to the person who was canvassed, they asked him whether he authorised the particular thing; they proceeded to get his authority for the insertion, and the thing was copied into the book. We must look at the injunction according to the facts that were proved in the particular case. The present Lord Chancellor says in *Kelly v. Morris*, "I think there must be an injunction in the same terms as that which was granted in *Lewis v. Fullerton*, viz., to restrain the publication of the part which are pirated, without waiting till all the parts which have been pirated, can be distinctly specified. The defendant has been most completely mistaken in what he assumes to be his right to deal with the labour and property of others. In the case of a dictionary, map, guide book, or directory, when

there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road book, he must count the mile-stones for himself"—to stop there for a moment, in this case the party has gone to the individual himself. "In the case of a map of a newly discovered island (the illustration put by Mr. Daniel), he must go through the whole process of triangulation, just as if he had never seen any former map, and generally he is not entitled to take one word of the information previously published without independently working out the matter for himself so as to arrive at the same result from the same common sources of information; and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained. So in the present case the defendant could not take a single line"—that means as I apprehend, that he could take nothing whatever—"of the plaintiff's directory for the purpose of saving himself labour and trouble in getting his information." If it goes further than what I take it to mean, no doubt it goes beyond what the law authorises, and beyond what the decision of the Lord Chancellor and myself was the other day in *Pike v. Nicholas*. It does not mean that he may not look into the book for the purpose of ascertaining where a particular person lived, and for the purpose of ascertaining from that book whether it was worth his while to call upon that person or not; but it means that he may not take that particular slip and show that to the person, and get the authority of the person as to putting that particular slip in. Then the Lord Chancellor goes on—it does not rest there. "The defendant from the description of the way in which he had in the first instance compiled his business directory, seems to have known exactly what he might do. No doubt the expense of procuring information in a legitimate way is very great. The defendant himself has told us so, and also that it was not for some years that he was able to make it pay. But the defendant goes on in his affidavit to propound a most extraordinary doctrine as to the right of publicity in the names of private residents, who had, as he expressed it, given their names for public use. What he has done has been just to copy the plaintiff's book, and then to send out canvassers to see if the information so copied was correct. If the canvassers did not find the occupier of the house at home, or could get no answer from him, then the information copied from the plaintiff's book was repeated bodily, as if it was a question for the occupier of the house merely, and not for the compiler of the previous directory. Further than this the defendant tells us that he had a number of new agents and that one of them performed his part of the work carelessly, thus at once showing how easy it would be on the system adopted by the defendant, for any negligent agent to send back his list all ticked as if correct, without having taken the trouble to make a single inquiry."

I take it that that judgment rests entirely upon the facts, and I am quite satisfied from what the Lord Chancellor said in the copyright case the other day, *Pike v. Nicholas*, that it was never his intention to say you may not look at a directory for the purpose of directing you where to call. What he meant was, you are not to take a passage of the directory, and go and see whether it happens to be accurate, and, if it is accurate, bodily copy it into your directory.

My own judgment in *Morris v. Ashbee* was also referred to. That judgment did not go so far as regards the facts as the judgment of the Lord Chancellor did. What I said was this: "The

CHAN.]

THE ATTORNEY-GENERAL v. THE MAYOR, &C., OF HALIFAX.

[CHAN.]

plaintiff incurred the labour and expense, first of getting the necessary information for the arrangement and compilation of the names as they stood in his directory, and then of making the actual compilation and arrangement, and though each individual who paid might no doubt have his own name printed in capital letters, or with the same super-added lines wherever he chose, neither one nor all of them could authorise the cutting of a series of slips, or the taking of the names, as arranged from the plaintiff's directory, and the use of them in the printing of a rival work. This brings me to *Kelly v. Morris*. In that case, no doubt, Morris's canvassers did more than anything that has been proved to have been done by or on the part of these defendants, for in *Kelly v. Morris*, if the canvassers did not find the occupier of the house at home, or could get no answer from him, then the information copied was printed bodily. Neither the decree, however, nor the judgment, is based solely on, or confined to, this. The decree is general in its terms, following *Lewis v. Fullarton*, and the substance of the judgment is, that in a case such as this no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at these results by some independent road. If this was not so, there would be practically no copyright in such a work as a directory. Moreover, it is not necessary for me to define the extent to which the defendants might have gone, or may go, in using the plaintiff's directory. What I have to determine is, whether they could lawfully do what they actually did. Now it is plain that it could not be lawful for the defendants simply to cut the slips which they have cut from the plaintiff's directory, and insert them in theirs. Can it then be lawful to do so because, in addition to doing this, they sent persons with the slips to ascertain their correctness? I say clearly not." Therefore, it is quite clear in both those cases that the parties had gone very far beyond anything stated in the 13th and 16th paragraphs of Mr. Wright's affidavit. They had virtually and bodily copied from the book; they had copied from the very slip; and all they had done was to take the slip, and vary it, and nothing else. As pointed out by Mr. Wright's affidavit, it is a very different thing undoubtedly. In *Pike v. Nicholas* we had this—two rival works were published with reference to the same subject-matter; and we thought certainly that the defendant had been guided by the plaintiff's book, more or less, to the authorities which the plaintiff had cited; but it was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if he did, taking that book as his guide himself, go to the original authorities, and compile his book from the original authorities, he made no unfair or improper use of the plaintiff's book. And so here, if the fact be that Mr. Wright used the plaintiff's book in order to guide him as to the persons whom it would be worth his while to call on, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book. Of course, the law so laid down, no doubt, would govern this case in the court below, but I do not wish to say anything whatever to prejudice what the ultimate facts of this case may be, supposing the plaintiff makes out such a case as he alleges by his bill; but what I do think in the present state of things is, that the Vice-Chancellor did that which was right between the parties. There was no case whatever for an injunction, there being no book even in print, and no publication of any kind; the plaintiff being in this position, beyond all doubt—that if that was published, which he says the defendant has compiled, he could restrain it.

Under these circumstances, although I regret it, I must refuse the appeal with costs.

Solicitors for the plaintiff, *Williams and James*.
Solicitor for the defendants, *J. Perry*.

Monday, Dec. 6, 1860.

(Before the LORD CHANCELLOR and Lord Justice GIFFARD.)

THE ATTORNEY-GENERAL v. THE MAYOR, &C., OF HALIFAX.

Practice—Withdrawal of appeal—What costs to be allowed to respondent.

An appeal was presented against a decree made in a suit by information and bill. The appellants memorialised the Attorney-General so withdraw his fiat, and he was attended by all parties. He refused to interfere, and held that he had no power to deal with the costs of attending him. The appellants then gave notice that they should withdraw their appeal, and at once served notice of motion accordingly. The respondents asked for a direction that the costs before the Attorney-General should be in terms included in the costs to be paid by the appellants. But

Their Lordships refused any special direction, and ordered only that the appellants should pay all such costs as they would have had to pay if the appeal had on that day been dismissed with costs.

This was an original motion by leave of their Lordships on behalf of the defendants, that they might be at liberty to withdraw a petition of appeal, which they had presented against a decree of James, V.C., they undertaking to pay to the plaintiff and informant such costs as by the order for setting down the said appeal they might be liable to pay, and that the deposit on the appeal might be returned to them. His Honour's decree is reported in 21 L. T. Rep. N. S. 52, and by it an injunction was decreed to restrain a contemplated extension of certain works by which a stream called the Hebble Brook was polluted.

The appeal was on this day about fourteen out of their Lordships' printed list, and it was stated that probably no costs had been incurred by the plaintiff, and it was desired to avoid all further costs.

The common form of setting down an appeal for hearing is that the appeal shall be set down for hearing, upon the petitioners or their solicitors, subscribing the said petition, thereby consenting to pay such costs as the court may think fit to award in respect of any proceedings had (if any) since the decree made at the hearing.

Bristowe, Q.C., appeared to support the motion, of which notice had been given, and, having stated the facts as above, was stopped by the court.

Ince, for the plaintiff and informant, stated that until very lately an appellant could not withdraw his appeal; and though the modern practice had altered that rule, it was necessary for the court to say in each case what costs were to be allowed. On the 8th July 1869 the Vice-Chancellor made the decree; the petition of appeal was presented and set down on the 3rd November, and the order setting it down was served. The appellants then memorialised the Attorney-General to direct the withdrawal of his fiat. This memorial was presented *ex parte*, but the Attorney-General gave notice that he would hear all parties on the 30th November, on the memorial. All parties accordingly attended him by counsel, when he declined to interfere, but held that he had no power to deal with the costs of that application. Notice of withdrawal of the appeal was given on the next day. He now asked

ROLLS.]

Re THE ESTATES INVESTMENT COMPANY; ASHLEY'S CASE.

[ROLLS.]

that their Lordships would give special directions as to these costs, without which, as he alleged, the taxing master would not include them, and he cited

Vowles v. Young, 9 Ves. 172;

Cunyngham v. Cunyngham, Ambl. 89;

and, as to the 20*l.* deposit,

Brashier v. Wyatt, 16 W. R. 182.

The LORD CHANCELLOR said.—Mr. Bristowe, your clients must pay all such costs as if on this day the appeal had been dismissed with costs, including the costs of this motion. I confess it appears to me that the reason of the rule is extremely simple—that whereas, up to the time when that rule was adopted, persons who were minded to withdraw from a contest were obliged to incur the expense of preparing briefs for counsel, to have the matter solemnly argued, and solemnly disposed of in court, they are now permitted by the new system to withdraw at any time they think proper, with less expense incurred in simply making the application to the court, and submitting to the terms, if the matter has not been heard on its merits, of paying all such costs as the court should think fit. What more can be given to anybody than all the costs he would have had if the petition of appeal had been dismissed with costs? It was not intended by the undertaking to put the party under any sort of pressure or penalty, or to do more than if the petition had come to a hearing and had been dismissed with costs, but only to relieve him of some portion of the costs, which might be incurred if he were obliged to bring it on. Therefore the obvious justice of the case is, that the party shall be put in the same position as if he had brought it on, and had been directed to pay all the costs, and it is not because he has given an undertaking of this description that he should pay more costs than he would have been compelled to pay otherwise. There have been some intermediate proceedings before the Attorney-General, as to which it appears there is a difficulty as to the Attorney-General granting the costs; but if the difficulty be so, it might just as well have been so before the case had come on before James, V.C. and before the Vice-Chancellor had dismissed the information with costs. It would have been exactly the same. He would have given no special directions. If they were costs in the cause they would have to be paid for. If they were not costs in the cause they would not have to be paid for. I think the form of order I have suggested will meet the justice of the case.

Lord Justice GIFFARD concurred.

Solicitors: *Edwards, Layton, and Jaques*, agents for *Holroyd and Co.*, of Halifax; and *Williamson, Hill, and Co.*, agents for *Norris and Foster*, of Halifax.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Monday, Jan. 31.

Re THE ESTATES INVESTMENT COMPANY;
ASHLEY'S CASE.

Company—Winding-up—Contributory—Fraudulent prospectus—Laches.

A., amongst a number of other persons, was induced by misrepresentations to take shares in a company. On discovering that they had been deceived, a number of the shareholders repudiated their shares and formed themselves into a committee to protect themselves, and agreed to be bound by the result of a representative suit instituted against the company by one of their

number. A. did not join the committee, and did not repudiate his shares until the representative suit had terminated in favour of the plaintiff. He then demanded back the money which he had paid on his shares, but took no active steps to have his name removed from the register of the shareholders on which he remained at the date of the winding-up of the company:

Held, that he had lost his remedy by laches, and that he must be settled on the list of contributories.

Adjourned summons.

This was an application by the official liquidator of the above named company to settle Mr. Ashley's name on the list of contributories in respect of thirty shares under the following circumstances:

Ashley, amongst a number of other persons, had been induced by the misrepresentations contained in the prospectus to take shares in the company on its formation in February 1865. In the following June several persons who had applied for shares on the faith of these representations repudiated their shares and formed themselves into a committee to protect their interests by legal means, and to resist any actions that might be brought against any of them by the company. On their refusal to make any payments in respect of their shares, actions were commenced against them separately by the company; these were consolidated, and ultimately stayed by order of Martin, B., until the decree should be made in *Ross v. The Estates Investment Company*, a representative suit which had been instituted by Ross at the instance of the committee to have his name removed from the register of shareholders. By an arrangement with the solicitor of the company it was agreed that the other dissentient allottees should not be prejudiced by their not taking proceedings pending the decision in *Ross's* case. The company was ordered to be wound-up on the 16th March 1867, and it was not till after that date that the suit of *Ross v. The Estates Investment Company* was finally decided by the Court of Appeal in favour of Ross: (*Vide* 15 L. T. Rep. N. S. 272; L. Rep. 3 Eq. 122, and on appeal 19 L. T. Rep. N. S. 61; L. Rep. 3 Ch. App. 682.)

Ashley was not a member of the committee of dissentient allottees, nor did he in any way join with them, or agree to abide by the result of *Ross's* suit; and he did not become a client of the solicitor employed by the dissentient allottees until after the date of the winding-up order. At a meeting of the company held on the 18th July 1865, he learned that the prospectus was alleged to contain misrepresentations; and at the same time he heard of the institution of the suit by Ross to have his name removed on the ground aforesaid. He afterwards received a circular from the secretary of the company, stating that arrangements had been made for the settlement of the questions which had been raised between the company and the dissentient allottees.

Ashley took no steps to repudiate his shares until after the decision of Wood, V.C. in *Ross v. The Estates Investment Company* (*sup.*) which was pronounced on the 18th Nov. 1866, and a report of which Ashley read in the *Times* newspaper. Soon afterwards he called at the office of the company and asked them to return the money which he had paid on his shares, but he was in reply informed by the secretary that the money could not then be repaid, as the company were about to appeal from the Vice-Chancellor's decision. His name was afterwards removed from the list of contributories, on the ground that his case came within *Pawle's* case 20 L. T. Rep. N. S. 100, 589; L. Rep. 4 Ch. 497, in which it was held that *Pawle*, a member of the committee, had not lost his right to have his name removed from the list of contributories by having

ROLLS.] *Re* LONDON, HAMBURGH, AND CONTINENTAL EXCHANGE BANK; ZULUETA'S CASE. [ROLLS.]

awaited, under the above-mentioned arrangement with the company, the result of Ross's suit.

The present summons was taken out to settle Ashley's name on the list, on the ground that he had lost his right to relief by *laches*.

Roxburgh, Q. C. (Higgins with him), for the official liquidator, contended that as Ashley's name was on the register of shareholders at the date of the winding-up, and he had taken no proceedings against the company to repudiate his shares, he must now be fixed on the list. He cited

Re The Cleveland Iron Company, Ex parte Stevenson, 16 W. R. 95.

Jessel, Q. C., Swanston, Q. C., and Everitt, for Ashley, contended that there was in this case everything to entitle him to be removed from the list of contributories; there was misrepresentation on the part of the directors, there was no act on the part of Ashley to affirm the contract, and he had verbally repudiated his shares. They cited

Re The Reece River Company, L. Rep. 4 E. & I. 64; *Scholey v. Central Railway Company of Venezuela*, 14 W. R. 786.

LORD ROMILLY.—I think Mr. Ashley must be fixed on the list of contributories. The leading principle in all these cases is, that a man must not play fast and loose. It is the duty of a shareholder in a case like this to go and ascertain for himself whether there has been a misrepresentation or not. He attended the meeting of the 18th July 1865; and instead of joining the committee of dissentient allottees, and agreeing to be bound by the result of Ross's suit, as he might have done, he did what amounted to nothing at all; he remained in such a position that if the company proved successful he could have insisted on retaining his shares. The secretary's reply to this application to have his money returned amounts to nothing; he did not say that if the company failed in their appeal they would pay. I am of opinion that this case is not governed by *Pawle's case (sup.)*, but by *Scholey v. The Central Railway Company of Venezuela (sup.)*, and that Mr. Ashley, therefore, must be fixed on the list of contributories.

Solicitors for the official liquidator, *Batt and Son*.

Solicitor for Mr. Ashley, *H Harris*.

Jan. 29 and Feb. 9.

Re THE LONDON, HAMBURG, AND CONTINENTAL EXCHANGE BANK.

ZULUETA'S CASE.

Company—Payment by directors ultra vires—Remedy.

The directors of a bank instructed their broker to buy a round number of shares in order to keep up their price in the market. The broker accordingly bought and paid for a large number of shares, which were transferred afterwards into the name of a trustee for the bank. In payment for them the secretary of the bank gave the broker a ticket to be delivered to the cashier directing him to credit the broker's account at the bank with the amount which he had paid for the shares, and his account was credited therewith accordingly:

Held, that, assuming the payment to have been made *ultra vires*, it could not be disallowed in the winding-up, as the transaction was concluded by crediting the broker's account with the amount, though it might have otherwise if the transaction had remained *in fieri*:

Held, also, that it was not the duty or the business of the broker to construe the articles of association of the company, or to decide whether the directors were or were not exceeding their powers.

Semble, that if the transaction was *ultra vires*, the only remedy of the shareholders was against the directors personally.

Adjourned summons.

This was an application by Messrs. Zulueta for leave to prove in the name of a Mr. Henry in the winding-up of the above bank for 1843l. 11s. 5d. under the following circumstances:

In Nov. 1864 the directors of the bank, in order to keep up the price of their shares in the market, instructed Mr. Henry, their broker, to buy a round number of shares in the market. The directors made no entry of it in their minute-book, but they called Mr. Henry into the board room and gave him his instructions, using the expression "a round number" of shares, and they informed him that some of the shares would be taken by the directors personally, and the remainder by the company.

Henry accordingly bought 175 shares at the average price of 11l. 1s 4d. per share, and paid for them out of his own moneys. Two of these shares were afterwards transferred into the name of one Edmands, and Henry was paid for them; sixty more were transferred into the names of the various directors, all of whom paid Henry for them; the remaining 113 shares were first transferred into the name of one Hunt, one of the clerks of the bank, in trust for the company, and afterwards into the name of a Mr. Marshall as the nominee of the bank. For these 113 shares Henry had paid 1843l. 11s. 5d.; and he was paid for them by the bank in this manner: the secretary of the bank gave him a ticket to be delivered to the cashier, directing the latter to credit Henry's account at the bank with the amount, which was accordingly done; and Henry continued to draw upon and pay into his account, as he had previously been in the habit of doing. At this time the account showed a balance of upwards of 18,000l. in his favour.

Henry also acted as broker for Messrs. Zulueta, who were in the habit of placing large sums in his hands for investment; and in March 1865, when the winding-up began, Henry had nearly 15,000l. standing to his credit at the bank. This sum in fact belonged to Messrs. Zulueta, who had already obtained leave to prove for the whole amount, with the exception of the sum of 1843l. 11s. 5d., for which the official liquidator refused to allow Messrs. Zulueta to prove, on the ground that the directors had no power to purchase the shares on behalf of the bank, that the purchase was a breach of trust, of which Henry was cognisant, and, therefore, that the transaction was not binding on the company.

Jessel, Q. C., and F. O. Haynes, for Messrs. Zulueta, contended that the directors had power to purchase shares in the bank and to expend the moneys of the company for that purposes, and that, even if the transaction were *ultra vires*, the giving of the credit ticket by the secretary, and the crediting of Henry's account with the money, amounted to actual payment, and concluded the transaction. They referred to

London, Hamburg, and Continental Exchange Bank v. Henry, L. Rep. 7 E

Roxburgh, Q. C., and Graham Hastings, for the official liquidator, contended that the transaction was *ultra vires*, as the articles of association did not authorise the directors to invest the funds of the company in the purchase of their own shares; and that it was a breach of trust of which Henry must be assumed to have been cognisant, as all persons dealing with a company have implied notice of the articles of association; and, consequently, that Zulueta, as claiming through Henry, was not entitled to prove for the amount credited to Henry under these circumstances. They cited

ROLLS.] *Re* THE UNIVERSAL BANKING CORPORATION; MACKRETH'S AND STRANG'S CASE. [V.C. S.

Ernest v. Croysdill, 2 L. T. Rep. N. S. 616; 2 De G. F. & J. 175;

Re German Mining Company, Chippendale's Case, 4 De G. M. & G. 19;

Re Pooley Hall Colliery Company, 21 L. T. Rep. N. S. 690.

Jessel, Q. C., in reply, referred to

Re The Contract Corporation, Ex parte The Ebbw Vale Company, 20 L. T. Rep. N. S. 964; L. Rep. 8 Eq. 14.

Feb. 7.—Lord ROMILLY.—This is an application for leave to prove for 1843*l.* 11*s.* 5*d.* against the bank. The amount is not in dispute, neither is it in dispute that the claimant is entitled to stand in exactly the same situation as Mr. Henry, the late stockbroker of the company. The question is, whether Mr. Henry is entitled to prove for the sum against the bank; in other words, whether he is a creditor of the company. The facts are these. [His Lordship stated the facts of the case, and continued:] By a round number I consider that the directors made a considerable or large number of shares, but that the number was left entirely to Mr. Henry's discretion. The facts of the case being as I have stated, it is difficult to understand how the directors or the official liquidator, which is the same thing, can now say that Henry is not to be at liberty to prove for this amount. It is said that the act of the directors was *ultra vires*, and that it does not bind the company; but assuming this to be the case, it is difficult to see how they can recover back from a person to whom they have paid the money for the goods bought the money so paid. Suppose the transaction to be wholly *ultra vires*, and that the company had joined, how could the directors or the company, in taking the accounts with their stock broker, disallow this item, or require it to be refunded by him? If the transaction was still *in fieri* it might be so, but when it is concluded, and the money paid, what other remedy have the shareholders of the company than to require the directors personally to repay the money so improperly expended by them. For I consider the transaction in effect exactly the same as if the secretary had directed the cashier to pay the money in bank notes to Mr. Henry, and he had done so, and the amount had never appeared in his account at all. It was not the duty or the business of Henry to construe the articles of association of the company, or to decide whether the directors were or were not exceeding their powers. This was a matter for their consideration. Also, how was he to know how many were intended for the company, and how many for the directors or nominees of the directors? One hundred and seventy-three shares were delivered by him to the company; it was not his function to distribute them, or to award sixty to the directors and one hundred and thirteen to the company; all that he was required to do was to deliver the shares, and what he was entitled to was to be paid for the shares which he bought under their instructions. It would be an endless and indeed an impossible matter for every person who has dealings with a joint-stock company to ascertain whether the transaction is within their power and authority. If it were, it would be necessary in some cases to take the opinion of counsel on the subject, and it would in every case paralyse the powers and functions of the board, with whom no one would deal under such a restriction, unless the order was accompanied by an opinion of counsel, and indeed even then the trader would not always be safe. My opinion is that Henry is entitled to prove, and that the remedy of the shareholders, if any, is against the directors of the company personally.

Solicitors for applicant, *Bothamleys and Freeman*.

Solicitors for official liquidator, *Deane and Chubb*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Dec. 10 and 11, 1869, and Jan. 31, 1870.

Re THE UNIVERSAL BANKING CORPORATION (LIMITED);

MACKRETH'S AND STRANG'S CASE.

Company—Contributory and creditor—Assignment of debt—Balance order—Set-off—Composition-deed—Jurisdiction.

A shareholder and creditor of a company who subsequently to the winding-up of the company assigned the debt due to him:

Held, not entitled to set-off the debt against a sum claimed for calls.

A liquidator of a company who refused to prove for calls under a composition-deed, executed by a contributory after the winding-up:

Held, entitled to an order for payment of the calls; but that leave must be obtained from the Court of Bankruptcy before process could issue.

This was an adjourned summons taken out on behalf of a Mr. Mackreth to set aside a balance order obtained against him by the official liquidator of the above company, in respect of a sum of 2550*l.* (residue of a sum of 3400*l.*) due from and ordered to be paid by him for calls on 340 shares in the company.

The facts were as follows:—

The company was incorporated under the Companies Act 1862. Shortly after its formation Mackreth became the holder of the shares in question, and advanced to the company a sum of about 9000*l.* On the 22nd June 1866 an order was made for the compulsory winding-up of the company, and on the 20th Dec. in the same year Mackreth assigned the debt due to him from the company to a Mr. Strang.

In Oct. 1867 Mackreth executed a deed of arrangement with his creditors, whereby he covenanted to pay them a composition of 1*s.* in the pound. In the schedule of the deed (which was duly executed and registered under the Bankruptcy Act 1861) the official liquidator's claim for the 2550*l.* was inserted as a debt due from Mackreth to the company.

On the 16th June 1868 Strang gave the liquidator notice of the assignment of the debt due from the company to Mackreth.

On the 8th July in the same year, the list of contributories of the company (including Mackreth's name) was settled; and on the 16th July Mackreth went to the official liquidator, and tendered him under the deed of composition the sum of 127*l.* 10*s.*, as a full satisfaction of the 2550*l.* The official liquidator, however, refused to receive the money or to come in under the deed.

In Nov. 1868 a call of 10*l.* per share was made upon the contributories; and in Jan. 1869, the balance order for the 3400*l.* was made, and Mackreth paid (as was admitted) 850*l.* under it. On the 5th June 1869 the list of the creditors of the company was settled, including the name of Strang, the assignee of Mackreth's claim. No dividend, however, had as yet been declared on the debts due from the company.

Dickinson, Q. C. and *Bathurst*, in support of the summons, contended that the liquidator was bound to accept the composition tendered to him in discharge of his claim. The deed was perfectly valid and acted as a complete bar to any action which the company might bring against Mackreth for their alleged debt. Further, even if Mackreth was not protected by the deed, he was entitled to set-off against the claim of the liquidator an equal

V.C. S.]

CHUBB v. STRETCH.

[V.C. M.]

amount of the debt of 9000*l.* due to him from the company. Although he had assigned the debt, his assignee could only sue the company for it in his name, and he was still the legal owner of it. They cited

Re Duckworth, L. Rep. 2 Ch. App. 578; 16 L. T. Rep. N. S. 580;

Re The Anglo-Greek Steam Navigation Company, L. Rep. 4 Ch. App. 17; 19 L. T. Rep. N. S. 706; *Blumberg v. Rose*, L. Rep. 1 Ex. 232, 314—365.

Greene, Q.C. and *Brooksbank* for the official liquidator, were not called upon.

The VICE-CHANCELLOR.—I cannot say that I entertain the slightest doubt on the question of set-off. The arguments on the question have proceeded on the fallacy that Mackreth after having parted with all his right to the debt due to him by the company, and made it the property of Strang, still is to be treated as if he had retained some right in respect of it. That is an entire mistake, for if his assignment is good for anything it is an assignment of all his right to recover his debt from the company. In that view of the case, what is now sought by Mackreth is to set-off the debt due from the company to Strang against what he (Mackreth) owes to the company. He cannot, however, assert any such right, because it must necessarily depend on the company owing something to him, and his owing something to the company. After the assignment the company owed nothing to him, and what they now owe in respect of the debt they owe to Strang. There being, therefore, no right of set-off the liquidator is entitled to the balance order claimed. There is a reduction agreed upon, and about that there is no dispute. For that the balance order must go. As to the question affecting the validity and effect of the composition-deed I shall not at present finally dispose of it, because I do not intend that the order I now make shall be drawn up until I have given judgment in the case of *Mitchell and Aspinall*. Both cases are similar with regard to the deed. I still, however, retain the same opinion that I expressed at the time when I reserved my judgment in *Mitchell's and Aspinall's* case, and the more I have thought about it the more I am convinced that the words of the Bankruptcy Act of 1861 admit of no doubt. The decision in the *Richmond Hotel Company, ex parte King*, L. Rep. 4 Eq. 566; 16 L. T. Rep. N. S. 785; L. Rep. 3 Ch. App. 10; 17 L. T. Rep. N. S. 188, proceeded on the ground that the Court of Bankruptcy had no jurisdiction to say whether process could issue or not, if it were process of contempt (which is only process against the person), and that the Act of Parliament only related to process against the property. Now the language of the statute is as clear as can be, for the 198th section mentions process both against the person and the property. Process for contempt is process against the debtor's person for the purpose of compelling him to pay the debt. That seems, by an inadvertence, to have escaped the attention of the court in dealing with the case I have referred to; but however high the authority of the decision of that court upon this question may be, the words of the Act of Parliament are higher, and, therefore, my impression is, that I am bound to act upon them. If the matter be considered, it is quite clear that following the language of the Act of Parliament is what most conduces to the purposes of justice in this case; for if this balance order is allowed to stand, the liquidator, according to the Act, will not be entitled to issue process without leave of the Court of Bankruptcy. That is perfectly clear. When, therefore, he goes to the Court of Bankruptcy, that court having a clear statutory jurisdiction to administer the trusts of the deed, will decide whether or

not, the liquidator is to come in under the deed, or whether he can be allowed to issue process as not being entitled to come in under the deed. If the judge in bankruptcy should say that he must come in under the deed, and the liquidator considers that the deed is a bad one, the question can then be decided by the Lord Chancellor sitting in bankruptcy. The deed is registered in bankruptcy, the Court of Bankruptcy has an express statutory jurisdiction over it, and for other courts to enter into the consideration as to whether the deed is good or bad seems to me a highly inconvenient course. I think also there can be little doubt that questions of this kind can be better disposed of under the paramount jurisdiction of the Lord Chancellor in bankruptcy than by an action at law, or by this court. There is another consideration involved. In this case the court, under its statutory jurisdiction and the Companies Act, is administering the assets of this company, and it is the duty of the court in administering those assets to say what are the debts and what the credits of the company. But what a conflict of jurisdiction there would be if I were now to say what is to be done in the administration of Mackreth's estate, with which I have nothing to do. Any order which I might now make might be at variance with the decree of the other branch of the court when it comes to decide upon the administration of the trusts of the deed of composition. It seems to me that this is one of the few cases in which the statute is perfectly clear and distinct, and in which, by following the words of the statute, a liability to error is escaped. The balance order must therefore stand, and the liquidator must carry it to the Court of Bankruptcy. The Lord Chancellor has jurisdiction to say whether that is right or wrong, because it is a question involved in the administration of the trusts of this deed and the assets of Mackreth. The order, however, as I have before observed, will not be drawn up until the order is made in the case of *Mitchell and Aspinall*. With respect to Mr. Strang's position the liabilities of his assignor attach to him. The order as to that part of the case which affects him will therefore be: Declare a set-off of an equal portion of the debt against the call; let Strang or Mackreth prove for the balance, but order that no dividends be paid on such balance to either Strang, or Mackreth for him, until after the full amount of 2550*l.* has been really paid to the liquidator. The costs of the liquidator will be reserved.

Jan. 31.—The VICE-CHANCELLOR made an order to the effect that the balance order of Jan. 1869 had been rightly obtained, and that the duty of the liquidator would be to apply to the Court of Bankruptcy for leave to issue process against Mackreth according to the course of the court of equity.

Solicitors: *Pulbrook*; *John Rae*.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.

Monday, Feb 28.

CHUBB v. STRETCH.

Separate estate—Debts before marriage—Bankruptcy of husband.

Where a wife had incurred debts before marriage, and on her marriage made a settlement of her property to her separate use:

Held, that her separate estate was liable to the debts, even though her husband had, subsequently to the marriage, become bankrupt and obtained his discharge.

In the months of March and April 1867, the

V.C. M.]

CHUBB v. STRETCH.

[V.C. M.]

defendant, Mary Meade Stretch (then Mary Meade Willing, widow), accepted for her brother, John Gange Franklin, two bills of exchange for 200*l.* and 80*l.* respectively, which she delivered to the Wilts and Dorset Banking Company, who discounted them, and they were indorsed and delivered to the company by the said John Gange Franklin. The bills of exchange were not paid when they became due. On the 8th Oct. 1867, Mary Meade Willing intermarried with the defendant, the Rev. Henry Stretch, and previously to, and in contemplation of, such marriage, an indenture of settlement dated the 5th Oct. 1867, was made and executed between Mary Meade Willing of the first part, the Rev. Henry Stretch of the second part, and the defendant, John Petty Hine, of the third part, whereby Mrs. Willing conveyed to J. P. Hine and his heirs certain lands and hereditaments in the parish of Broadway, in the county of Somerset, to hold the same, after the solemnisation of the then intended marriage, to such uses as she should, notwithstanding coverture, by deed or will appoint, and in default of such appointment, to the use of the said J. P. Hine, his heirs and assigns, during the joint lives of the said Henry Stretch and Mary Meade Willing, upon trust to pay the rents and profits of the said hereditaments and premises to the said Mary Meade Willing for her separate use, and from and after the decease of the said Henry Stretch, in case he should die in the lifetime of the said Mary Meade Willing, to the use of the said Mary Meade Willing for her life, but in case she should die in the lifetime of the said Henry Stretch, then to the use of the said Henry Stretch for his life, and after the decease of the survivor of them, to the uses in the said indenture mentioned; and it was by the said indenture declared that the said J. P. Hine, his executors and administrators, should stand possessed of certain sums due on promissory notes belonging to the said Mary Meade Willing, and which had been endorsed to the said J. P. Hine, upon trust during the life of the said Mary Meade Willing, to permit the same to remain in their then present state of investment, and after her decease to invest the same as therein mentioned; and it was thereby further declared that the said J. P. Hine, his executors, administrators, and assigns, or the trustee or trustees for the time being of the said indenture should stand possessed of such sums, and the securities for the same upon such trusts, and subject to such powers as would correspond with the trusts and powers by the said indenture expressed and declared concerning the said lands and hereditaments, or as near thereto as might be.

The bills of exchange not having been paid at the time they became due, the banking company commenced an action against the defendants, Henry Stretch and Mary Meade Stretch, for the recovery thereof, to which action an appearance was put in; but before judgment could be obtained the defendant Henry Stretch was, on the 27th Feb. 1868, adjudged a bankrupt, and the plaintiff, one of the registered public officers of the company, was, on behalf of the company, appointed creditors' assignee. The amounts due on the said bills of exchange were proved by the company as debts in the bankruptcy, but no dividend was declared, and there were no assets whatever of the bankrupt applicable to the payment of his debts, and he obtained his discharge. The present bill was then filed on behalf of the company, and prayed that it might be declared that the company were entitled to have the rents and profits of the said lands and hereditaments comprised in the said settlement of the 5th Oct. 1867, and the income of the promissory notes therein mentioned, and the securities for the same, during the joint lives of the defendants, Henry Stretch and Mary Meade Stretch, applied in

payment of the said several sums of money due to the company upon the said several bills of exchange, and that the defendant J. P. Hine might be directed to pay the same accordingly, or that the beneficial interest of the defendant, Mary Meade Stretch, under the said settlement might be sold, and the proceeds of such sale might be applied in payment of such sums.

J. Pearson Q.C., and J. J. Jervis for the plaintiff, contended that Mrs. Stretch's separate estate was liable to the debts incurred by her before her marriage, and that although at law she was discharged from the debts by the bankruptcy and discharge of her husband, yet in equity the payment of these debts could be enforced against her separate estate. They cited

Biscoe v. Kennedy, 1 Bro. C.C. 16, *in notis.*

Miles v. Williams, 1 P. Wms. 249;

Sparkes v. Bell, 8 B. & C. 1;

Lockwood v. Salter, 5 B. & Ad. 303;

Bonner v. Bonner, 17 Beav. 86.

Lindley, for the defendants, argued that the wife's debt was absolutely gone at law, through the discharge of the husband. This bill was to recover a debt which was a legal but not an equitable debt. The legal debt was now gone, therefore the bill could not stand. This court had no jurisdiction to enforce a purely legal demand which had gone. The only case in which a wife's debt incurred before marriage was ordered to be paid out of her separate estate, was *Biscoe v. Kennedy* already cited; that case had never been acted upon here, and in America the court declined to follow it (*Vanderheyden v. Mallory*, 1 Comstock, 452). In Jacob's edition of Roper's "Husband and Wife," vol. ii., p. 240, the case was quoted, but without any comment one way or the other. He also referred to 1 Chitty on Pleading, 67.

Pearson, Q.C., in reply.—In all the cases cited a distinction was drawn between separate property and no separate property. The debt did not on marriage cease to be the debt of the wife, though the husband was liable.

The VICE-CHANCELLOR.—This suit raises a point of very great importance. The case raised is this: The plaintiff is one of the registered public officers of the Wilts and Dorset Banking Company, and the defendant, Mrs. Stretch, in the months of March and April 1867, and while a *feme sole*, became the acceptor for her brother of certain bills of exchange which came into the hands of the banking company. In the month of October following she married the defendant Henry Stretch, and being the possessor of a small property, on the 5th Oct. 1867, in contemplation of the marriage, she conveys all the property to which she is entitled to the defendant John Petty Hine, to such uses as she should appoint, and in default of such appointment to the use of the said J. P. Hine during the joint lives of herself and her husband, upon trust to pay the income to herself for her separate use, but without any restriction on anticipation; and what the plaintiff now claims is this separate life estate. The bank, finding the bills were not paid, brought an action against the husband and wife for the recovery of the money. The husband, however, became bankrupt before judgment was obtained, and it is not disputed that he is completely discharged by his bankruptcy from these bills. Now it is perfectly well settled that upon marriage the husband becomes liable for a debt incurred by his wife before marriage; but it is clear that, the debt being a debt of the wife, the husband and wife must be joined as parties in any action for the recovery of the debt; and it is also clear that if before

V.C. M.]

Re WATMOUGH'S TRUSTS.

[V.C. M.]

judgment is obtained the husband becomes bankrupt and obtains his discharge, the wife at law is absolutely discharged for ever from the debt; this was decided in the case of *Lockwood v. Salter*, 5 B. & Ad. 303, and *Miles v. Williams*, 1 P. W. 249. There is no doubt, therefore, that the personal liability of both the wife and husband is completely gone by the husband's discharge. But this bill is founded on the principle that, although the wife is personally discharged her property is not discharged. But on the question of principle, if the law is that a woman who contracts debts, and, having abundant means of paying them, marries, and makes a settlement of her property upon her marriage, is to be discharged from such debts, it is a state of things greatly to be deplored. Removing property from the reach of creditors savours of fraud; people are bound to make provision for their debts, and to settle only such part of their property as is free from debts; and I think the court is bound to consider an evasion of this duty, if not a fraud, at all events, an act deserving of strong disapprobation. In the present case no fraud is alleged, for it is said that the husband did not know of the debts at the time of the marriage; but after the marriage he did know of them, and he now resists the payment of them. Here the lady has secured all her property for her life. Is it just or equitable to say that she should be able to defeat her creditors? The question is, whether she can do so? It is clear that if a man is indebted and marries, and reserves to himself a life estate, the law gives this life estate to the creditors. Why should it be different in the case of a woman? On every principle of justice, every interest she may reserve to herself under her settlement should be liable to her debts. But it is said that as this lady is discharged from her debts at law they cannot be enforced in equity. I think, however, that this point is decided by the case of *Miles v. Williams* (*sup.*); there Lord Macclesfield, then Parker, C. J., after deciding that the wife is for ever discharged by the discharge of the husband, says, "a case may possibly be put, where a woman being in debt may make over all her effects in trust and then marry a bankrupt, and by that discharge all her debts and yet preserve her estate; but that would be a fraudulent conveyance as against creditors, *quoad* so much of the estate as would satisfy their debts, and for that they might have remedy." There Lord Macclesfield puts the very case we have here; and I am of opinion that this lady, *quoad* her estate under the settlement, cannot make a settlement to defeat her creditors; and I entirely agree with his lordship in the opinion that such a settlement is a fraudulent conveyance. The decision in *Miles v. Williams* was followed in *Lockwood v. Salter*, but the judges there declined to give any decided opinion as to the case of the wife having separate property, that being an equitable question. I now come to the other cases that have been cited at law. In *Sparkes v. Bell*, 8 B. & C. 1, the husband and wife were both taken in execution for a debt of the wife's, and an order having been made by Bayley, J., for the discharge of the wife from prison, an application was made to the Court of King's Bench to discharge that order on the ground that the wife had separate estate, although the husband had obtained his discharge as an insolvent debtor. There the court acted on the principle that though the wife may be personally discharged, yet her separate property is not discharged, and granted the application. Bayley, J., said, "When the wife is taken in execution she shall not be discharged unless it appear that she has no separate property, out of which the demand can be satisfied." In *Lockwood v. Salter*, although it was decided that the wife was personally discharged,

yet that eminent judge, Patteson, J., referring to *Sparkes v. Bell*, as apparently inconsistent with *Miles v. Williams*, said the application in the former case was to the equitable jurisdiction of the court, and that the wife might have applied for her discharge under the 72nd section of 7 Geo. 4, c. 57, which was not adverted to in the argument, and he thought that that section was intended to operate so as to make the separate property of a married woman available to her creditors, and that on that ground the decision in *Sparkes v. Bell* might be supported. The court there again recognised the principle that the wife may be personally discharged, but not without giving up her separate property. In *Biscoe v. Kennedy* (reported in a note to *Hulme v. Tennant*, 1 Br. C. C. 16), there were two suits, the object of which was to make the wife's separate estate liable for a debt incurred before marriage. In the first suit, the bill was dismissed; but in the second, the separate estate was declared liable to the debt, which was ordered to be paid out of it accordingly. Mr. Lindley says that this case has not been acted upon, and that in America it has not been followed; but I think that if the case had been one of any doubt, it would have attracted Mr. Jacob's attention. In his edition of Roper's "Husband and Wife," vol. ii., p. 240, he cites the case, and though he does not comment upon it, still I must infer that he cites it as good law, and I am of opinion that it is now good law, and I cheerfully follow it, as it is founded on principles of justice and honesty. I am of opinion, therefore, that all Mrs. Stretch's separate estate must be given up to the payment of the debts incurred by her before her marriage, and, accordingly, that the plaintiff is entitled to the decree he asks. There will be no costs for the husband and wife, but the trustee's costs must be a first charge on the wife's life estate.

Solicitors for the plaintiff, *Whitakers and Woolbert*, agents for *Paull, Ilminster*.

Solicitors for the defendants, *Whites, Renard, and Floyd*.

June 11 and 25, 1869.

Re WATMOUGH'S TRUSTS.

Mortmain—Charitable legacy—Gift towards the erection of a chapel.

A testator left the residue of his property to his executors, "to be given, used, or employed by them towards the erection of a new Wesleyan chapel in the town of H. instead of the one now in use, when such an erection shall take place."

Held, that the gift was void under the Statute of Mortmain.

Booth v. Carter, L. Rep. 3 Eq. 757 dissented from.

It is a clearly settled rule that a gift of money to be applied in building a chapel, schools, or other charitable object, implies the acquisition of land for the purpose of the building, and is therefore void under the Statute of Mortmain.

This was a petition under the Trustees Relief Act, and related to a bequest contained in the will of the Rev. Abraham Watmough, a Wesleyan minister, the question being whether a bequest towards the erection of a chapel was void under the Statute of Mortmain.

Mr. Watmough died in 1863, and by his will, made in 1861, he left the whole of his estate, after payment of his debts and funeral expenses, to be used and employed by his executors for the sole use and benefit of his wife, as she might require it while living, and to cover the expenses of her funeral, when dead, and the rest of his property he gave, bequeathed, and left in the hands of his ex-

[V.C. M.]

Re WATMOUGH'S TRUSTS.

[V.C. M.]

cutors, "to be given, used, or employed by them toward the erection of a new Wesleyan chapel in the town of St. Helen's instead of the one now in use, when such an erection shall take place."

Mrs. Watmough died in 1868, and the executors after her death paid 534*l.* 8*s.* into court under the Trustee Relief Act, as representing the testator's residuary personal estate. The trustees of the Wesleyan Chapel at St. Helen's presented this petition, which asked that the fund might be paid to them, to be applied by them towards the building of a chapel then in course of erection. The circumstances of the case, which were referred to in the petition were, shortly, that the testator, during his life, had occasionally preached in the Wesleyan Chapel at St. Helen's. This chapel was too small for the congregation, and about the time the testator made his will, discussions, in which he took part, had frequently taken place as to the necessity of erecting a new chapel, and the means of providing funds for that purpose. There was at that time a probability that a new chapel would be built as soon as the funds could be obtained. In 1868 the trustees of the chapel took a lease for 999 years of a piece of land, and a new chapel was now in course of erection upon it, and, when completed, it was to be used instead of the existing chapel. *

Glasse, Q.C. and Rowcliffe for the petitioners, maintained that the bequest towards the erection of a chapel was a valid one. It could not be inferred here that the testator intended that the money which he bequeathed was to be laid out in the purchase of land, and the old doctrine that a bequest was void which tended to bring fresh land into mortmain was over-ruled by the House of Lords in *Philpott v. St. George's Hospital* (*infra*), which established the principle that it must appear upon the face of the will that the testator intended the money to be laid out in the purchase of land. Here the natural construction of the testator's words pointed to the site of the old chapel, which was land already in mortmain. In *Booth v. Carter* (*infra*), a bequest in almost precisely similar terms to the present, was held to be valid.

Wickens, for the Attorney-General, supported the prayer of the petition, and took the same line of argument.

Cole, Q.C. and Bird, for the testator's next of kin, opposed the petition, and urged that the bequest was void. It was laid down that a direction to build must be considered as a direction to purchase land for the purpose of building, unless a contrary intention is clearly expressed. In *Philpott v. St. George's Hospital*, which had been relied upon by the other side, the testator had expressly prohibited the application of money in the purchase of land. *Booth v. Carter*, was inconsistent with the authorities. Moreover, the gift here was void for remoteness.

Badnall for the executors.

The following cases were cited :

Philpott v. St. George's Hospital, 6 H. of L. Cas.

Booth v. Carter, L. Rep. 3 Eq. 757;

University of London v. Yarrow, 1 De G. & J. 72

Edwards v. Hall, 6 De G. M. & G. 74;

Sorresby v. Hollins, 9 Mod. 221;

Carter v. Green, 3 K. & J. 591;

Johnston v. Swann, 3 Mad. 457;

Hartshorne v. Nicholson, 26 Beav. 58;

Sewell v. Crewe-Read, L. Rep. 3 Eq. 60;

Attorney-General v. Davies, 9 Ves. 535;

Pritchard v. Arbouin, 3 Russ. 456;

Mather v. Scott, 2 Keen, 172;

Giblett v. Hobson, 3 My. & K. 517;

Henshaw v. Atkinson, 3 Mad. 303;

Attorney-General v. Hull, 9 Ha. 647;

Tatham v. Drummond, 34 L. J. 1, Ch.; 11 L. T. Rep. N. S. 324;

Dunn v. Bownas, 1 K. & J. 596;

Attorney-General v. Bishop of Chester, 1 Bro. C. C. 444.

The VICE-CHANCELLOR.—This case involves important principles, though it relates to a bequest of no great amount. The testator, after giving his property to his wife for her life (which makes no difference as regards the construction of the bequest in question) gives the rest of his property "to be given, used, or employed by his executors towards the erection of a new Wesleyan chapel in the town of St. Helen's instead of the one now in use, when such an erection shall take place." Now it has not been, and could not be, contested, that if the testator had added the words, "on the site of the existing chapel," or had in any way pointed out that the new chapel was to be erected on land already in mortmain, or had expressly prohibited his executors from applying the money in the purchase of a site, the bequest would have been perfectly good. But I have been surprised that the question whether a bequest of money for the purpose of building a chapel is valid or invalid, should have been argued. It is a question which has been discussed for many years, and it is in my opinion clearly established by all the authorities (except the case of *Booth v. Carter* (*sup.*), that a naked gift of money to be applied in building anything, whether it be a chapel or school, or any other building, implies the acquisition of land for the purpose of the building, and is, therefore, within the Statute of Mortmain, and is invalid. The rule is stated by Lord Eldon in *Attorney-General v. Davies* (*sup.*) to be, that "unless the testator distinctly points," that is to say, by the terms of his will, "to some land already in mortmain, the court will understand him to mean that an interest in land is to be purchased, and the gift is not good." That rule has been acted upon ever since. In *Pritchard v. Arbouin* (*sup.*), which has always been considered a leading authority on this subject, the rule is again laid down in almost the same language. In *Giblett v. Hobson* (*sup.*) where the terms of the bequest were very similar to those in the present case, although there never was a case in which it was more fit to give a favourable construction to a charitable legacy, for it was perfectly clear from the extrinsic evidence that the testator intended the almshouses to be built on the land already promised to the charity, the Vice-Chancellor (Sir L. Shadwell) and Lord Brougham felt themselves bound to hold the bequest void, because the testator had simply given a direction to build, without referring to land already in mortmain. In *Mathew v. Scott* (*sup.*) all these authorities are cited and followed as establishing the rule of the court. I was surprised to hear counsel contend that all these cases have been overruled by the House of Lords in *Philpott v. St. George's Hospital* (*sup.*), but I have carefully read that case, and I find that, so far from being overruled or impugned, all these cases are cited, and expressly approved of and affirmed; and each of the learned lords who gave judgment in that case laid down the rule as an established rule, that a direction to lay out money in building implies a direction to purchase land upon which to build. I need only mention the other authorities to the same effect which have been cited: *Attorney-General v. Hull* (*sup.*); *Dunn v. Bownas* (*sup.*); and the latest authority, *Tatham v. Drummond* (*sup.*), in which Lord Westbury, in accordance with all the decisions, held that a direction to build slaughterhouses implied the necessity of purchasing land, and was therefore void. *Philpott v. St. George's Hospital* has really nothing to do

V.C. J.]

JOHNSTON v. RENTON. JOHNSON v. PARSEY.

[V.C. J.]

with this case; there the testator not only directed that the money should be laid out in building on land which was to be provided from other sources, but, to avoid all possibility of doubt, he expressly prohibited the application of his money in or towards the purchase of land. It is in my opinion so important that the rules of construction should be free from doubt, and that every one should be able, upon reading the will, to say whether a bequest is valid or invalid, that I should not have called upon the counsel for the respondent in this case if it had not been for the decision of the Master of the Rolls in *Booth v. Carter* (*sup.*). I asked Mr. Cole to distinguish that case from the present, but he failed to do so, and in my opinion the two cases are undistinguishable. The only additional words in the bequest in this case, viz., "when such an erection shall take place," merely express that which would have been implied if it had not been expressed, and consequently they have no effect upon the construction. In *Booth v. Carter* the Master of the Rolls seems to have allowed himself to be influenced by the extrinsic evidence that there was land already in mortmain on which the chapel might be built. But in my opinion the rule is clearly settled, that in order to uphold such a bequest you must find in the will itself, and not outside it, a saving clause rebutting the implication which arises from a direction to build, that land is to be purchased, and as in *Booth v. Carter* there was nothing in the will but a direction to apply the money in building, I think that the decision in that case is contrary to all the authorities, and to the established rule, which is founded on principles of convenience and justice, and I must, with all respect for the Master of the Rolls, decline to follow it, and must decide that this bequest is void. I hope the case may be carried further, so that this point may be clearly settled by the court of appeal.

Solicitors: *Gregory, Rowcliffes, and Rawle; Clarke, Woodcock, and Ryland.*

V. C. JAMES'S COURT.

Reported by W. H. BENNET and R. T. BOULT, Esqrs., and Hon ROBERT BUTLER, Barristers-at-Law

Jan. 12 and 13.

JOHNSTON v. RENTON.

JOHNSTON v. PARSEY.

Shares in company—Forged transfer—Rights of owner.

On bill filed by plaintiff, the owner of shares in a railway company, which had been transferred to innocent purchasers by deeds of transfer to which the name of the plaintiff was forged by the person to whom he had intrusted the shares for safe custody, against the company and the innocent purchaser, praying that the purchaser might be decreed to deliver up the certificate to the plaintiff, and that the company might be decreed to cancel the alleged transfer, and to deliver to the plaintiff a new stock certificate:

Held, that the plaintiff was entitled to the relief prayed, but that, under the circumstances, his own negligence having facilitated the forgery, he was not entitled to costs.

Cottam v. Eastern Counties Railway, 1 J. & H. 243, followed.

The object of both these suits was to obtain the decree of the court that the defendants Renton and Parsey should deliver to the plaintiff certain railway stocks, and that the railway companies should re-enter the name of the plaintiff in their books as the owner of such stock.

The facts in the first suit were as follows:—

William Johnston in 1865 delivered the certificates for twenty-five fully paid-up shares in the Metropolitan District Railway Company for safe keeping with George Edward Hudson, as manager of the United Service Company Bank (Limited), with which company the plaintiff kept a banking account, and on the 4th Sept. 1865, Hudson gave the plaintiff a receipt for the certificates.

On the 25th Sept. 1865, the shares were converted into stock, and the plaintiff was registered as the owner of such stock. Shortly afterwards the certificate for the same was given to the plaintiff, who signed a receipt for it, and at the same time gave his address as at 9, Waterloo-place, where the United Service Company Bank carried on business, saying it was the address of his agent George Edward Hudson, who had the charge of the share certificates.

On the 12th Nov. 1867, the plaintiff gave Hudson the stock certificates for the purpose of keeping them safe, and Hudson received the dividend and put it to the plaintiff's credit in his banking account.

The United Service Company in June 1868, passed a resolution for voluntarily winding-up the affairs of the company. About this time Hudson began to carry on a banking business on his own account, and sold the plaintiff's railway stock of which he held the certificates to the defendant Renton, who purchased them in the ordinary course of business on the Stock Exchange. Hudson forged the plaintiff's name to the deed of transfer. On the 7th July the registrar of the railway company having received the forged transfer and the stock certificate, wrote to the plaintiff to inform him that the transfer was lodged for registration, and directed the letter to 9, Waterloo-place. No answer being received, the transfer was duly registered, and a new stock certificate was given to Renton.

A short time before the 4th Nov. 1868 Hudson absconded, and about the same time the plaintiff discovered the forgery; and on the 6th Nov. his solicitors wrote to Renton, and also to the secretary of the railway company, informing them of the forgery and requiring the transfer to be cancelled. Renton replied that he did not consider himself liable to return the stock. On the 20th Nov. 1868 this bill was filed, and on the 14th April 1869 it was amended. The bill prayed that the defendant Renton might be decreed to deliver to the plaintiff the stock certificate, and that the railway company should cancel the forged transfer, and re-enter the plaintiff's name in their books as the owner of such stock, and that all dividends accrued and to accrue on such stock since the alleged transfer took place should be paid to the plaintiff.

The defendant Renton denied the fact of the forgery, and insisted that he had a good legal title to the stock; and even admitting the allegations in the bill, the plaintiff, whatever his remedy might be against the company was entitled to none as against him, and that the plaintiff had, by his own negligence, so contributed to the fraud as to prevent him obtaining that relief to which he might otherwise be entitled.

The following were the facts in the second suit: The plaintiff was the owner of 200*l.* stock of the London and South-Western Railway Company, the certificates for which he deposited with Hudson as manager of the United Service Company for safe custody, and the plaintiff requested by letter the treasurer of the railway company to pay all dividends accruing thereon to his agents the United Service Company, and in a postscript he gave his address at the East India United Service Club. Towards the end of June 1868 Hudson, without the knowledge of the plaintiff, sold this stock to the

V.C. J.]

JOHNSTON v. RENTON—JOHNSTON v. PARSEY.

[V.C. J.]

defendant Parsey, giving him a transfer deed purporting to be signed by the plaintiff, and also the certificates of the stock. The defendant Parsey sent the transfer-deed to the treasurer of the railway company for the purpose of being registered. The treasurer then wrote a letter to the plaintiff, addressed to his club, inclosing a notice which he begged to be returned to him after being signed by the plaintiff if the transfer was correct. Receiving no answer to this letter, the treasurer wrote two more letters to the same purport and directed to the same address, to the last of which the following reply was received:

14, St. James'-square, 16th July, 1868.

SIR,—In reply to yours of the 11th and 15th instant, I beg to say that I have executed a deed of transfer of the 200l. stock held by me in the London and South-Western Railway. I am, Sir, your obedient servant, W. JOHNSTON.
To the Treasurer of the London and South-Western Railway.

Hudson, who by some means had become acquainted with the contents of the treasurer's letters, forged the above reply. In consequence of that reply the transfer was registered in the name of the defendant Parsey. Within four days after the plaintiff discovered the forgery his solicitor wrote to the treasurer of the company, informing him of the fact of the fraud. The treasurer replied that the shares had been transferred into the name of the defendant Parsey. The plaintiff's solicitors wrote another letter threatening the railway company with proceedings if the company did not cancel the transfer and restore the stock to the plaintiff. The company not acceding to the request, this bill was filed, which prayed for relief in the same manner as in the first issue, except as to payment of the dividend.

Willcock, Q. C. and Graham Hastings were for the plaintiff.

Fry, Q. C., and Streeten appeared for the Metropolitan District Railway Company.

Fry, Q. C., and Gaselee for the London and South-Western Railway Company.

Lindley and Stirling were for the defendant Renton.

Amphlett, Q. C., and Lindley were for the defendant Parsey.

The following cases were cited in the course of the argument:—

Taylor v. Great Indian Peninsula Railway Company, 4 De G. & J. 559;

Governor and Company of the Bank of Ireland v. Trustees of Evans's Charity, 5 H. L. Cas. 389, 413;

Cottam v. Eastern Counties Railway Company, 1 J. & H. 243; 3 L. T. Rep. N. S. 465;

Hare v. London and North-Western Railway Company, Joh. 722; 2 L. T. Rep. N. S. 229;

Hildyard v. South Sea Company v. Keater, 2 P. Wms. 76;

Ashby v. Blackwell and Million Bank Company, 1 Amb. 503; 2 Eden, 299;

Davis v. Bank of England, 2 Bing. 398;

Taylor v. Midland Railway Company, 28 Beav. 287; 2 L. T. Rep. N. S. 588;

Sloman v. Bank of England, 14 Sim. 475.

The VICE-CHANCELLOR.—Both these cases appear to me to be on all fours with *Cottam v. Eastern Counties Railway Company*, both as to the relief prayed and as to the costs. In this case, no doubt, the plaintiff had a right to say, "I am the owner of stock and the company will not acknowledge my right." I am of opinion that it would have been quite competent to the plaintiff, if he had been so advised, to have filed a bill against the company alone, saying, "I am owner of this stock, I am a shareholder. You have put somebody else's name

on the register. This is a matter I have nothing to do with, any more than if you had given it to anybody without authority. I claim that I had 500l. stock, and I still have it, it never having been transferred." He might have filed his bill against the company for that purpose; and if he had done that, the company might probably have insisted that somebody else should have been made a party, and if the company had so insisted, then there would have been a different question as to costs. No such opportunity was given to the company here. The company, if such opportunity had been given, would probably have given notice to the transferees that if they did not come in as defendants they, the company, would retransfer the fund back into the name of the transferor, or something of that kind. However that may be, the facts here are substantially the same as in the case of *Cottam v. Eastern Counties Railway Company*; that is to say, a forged instrument, together with the possession of the deeds, was presented to the company; the company acted upon that; the person who claimed under the forged instrument was made a defendant; the company was also made a defendant, and the decree in that case was to restore the debentures to the plaintiff whose name had been forged. But at the same time the conclusion of the Vice-Chancellor's judgment was that it was not a case for costs. I am bound to say I cannot see any distinction between that case and this; at all events, any distinction which is in favour of the plaintiff, because, as far as I can make out, there was no negligence of any kind attributable to the parties there, except that they all three joined in depositing the instrument in the hands of one solicitor. In this case I am bound to say there is some evidence of negligence, or, at least, of misplaced confidence, on the part of the plaintiff, which misplaced confidence has led to the loss; and it would, therefore, be very hard, as it seems to me, to throw the costs arising from the plaintiff's misplaced confidence on the other parties who have been misled by it. The facts are these: In the first place, as to one company, he gave his address at the banker's, who, through their manager allowed the certificates to get out of their hands. He trusted the certificates with them; that is part of the trust which he reposed in the bank. He then told the company that any notice to be sent to him connected with these shares was to be sent to the bank. The notices were sent to the bank, and thereby the company was deprived of the protection which they otherwise would have had. Then he says, "It was all wrong, it was a gross fraud of the manager of the bank." But who was it who trusted the bank, and who was it who, through the bank, trusted the manager? Why, the plaintiff. It seems to me, therefore, that, in the first place, the plaintiff has by his own negligence led to the proceedings. In the second suit he says he gave his address at his club. In some way or other the club must have received authority from him to hand the letters over to the person who got them, and it was the plaintiff's business to have taken care that letters of business were sent to him at his own proper address. Not having done that, he has also in that respect contributed to the loss by his own want of precaution, or his own misplaced confidence in somebody else, which comes to the same thing. Therefore, it seems to me that this is a much stronger case than that of *Cottam v. Eastern Counties Railway Company* for following the decision of the Vice-Chancellor, and saying that this is not a case for costs against either of the defendants. The remedy will be simply, in the first suit, to decree the company to cancel the alleged transfer of the 500l. stock to the defendant Renton, and the entry of such alleged transfer, and to enter the name of

V.C. J.] *Re* ALBERT ASSUR. CO. BRIGHTON TURNPIKE TRUSTEES *v.* SURVEYORS OF PRESTON. [Q. B.]

the plaintiff in their books as the owner of such 500*l.* stock, and to deliver to the plaintiff a certificate of the ownership of such stock. I think the company must pay the dividend. I think the plaintiff has a right to have it, whether against the person who has received it, or against the company. In the first suit, therefore, the order for payment of the dividend will be against the company. In the second suit, I think the plaintiff has a right to say, "You have paid my money, and you must repay it to me." It will exactly follow the words in *Cottam v. Eastern Counties Railway Company*. The decree will be without prejudice to any question between the co-defendants in equity as well as at law.

Solicitors for the plaintiff, *Deane and Chubb*.

Solicitors for the defendants in the first suit, *Murray and Hutchins; Baxter, Rose, Norton, and Co.*

Solicitors for the defendants in the second suit, *R. and W. B. Smith*, for *John Pearce*, Wandsworth; *J. Crombie*.

Tuesday, Feb. 15.

Re ALBERT LIFE ASSURANCE COMPANY;

COOK AND EDWARDS' CASE.

Assurance Company—Petition to wind-up—Premium payable after presentation of petition.

The non-payment by a policy-holder of a premium falling due after the presentation of a winding-up petition, in which an order for winding-up is ultimately made, does not affect the policy-holders' claim against the company, in respect of the policy.

The question raised by this petition was whether a policy was forfeited by non-payment of the premium after a petition to wind-up the company had been presented.

The premiums on the policies in question were payable on the 7th Aug., and the thirty days' grace allowed by the rules of the company for the payment of premiums expired on the 7th Sept. In the mean time, on the 11th Aug., a petition for winding-up the company was presented, and on the 17th Sept. the order to wind-up the company was made.

Eddis, Q. C., and *Lindley*, for *Cook and Edwards*, contended that they were not bound to pay the premiums after the petition to wind-up the company had been presented, and referred to

The Companies Act 1862 (25 & 26 Vict. c. 89), s. 84:

Re Smith, Knight, and Company, ex parte Ashbury, L. Rep. 5 Eq. 223;

Kay, Q. C. and *Higgins* appeared for the official liquidators of the company, and submitted that the contract between the policy-holders and the company was not put an end to by the presentation of a petition to wind-up the company, and that the policy-holder must go on paying the premium due on his policy until the time arrived for proving for the amount of his claim. The time fixed by the General Orders of Nov. 1862, rule 25, for ascertaining the liability of a company in course of winding-up was not the date of the commencement of the winding-up, but the date of the winding-up order. The premium in this case not having been paid within the thirty days' grace, which expired before the winding-up order was made, the policy had been forfeited. They cited the following cases in support of their argument:

Re Trent and Humber Company, ex parte Cambrian Steam Packet Company, L. Rep. 4 Ch 112;

Ex parte Mendel, 1 De G. J. & S. 330.

Eddis, Q. C. was not heard in reply.

The VICE-CHANCELLOR was of opinion that nothing in this case had occurred to interfere with the rights of the policy-holder. There was a contract between this gentleman and the company to the effect that if he would pay a certain sum every year on a certain day, they on their part would, after his death, pay a certain sum to his representatives. The performance of this contract the company had rendered impossible for this gentleman to perform, for, on the 11th Aug. 1869, a petition to wind-up the company was presented, and on the 17th Sept. a winding-up order was made which was quite inconsistent with the contract. By this order the funds of the company were transferred to the official liquidator, whose duty it was to apply them in discharge of the liabilities of the company. For all practical purposes it was the company and not the policy-holder who determined this contract. The case mentioned by the learned counsel for the company, in which a company sought, by means of a winding-up order, to be relieved from their contract, and in which case damages were recovered against them, was not applicable to the present case. In the present case the amount of damages should be ascertained on the day of the commencement of the winding-up. The claimant is entitled to prove notwithstanding the non-payment of the premium. The costs to come out of the assets of the company.

Solicitors: *Mercer and Mercer*; and *Lewis, Munns, Nunn, and Longden*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Saturday, Jan. 15.

THE BRIGHTON TURNPIKE TRUSTEES *v.* THE SURVEYORS OF THE HIGHWAYS OF THE PARISH OF PRESTON.

Turnpike-road—Order of contribution for repairs for parishes—Principle of computation.

When an application is made to justices at the instance of turnpike trustees for an order of contribution upon the parishes through which the road runs towards its repair, such order should be made upon the principle of the actual costs of repairs of the road in each parish, and not upon a mileage principle.

*Where, therefore, the trustees of a turnpike-road were authorised by their Act to expend annually 850*l.* upon the repairs of their road, and finding that sum was insufficient they applied to justices for an order of contribution upon the several parishes through which their road ran, and in doing so represented that they had expended the 850*l.* upon the mileage principle, whereby a larger contribution was required from parish P. than would have been required had they expended on the road in such parish a fair proportion of the 850*l.* according to its relative wear and tear:*

*Held, that the trustees were wrong, and that the justices having estimated what would be the fair relative proportion of the 850*l.* to have applied to the repair of the road in such parish, and having made an order for the deficiency, they were right in so doing.*

This was a case stated by Justices under the 20 & 21 Vict., c. 48, as follows.

At a special sessions for highways, held at Hove, in the county of Sussex, on the 1st March 1869, an information by *Edward Waugh*, clerk to the appellants, was exhibited before the justices under the 4 & 5 Vict., c. 59 (which statute has been continued by several subsequent statutes to the present time),

Q. B.] BRIGHTON TURNPIKE TRUSTEES v. THE SURVEYORS OF HIGHWAYS OF PRESTON. [Q. B.]

stating that the funds of the Brighton, Cuckfield, and West Grinstead Turnpike Trust, applicable under the Brighton, Cuckfield, and West Grinstead Turnpike Roads Act 1854 (the local Act by which the trustees are authorised to levy tolls upon the roads, for the repairs and maintaining the same), were insufficient for the repairs of the turnpike road within the parish of Preston, and praying that the justices would proceed to make such judgment and order in the premises, as upon examination to the justices would seem meet, and as to law did appertain. The justices examined into the allegations contained in the information, and it appearing to them that the allegations were true, they did adjudge and order that the respondents should pay to the appellants the sum of 53*l.* out of the highway rates to be levied in the parish of Preston, such sum of 53*l.* to be wholly laid out in the actual repairs of such part of the turnpike road as lies within the parish of Preston. The appellants were dissatisfied with the determination of the justices, upon the hearing of the information, as being erroneous in point of law; and having duly applied to them to state and sign a case setting forth the facts and grounds of their determination for the opinion of this court, the following case was stated:—

Upon the hearing of the information the following facts were proved and admitted by both parties:—The Turnpike Trust is regulated by the Brighton Cuckfield and West Grinstead Turnpike Roads Act 1854, which Act is to be taken and considered as part of this case, and is hereinafter referred to as the local Act. Sect. 25 of the local Act, provides for the application of the revenue of the trust in the following order: First, in paying the expenses of the Act. Secondly, in paying the expenses of erecting a new toll house, in lieu of the Preston gate. Thirdly, in paying the expenses of repairing toll gates, and in salaries and general management, not exceeding in any one year the sum of 174*l.* Fourthly, in paying the expenses, not exceeding the sum of 850*l.* in any one year, of maintaining and keeping in repair the said roads. Fifthly, in paying interest at 3*l.* 10*s.* per cent. on 2761*l.*, a portion of the debt due on the roads. Sixthly, in paying interest at the rate as aforesaid, on 4700*l.* the remainder of the debt. Seventhly and eighthly, in reducing the principal of such debt. Ninthly, in paying any further expenses (beyond the sum of 850*l.*) of maintaining, keeping in repair and improving the roads and of putting the Act into execution in reference thereto. There was not any portion of the revenue applicable for the repair of the roads under the ninth clause.

The roads of the trust were of the total length of thirty-five miles, and the proportion of the turnpike road within the parish of Preston was one mile and thirty-eight poles in length. The sum of 850*l.* authorised by the local Act to be expended in repairs of the roads was at the rate of about 24*l.* 6*s.* per mile on the whole length of the roads, and such sum was wholly insufficient for the repairs of the roads. The average cost of the repairs has been the sum of 1200*l.* per annum. In no one of the parishes within which the turnpike road of the trust lies, can it be kept in repair for a sum at the rate of 24*l.* 6*s.* per mile. The estimated cost of repairs for the whole of the road for the year ending 31st Dec. 1869, was the sum of 1850*l.* 13*s.*, out of which the cost of repairing so much of the turnpike road as lay within the parish of Preston for that year was the sum of 142*l.* 13*s.* 2*d.* The portion of the turnpike road which lay within the parish of Preston had a large amount of traffic upon it, and was very much used and resorted to by the inhabitants and visitors of Brighton, and costs considerably more to keep in repair than any other portion of the road. There was no toll gate in the parish of Preston, and under the local Act the trustees

were prohibited from erecting a toll gate in such parish. The cost of keeping the roads in repair varied considerably in the several parishes, and the following tabular statement shows the length of the road in each parish, and the estimated cost of repairing the same for one year.

Name of Parish.	Length of road.				Total cost of repairs in 1869.		
	M.	F.	P.	L.	£	s.	d.
Preston	1	"	38	"	142	13	2
Patcham	2	"	34	"	172	15	3
Piecombe	2	2	38	"	108	11	3
Clayton... ..	4	5	39	11	202	4	5
Keymer	1	"	37	12	41	1	0
Cuckfield	10	2	37	22	328	11	2
Hangham	3	6	1	"	99	13	5
Crawley... ..	"	6	13	" 2	31	11	11
Ifield	1	2	8	2	38	14	0
Bolney... ..	2	2	32	"	59	14	4
Cowfold	2	3	37	15	70	5	2
West Grinstead	1	7	25	"	54	17	11
	34	7	21	39	1350	13	0

The appellants, as trustees of the roads at a meeting held for, among other purposes, that of fixing the amount to be contributed towards the repairs of the roads out of the highway rates of the several parishes within which they lie, had considered and decided that the sum of 850*l.*, which by the local Act they are authorised to expend out of the tolls in the repair of the roads, should be credited to the several parishes within which they lie rateably in proportion to the mileage of road of the trust within each parish; and they consequently applied to the respondents to pay them out of the highway rates for the parish of Preston the difference between the anticipated cost of the actual repairs of such part of the turnpike road as lies within the parish, and the sum (portion of the 850*l.*) which they had on the above-mentioned mileage principle appropriated to the repairs thereof. The respondents contended that the trustees ought to expend the sum of 850*l.* in proportion to the actual wear and tear in each parish.

There was no evidence to show whether the sum of 850*l.*, or any part thereof, had been actually expended in proportion to mileage, or in proportion to wear and tear. Under the mileage principle contended for by the appellants the proportion of the sum of 850*l.* to be spent in the parish of Preston was 27*l.* 4*s.* 8*d.*, leaving a sum of 115*l.* 8*s.* 6*d.* to be contributed by the respondents, and this last-mentioned sum the appellants applied to the justices to adjudge and order to be paid by the respondents. The justices were of opinion that—whereas the anticipated cost for the entire year of the repair of all the roads of the trust was 1850*l.* 13*s.*, of which 850*l.* was the sum to be contributed under the local Act out of the tolls, and the excess 500*l.* 13*s.*, the sum to be contributed under the general Act out of the highway rates—it was right that the two sums of 850*l.* and 500*l.* 13*s.* should be apportioned between the several parishes upon one and the same principle, that, namely, in accordance with the anticipated expense for the entire year of repair in each parish and not upon the principle of mere mileage, and as 89*l.* would be the share of the 850*l.* for which the parish of Preston would be entitled to have credit on this principle, the justices ordered the respondents to pay out of the highway rates of the parish of Preston the sum of 53*l.* 13*s.* 2*d.*, such sum being the difference between 89*l.* and the sum of 142*l.* 13*s.* 2*d.*, the estimated cost for the entire year of the repairs in that parish. The question of law arising upon the above statements was whether, under the circumstances stated, the decision of the justices was correct, or whether the principle contended for by the appellants was correct? If the court should be of opinion that the principle contended for by the

Q. B.]

Ex parte MARGARET SHORT.

[Q. B.]

appellants was the correct one, the order is to be amended by increasing the sum of 53*l.* 13*s.* 2*d.*, thereby ordered to be paid, to the sum of 115*l.* 8*s.* 6*d.* But if the court should be of a contrary opinion, then the order is to stand.

Grantham appeared for the appellants, and contended that the decision of the justices was wrong, for that the mileage principle is the one they should have adopted, being not only the simplest, but in its result the fairest.

Merrifield, for the respondents, argued that the justices were right in their decision, for that the just way of apportioning the 850*l.* was according to the relative extent of the wear and tear of the roads in the various parishes.

Grantham was heard in reply.

Cases cited.

Rea v. The Justices of Berks, 8 Dowl. 727 ;
Reg. v. South Shields, 23 L. J. 134, M. C. ;
Brown v. Evans, 34 L. J. 101, M. C.

COCKBURN, C. J.—I think that our judgment should be for the respondents. The Act of Parliament makes provision for enabling the trustees of turnpike roads where the funds are insufficient to bear the expenditure necessary in repairing the roads to apply for an order for contrivance out of the highway rate made for any parish through which the road passes. Now, starting from that point of view, I come to the conclusion that an apportionment according to the mileage principle is wrong. The present is a case of a trust with roads passing through several parishes, one contiguous to Brighton, where the population is large and the traffic heavy, and others being country parishes without any such large population or heavy traffic. In the former class of parishes, a much larger expenditure would be required than in the latter. Now if the fund which the trustees are authorised to raise and expend was sufficient for the repair of the whole system of roads it would be expended according to the proportion required for this or that parish. Instead, however, of being sufficient, it proves to be insufficient, and it therefore becomes necessary to apply for a rate in aid. Suppose then, that for parish A. 100*l.* should be required for the maintenance of the roads, whilst for parish B. 50*l.* would be sufficient, and a rate in aid is required, the amount which the trustees have in hand ought to be expended in the same proportion as it would have been if it had been sufficient without calling for any contribution. Justice and equity require that it should be apportioned between the parishes in proportion to the expenditure required in each for the repairs of the road in each. The justices, therefore, were right in saying that the fund received by the trustees ought to be apportioned in the way suggested by the respondents.

MELLOR, J.—I am of the same opinion. No doubt the division according to the mileage principle is the more simple of the two, but certainly the more equitable mode of apportioning is according to the expenditure actually required.

HANNEN, J.—I certainly felt some difficulty during the argument, but upon reflection I agree with the opinion expressed by my Lord. If, indeed, it had been intended that the fund should be applied according to the mileage principle, it is somewhat strange that the Legislature should not have said so ; and as they have not, I think that it must have been contemplated that something more was necessary than a mere mileage proportion. It is certainly proper that the greater expenditure required in the

repair of any particular portion of the road should be taken into consideration.

Judgment for the respondents.

Attorney for appellants, *E. Waugh*, Cuckfield.

Attorneys for respondents, *Williams and Greaves*, Brighton.

Thursday, Jan. 27.

Ex parte MARGARET SHORT.

The Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27, s. 17 ; 4 & 5 Will. 4, c. 87, s. 7)—*Second offence*—*Conviction*.

A beerhouse keeper, after the passing of the 32 & 33 Vict. c. 27 (The Wine and Beerhouse Act 1869) was convicted of the offence of keeping her house open for the sale of beer on Sunday before half-past twelve o'clock at noon, and subsequently she was again convicted for refusing to admit a constable to her premises :

Held, that the offence first named was properly treated as an offence within the provisions of the 4 & 5 Will. 4, c. 87, s. 7, and that the justices were right in treating the last-named offence as a second offence and of awarding a penalty accordingly.

J. Paterson moved for a rule calling upon two justices of Cheshire to show cause why a writ of *certiorari* should not issue to remove unto this court a certain conviction, made on the 6th Oct. last, against one Margaret Short, for refusing to admit a constable to her premises, which consisted of a beerhouse, whereby she was adjudged to be disqualified from selling beer, ale, &c., for the space of two years. By the 4 & 5 Will. 4, c. 85, s. 7, it is enacted

That it shall be lawful for all constables and officers of police, and they are hereby authorised and empowered to enter into all houses which are or shall be licensed to sell beer or spirituous liquors to be consumed upon the premises when and so often as such constables and officers shall think proper ; and if any person having such licence as aforesaid, or any servant or other person in his employ or by his direction, shall refuse to admit, or shall not admit, such constable or officer of police into such house, or upon such premises, such person having such licence shall for the first offence forfeit and pay any sum not exceeding 5*l.*, together with the costs of the conviction, to be recovered within twenty days next after that on which such offence was committed, before one or more justices of the peace ; and it shall be lawful for any two or more justices before whom any such person shall be convicted of such offence for the second time to adjudge (if they shall so think fit) that such offender shall be disqualified from selling beer, ale, porter, cider, or perry, by retail for the space of two years next after such conviction, or for such shorter space of time as they may think proper.

By the 32 & 33 Vict. c. 27, s. 16, it is enacted that—

Where any person licensed under any of the said recited Acts to sell beer, cider, or wine by retail, or any person licensed under the said Act of the ninth year of the reign of King George the Fourth, is convicted of keeping his house open for the sale of, or of selling beer, cider, wine, spirits, or any other excisable liquor, or of suffering the same to be drunk in such house at any time during which such house ought by law to be closed, any person (other than the servants or inmates of such house) present in such house at such time shall, unless he account for his presence to the satisfaction of the justices having cognisance of the case, be liable on summary conviction to a penalty not exceeding 40*s.* for each offence.

Sect. 17 enacts that—

In the following cases, that is to say (1), where any person is convicted of an offence against the tenor or conditions of a licence granted to him under any of the said recited Acts, or of an offence for which a penalty is imposed by any of the recited Acts. (2) Where any person is convicted of an offence against the tenor of a licence granted to him under the said Act of the ninth year of the reign of King George the Fourth, if any previous conviction or convictions since the passing of this Act for any of the said offences be proved against him, the offence of which he is last convicted shall be deemed to be a second or third offence as the case may be, provided that the said previous conviction or convictions did take place within the five years next preceding.

Q. B.]

JONES (app.) v. DICKER (resp.)

[Q. B.]

The conviction did not refer to any previous offence for which the said Margaret Short had been convicted of the same kind, but four other convictions for other offences were recited in it, one of which was since the passing of the 32 & 33 Vict. c. 27 (The Wine and Beerhouse Act 1869), and that was for keeping the house open for the sale of beer on Sunday before half-past 12 o'clock at noon. It was stated on affidavit, that the said Margaret Short had never been previously convicted of the offence of refusing to admit a constable into her house, or of any of the offences enumerated in the first branch of the 17th section of the 32 & 33 Vict. c. 27, since the passing of such Act.

J. Paterson contended that the justices were wrong in inflicting the penalty of disqualification from selling beer, &c., for two years, for the conviction shows no first offence which was necessary to justify them in inflicting it. The keeping of the house open upon a Sunday for which Mrs. Short had been convicted, could not be considered as a second offence, for that, it is submitted, is not an offence against the tenor or conditions of a licence granted to her under any of the recited Acts. It certainly was an offence under the 3 & 4 Vict. c. 61, s. 15, but that part of the Act is repealed by the 11 & 12 Vict. c. 49, s. 2, and a new enactment is provided with reference to this matter under the 4th section, and which Act is for regulating the sale of beer and other liquors on the Lord's Day, and imposes a penalty of five pounds for a breach of its enactments. That enactment is not included in those recited in the 32 & 33 Vict. c. 27.

E. Taylor showed cause in the first instance. The justices had jurisdiction to convict as they have done. Although there had been no previous offence of refusing to admit a constable, there certainly had been one of keeping the house open for the sale of beer before half-past twelve o'clock at noon, which it is submitted is an offence which comes within both branches of sect. 17 of the 32 & 33 Vict. c. 27, it being in fact an offence against the tenor of the licence. Although the 11 & 12 Vict. c. 49, was passed for regulating the sale of intoxicating liquors on the Lord's-day, yet it was one applicable to the due conduct of the house as intended by the last statute. [He was stopped by the court.]

J. Paterson was heard in reply.

COCKBURN, C.J.—I am of opinion that there should be no rule. The offence created by 11 & 12 Vict. c. 49, is identical with that which had been prohibited by the licence. It is certainly against the tenor and condition of the licence, and no doubt the Legislature framed the 17th section with the view of meeting such a case.

BLACKBURN, J.—I am of the same opinion. The obvious meaning is, that if a conviction takes place of the commission of one of a certain class of offences since the passing of the 32 & 33 Vict. the offence of which the person is last convicted shall be deemed a second offence with the consequences attached to the committing of a second offence.

MELLOR, J. concurred.

Rule refused.

Attorney for the prosecutor, E. J. Kent, Liverpool.

Attorneys for the appellant, Bretherton and Co., Birkenhead.

Monday, Feb. 14.

JONES (app.) v. DICKER (resp.)

Poaching Act (25 & 26 Vict. c. 114), s. 2—Unlawfully going on land in search or pursuit of game—Evidence to support conviction.

Appellant, a common carrier between B. and R., was met by a police constable coming along the turnpike road to R. with his horse and cart. The constable, suspecting that the appellant had been unlawfully on land in pursuit of game, asked him if he had any game in his cart, to which he replied that he had only a few rabbits. The constable then searched the cart, and found in a basket, beneath the rabbits, a pheasant, nine partridges (three of which had been shot, and six netted), and two hares (one of which had been shot, and the other trapped). The game was wet, and had been recently killed; and the boots of the appellant (who fainted when the game was discovered) were dirty, although the road was dry. The justices who convicted the appellant found that "no evidence was given on the one hand to show that the game was unlawfully obtained, or on the other hand to show that it was lawfully obtained."

Held, that the foregoing circumstances did not constitute sufficient evidence on which the appellant could be convicted of having obtained game by unlawfully going on land in search or pursuit of game within sect. 2 of 25 & 26 Vict. c. 114.

Case stated by justices.

This is a case stated by us, the undersigned, three of Her Majesty's justices of the peace for the county of Denbigh, under the stat. 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before us as hereinafter stated.

At a petty sessions holden at the county hall in Ruthin, in and for the division of Ruthin, in the county of Denbigh, on the 2nd Dec. 1867, an information preferred by John Dicker, sergeant of police, Ruthin (hereinafter called the respondent), against Hugh Jones, of Bettws Gwerfil Goch, in the county of Merioneth, carrier (hereinafter called the appellant), under sect. 2 of the 25 & 26 Vict. c. 114, intituled the Game Poaching Prevention Act, charging for that he the said Hugh Jones, on the 19th Nov. 1867, in the parish of Llanfwrog, in the county of Denbigh aforesaid, was lawfully searched by him, the said John Dicker, a constable for the said county of Denbigh, in a certain highway, then called "the road from Ruthin to Carrig-y-druidion," the said constable then having good cause to suspect the said Hugh Jones of coming from certain land there where the said Hugh Jones had been then unlawfully in search or pursuit of game, and the said Hugh Jones having in his possession game unlawfully obtained, and the said constable having then and there also lawfully stopped and detained a certain cart, in and upon which he had good cause to suspect game was then and there being carried by the said Hugh Jones, there being then and there found in and upon the said cart certain game, to wit, one pheasant, nine partridges, and two hares (which the said constable then and there seized and detained), contrary to the statute in that case made and provided, was heard and determined by us, the said justices respectively, being then present, and upon such hearing we decided the appellant came within the words of the statute, and he was duly convicted before us of the said offence, and we adjudged him, to forfeit and pay the sum of 3*l.* 2*s.* to be applied according to law, and to pay to the respondent the sum of 1*l.* 18*s.* for his costs in that behalf, and, in default of payment of the said several sums, we adjudged the appellant to be imprisoned in the

Q. B.]

JONES (app.) v. DICKER (resp.)

[Q. B.]

common gaol at Ruthin, in the said county, for the space of two months.

And whereas the appellant being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, hath, pursuant to sect. 2 of the said stat. 20 & 21 Vict. c. 48, duly applied to us in writing to state and sign a case, setting forth the facts and the grounds of such our determination as aforesaid for the opinion of this court, and hath duly entered into a recognisance as required by the said statute in that behalf.

Now, therefore, we the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case:

Upon the hearing of the said information it appeared that it was laid by the respondent in his character of a police constable, and in pursuance of the directions of the statute, and it was proved on the part of the respondent and found as a fact, that the appellant was a common carrier residing at Bettws (which is partly surrounded by the county of Denbigh), in the county of Merioneth (which adjoins the county of Denbigh), and was in the habit of carrying goods to the markets held in the town of Ruthin, in the county of Denbigh. That on the morning of the 19th Nov. last, the appellant was met by the respondent, a police constable for the county of Denbigh, coming along the turnpike road (in the county of Denbigh) leading from Cerrig-y-druidion and the village of Bettws to the town of Ruthin, with his own horse and cart, and about a mile out of the town of Ruthin, and in the county of Denbigh.

That the respondent suspected the appellant of having been on land taking game, and also of carrying game for himself and others, and this suspicion was in consequence of private information the respondent had received. The respondent asked the appellant if he had any game in his cart, to which he replied that he had no game whatever, only a few rabbits which he had bought. That the respondent searched the cart and found a basket covered over with a cloth, and in the basket were some rabbits, and under the rabbits one pheasant, nine partridges, three of which had been shot, and six had been netted, and two hares, one of which had been shot and the other trapped. That on the game being found by the respondent in the appellant's cart, the appellant fainted. That the game was wet and had been recently killed, and the appellant's boots dirty, although the road was dry, and the game was not visible in the cart. That the highway where the search took place was in the county of Denbigh, and about eight miles from Bettws, where the appellant lived. That the appellant, on being asked where he had the game from, stated that his wife had bought it from some person.

On the part of the appellant, a witness was called who proved that the appellant was a common carrier from Bettws to Ruthin, and that on the morning in question the witness had brought a parcel to him at Bettws, and placed it, at six o'clock in the morning on the 19th Nov., in the cart close to the basket in which the game was afterwards found. That he had seen a piece of the basket only, that a cloth covered the top part, and that the person afterwards accompanied the appellant to a place called Melin-yurg, on the borders of the county of Denbigh, a distance of about one and a half mile from Bettws, but saw no game put into the cart, or the basket disturbed, and that the appellant sometimes worked at a farm in Denbighshire. There was no evidence to show that the game was in the basket at Bettws, nor that it could not have been killed and put in after the appellant entered the county of Denbigh. No evidence was given on the one hand to show that

the game was unlawfully obtained, or on the other hand to show that it was lawfully obtained.

It was contended on the part of the appellant that the suspicions of the respondent, the search on the highway, and the possession of the game by the appellant, with the other concomitant circumstances, were not sufficient to support a conviction under the circumstances of his being a common carrier, and bound to carry all parcels entrusted to him in the same undisturbed condition in which he received them; that we, the said justices, were wrong in deciding as we had done; that the respondent was not bound to state and prove his grounds of suspicion of trespass, or to state whether or not he suspected the trespass to have been committed in the county of Denbigh or Merioneth; that the respondent not having seen the appellant coming from any land, but merely travelling the high road with his cart, and the latter's clothes not being wet, or any nets or other instruments for taking game found in his possession, we, the said justices, wrongly convicted the appellant, and that the appellant's witness having proved that the basket which, when found in the county of Denbigh, contained the game was in the cart at Bettws, a constable of the county of Denbigh had no right to take the game, nor had we jurisdiction to adjudicate on the information.

The questions for the consideration of the court are, first, whether our decision that the respondent was not bound to state and prove his grounds of suspicion of trespass, or to state whether or not he suspected the trespass to have been committed in the county of Denbigh or Merioneth was right? Second, whether or not it was incumbent on the respondent to show affirmatively that the appellant had been unlawfully on any land in the county of Denbigh in search or pursuit of game, and had so unlawfully become possessed thereof? Third, whether or not there was in point of law evidence from which we might infer that the appellant had obtained such game by unlawfully going on any land in search or pursuit of game, or that he had in his possession game unlawfully obtained?

If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand, but if the court should be of opinion otherwise, then the said complaint is to be dismissed.

JAMES MAURICE.

ROBT. GEO. JOHNSON.

GABL. ROBERTS.

25 & 26 Vict. c. 114, s. 2, enacts that—

It shall be lawful for any constable or peace officer, in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game; or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets, or engines used for the killing or taking game; and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, or should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace assembled in petty sessions as provided in the 18 & 19 of Her present Majesty, c. 126, s. 9, as far as regards England and Ireland, and before a sheriff or any two justices of the peace in Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, guns, parts of guns, nets, and engines, and the justices shall direct the same to be sold or destroyed, and the proceeds of such sale, with the amount of the penalty, to be paid to the trea-

Q. B.]

JONES (app.) v. DICKER (resp.)

[Q. B.]

suror of the county or borough where the conviction takes place; and no person who, by direction of a justice in writing, shall sell any game so seized, shall be liable to any penalty for such sale; and if no conviction takes place, the game or any such article or thing as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized.

Morgan Lloyd, for the appellant. In the first place the offence created by the statute is not charged in the information at all. The offence named in the statute is having "obtained game by unlawfully going on any land in search or pursuit of game, or having used" any gun, part of gun, nets, or engines "for unlawfully killing or taking game," or "having been accessory thereto;" whereas the offence charged in the information is that the appellant was lawfully searched by a police constable, then having good cause to suspect him of having come from certain land where he had been unlawfully in search and pursuit of game, and that he had in his possession game unlawfully obtained. None of the enumerated instruments for killing game was found upon him; and the only offence of which he could have been guilty, if guilty of any, was that of having "obtained game by unlawfully going on land in search or pursuit of game;" and, as that offence is not charged in the information, the information was bad.

Horatio Lloyd, for the respondent.—There are three questions submitted by the justices for the decision of this court, and the question now raised is not one of them, and cannot therefore be now discussed. [LUSH, J.—Such a question could not be matter of appeal in this form. If the conviction is void on the face of it, the proper remedy is to bring it up and quash it. We must confine ourselves to the questions put to us.]

Morgan Lloyd, in continuation.—Even if the information was good, it is submitted that there was nothing in the evidence to justify a conviction for "having obtained game by unlawfully going on land in search or pursuit of game." The appellant is a common carrier in the habit of carrying goods to Ruthin, and the justices state as a fact that no evidence was given to show that the game was unlawfully obtained. [LUSH, J.—Even supposing the appellant had got the game found in his cart from a poacher who had unlawfully taken it on land within the jurisdiction of the justices, would that be an offence under this Act?] It is submitted that it would not.

Horatio Lloyd for the respondent.—The finding of the justices that there was "no evidence" given to show that the game had been unlawfully obtained, means only that there was no direct evidence. There was quite sufficient indirect evidence to support the conviction. If the appellant had been carrying the game merely as a common carrier nothing would have been easier for him than to have given evidence of the fact of its having been sent by some person to another. Then there is the denial by the appellant that he had any game whatever in his cart, when asked by the police constable; the fainting of the appellant when the game was discovered by the constable; the fact that the game was wet, and had been recently killed; and the dirty boots of the appellant, although the road was dry—circumstances all pointing to the guilt of the appellant. In *Brown v. Turner*, 13 C.B., N.S., 485, a conviction was upheld under circumstances not materially different. There four labourers were met by a police-constable early one Sunday morning, on the high road. Suspecting from their appearance that they had been poaching, and seeing that there was something bulky in the pocket of one of them, the constable searched him (the other three walking away), and drew from his pocket five wild rabbits, which had been recently killed, and an iron spud;

the constable then followed another, and found in his pocket a net suitable for taking rabbits, and which appeared to have been recently used, and some rabbit's fur and fresh blood on his coat cuffs; the constable proved that a third member of the party had at a subsequent hour on the same morning sold a dead wild rabbit at a beerhouse for 6d.; and the Court of Common Pleas held that the magistrates were justified in inferring from the above evidence, as against three out of the four, that they had been unlawfully on some land in search or pursuit of game within this Act, although there was no proof that either of the parties had been seen off the high road. So in *Evans v. Botterill*, 3 B. & S. 787; 8 L. T. Rep. N. S. 272, it was held that it is not necessary to the conviction of a person charged under this Act that he should be shown to have come from some land, and that the presumption of that fact may be drawn from the surrounding circumstances. In that case five men were taken at 6 a. m. on a Sunday morning on a highway carrying bags, in which were found one hare and fifteen rabbits, and also with several nets and stakes used for the fastening down of the nets, but were not proved to have been on any land in pursuit of game; and it was held by this court that these facts constituted sufficient evidence on which the magistrates might have convicted the men of having obtained the game by unlawfully going on land in search of game, or of having used nets and stakes for unlawfully killing and taking game. [LUSH, J.—The section of the Act authorises the constable to search any person whom he may have good cause to suspect of "coming" from any land, where he shall have been unlawfully in search or pursuit of game, &c. At present I do not see any evidence of the appellant having been found so "coming" from any land. Suppose the appellant had himself been poaching the night before, and is found next day with game in his possession, could he, under such circumstances, be said to be "coming" from land where he had been unlawfully pursuing game?] The inference to be drawn from the circumstances of the present case is against such a view as that, for the game is found to be wet and recently killed, and the appellant's boots to have been dirty, though the road was dry. [HANNEN, J.—The justices do not say whether the dirt on the boots was not such as might have been got on the road.]

LUSH, J.—I think we must answer the third question put to us in the negative. I think there was no evidence in point of law from which the justices could infer that the appellant had obtained the game found in his cart, by unlawfully going on land in search or pursuit of game within the meaning of sect. 2 of the Act 25 & 26 Vict. c. 114. No doubt the case was one full of suspicion, and the appellant, in all probability, either obtained the game by poaching himself or from some poacher; but that is not the offence created by the statute, which is, that the person suspected "shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid (viz., gun, &c.) for unlawfully killing or taking game, or shall have been accessory thereto," and when "coming from any" such land he may be stopped and searched. Now I do not think there is any evidence here to show that. The facts proved in evidence lead as strongly to one inference as the other, and that is not sufficient to support a conviction. The appellant is proved to be a carrier going from one town to another, and game is found in his cart. It is true that the game is wet and recently killed; but how recently killed does not appear. It might have been killed the previous night, and by another per-

C. P.] THE TAMWORTH, PENRYN AND FALMOUTH, AND SOUTHAMPTON ELECTION PETITIONS. [C. P.]

sen than the appellant, and if so there would not be an offence within the Act. Therefore, as the facts leave the matter doubtful, the evidence is not, I think, sufficient to warrant a conviction.

HANNEN, J.—I am of the same opinion.

Conviction quashed.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR and H. H. HOCKING, Esqrs.
Barristers-at-Law.

Tuesday, Jan. 18.

HILL AND ANOTHER v. PEEL AND ANOTHER (The Tamworth Election Petition). BROAD AND OTHERS v. FOWLER AND ANOTHER (The Penryn and Falmouth Election Petition). PEGLER v. GURNEY AND ANOTHER (The Southampton Election Petition).

Costs—Election petition—The Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125), s. 41.

Where, on the trial of an election petition, an order is made by the presiding judge for the payment of the costs of the successful, by the unsuccessful, party, the successful party is entitled, on taxation of costs, to an indemnity for all costs that were reasonably incurred by him in the ordinary course of a matter of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over caution or over anxiety as to any particular case, or from considerations of any special importance arising from the rank, position, wealth, or character of either of the parties, or any special desire on his part to insure success. Such extraordinary costs as an attorney would not be justified in incurring without distinct and special instructions from his client ought not to be allowed, nor the costs of purely collateral proceedings upon which a party has failed, nor those which may have been occasioned by his default, negligence, or mistake.

There is no objection to the master adopting an uniform standard of allowance for counsel engaged on election petitions as an average for ordinary cases: (Per Borill, C. J. and Brett, J.)

It is reasonable and proper that consultations should be held among the counsel engaged in an election petition, from time to time during the trial thereof, and the fees paid for such consultations ought to be allowed on taxation to the successful party, according to the usual mode of charge in ordinary suits.

As to the costs incurred by the successful party after the presentation of the petition and before the hearing, the parties are entitled to take the judgment of the master on the particular items, if they think fit, instead of submitting them to him in one lump sum.

These three cases had been tried, and in each case the respondent had been successful, and an order had been made by the presiding judge for the payment by the petitioner of the respondent's costs.

In the *Tamworth* case, the fees paid to counsel by the respondent were, to the leading counsel, 200 guineas with his brief, and a refresher fee of 50 guineas a day for every day after the first; to the junior counsel, 100 guineas with his brief, and six refresher fees at 25 guineas each for six days attendance after the first. Upon taxation of costs, the master allowed in respect of the fee paid to the leading counsel with his brief, 100 guineas, and for refresher fees 25 guineas a day; and in respect of fees paid to the junior counsel, 50 guineas, and refresher fees of 15 guineas a day. The briefs consisted of 103 sheets each, besides various other voluminous documents and papers. For preparing these briefs the respondent's attorney charged 200

guineas, but this was reduced to 100 guineas on taxation. The respondent's attorney also employed a local attorney, whose charges amounted to 80*l.* 19*s.* 8*d.* The whole of this sum was disallowed on taxation.

In the *Penryn and Falmouth* case, there were two respondents, and the petitioners deposited only one sum of 1000*l.* in the Bank of England, as security for costs, in pursuance of the Parliamentary Elections Act 1868. The respondents, thinking that two sums of 1000*l.* ought to have been deposited, moved the court, after having failed before a judge in chambers, to set aside the petition, on the ground of the insufficiency of the recognizance. The court granted a rule, which, however, on cause being shown, was subsequently discharged without any order as to costs. The respondents now sought to put on the petitioners their expenses in these proceedings, but the master disallowed them. The fees paid to counsel were 300 guineas with the brief to the leader, with refresher fees of 50 guineas a day; and to the junior counsel, 150 guineas with the brief, and 30 guineas a day refresher fee. These were reduced by the master to 100 guineas and 25 guineas refresher to the leader, and 75 guineas and 20 guineas refresher to the junior. The master, moreover, allowed an extra 25 guineas to the leader and 20 guineas to the junior, on account of the great distance from London. The respondent's attorney charged 100 guineas for instruction for briefs, and besides that charged a large number of items, having relation to the preparation of evidence. The master considered that these items were already charged for under the head of instructions for briefs, and he accordingly struck them all out, but at the same time allowed 150 guineas instead of 100 guineas for the instructions. In the course of the trial of the petition, fees were paid to counsel on three different occasions for consultations, but the master on taxation refused to allow for more than one consultation.

In the *Southampton* case the main item disallowed by the master amounted to nearly 1000*l.*, and represented the charges of the respondents' attorney and three clerks for their services at Southampton after the presentation of the petition and before the hearing. This was alleged by the respondents' attorney in his affidavit to have been rendered necessary by the petitioner, who (as the affidavit alleged) was holding out inducements to persons to give evidence of bribery, treating, and other corrupt practices, and was offering large sums of money with a view to procure such evidence. The petitioner made no affidavit in answer to this charge. The master allowed 100 guineas as instructions for brief. The fees paid to counsel were reduced by the master from 200 guineas, with 50 guineas a day refresher, to half that sum, and the refresher fee paid to the junior counsel from 25 to 15 guineas a day. Three consultations were charged for, but the master only allowed one.

In each case a rule was obtained calling on the petitioner to show cause why the master should not be at liberty to review his taxation. For convenience' sake the three rules were argued together.

H. James, Q. C., for the petitioner in the *Tamworth* petition, showed cause.—As to the counsels' fee, that is in the discretion of the master, and the master having exercised that discretion, the court will not interfere. The respondent has no more right to call upon the petitioner to pay for such eminent counsel than an attorney would have to call on his client to do so in the absence of special instructions. It is for the respondent to show that the master has been wrong, not for the petitioner to show that he has been right. As for the sum allowed for instructions for brief, it is a ques-

C. P.] THE TAMWORTH, PENRYN AND FALMOUTH, AND SOUTHAMPTON ELECTION PETITIONS. [C. P.

tion of *quantum meruit*, with which the court ought not to interfere.

H. Lloyd, Q.C., for the petitioners in the *Penryn and Falmouth* case, showed cause.—It is preposterous to suppose that the respondent ought to have his costs on the unsuccessful appeal that he made to the court to have the petition dismissed.

Mellish, Q.C. and *Davey*, for the petitioner in the *Southampton* case, showed cause.—The costs of watching the petitioner's agents ought not to be thrown on the petitioner. The master cannot possibly judge whether such costs were properly incurred or not. [WILLES, J.—I think it would be most improper to allow the expense of this second canvass.] As between attorney and client, the attorney may charge a rich client many things, which he would not be justified in charging a poor one, and in a case of this nature, where the respondent holds the eminent position of Mr. Gurney, many costs might reasonably be incurred in order to insure success; but you cannot take these circumstances into consideration when the costs are to be paid by the opposite side. There is no principle involved in this case; it is a mere question of *quantum*, and in such cases the court will not interfere. The master has allowed something under the head of instructions for brief, for the costs of getting up the evidence. As to the counsel's fee, the courts have never, in any of the numerous cases brought before them, interfered with the decision of the master. The meaning of the 41st section of 31 & 32 Vict. c. 125 is that the costs are to be taxed in the same way as the costs of a party in a suit, which are to be paid by the other party on the scale of costs as between attorney and client. They cited,

Nichols v. Haslam, 15 Sim. 49;

Smith v. Earl of Effingham, 10 Beav. 378.

Hardinge Giffard, Q.C. (in all three cases, *Ledgard* with him in the *Southampton* case) in support of the rules. A party to a proceeding of this kind is entitled to have the assistance of a Queen's counsel as well as a junior counsel, and, considering the distance counsel have to go from London, he could not obtain the assistance of properly qualified counsel, except by payment of such fees as were paid in these cases. The successful party is entitled to an indemnity against all costs reasonably incurred. In taxation, the master ought to have allowed costs as between attorney and client in the Court of Chancery. As to costs on that scale it is said in *Morgan v. Davey*, on Costs in Chancery p. 1, "Costs as between solicitor and client, payable by one party to another, will not include all costs to which the solicitor would be entitled as against his client. It is impossible to lay down with exactness any rule upon the subject, but generally it would seem that all such costs would be allowed as a solicitor would ordinarily incur in the conduct of his client's business, including those extraordinary costs which may have been occasioned either by the default of the client, as by incurring a contempt, or by his express instructions, as to employ an unusual number of counsel." In the *Southampton* case, the affidavit charges malpractices against the petitioner and the petitioner has not denied the charge. It must then be assumed that the respondent was justified in incurring charges in counteracting these malpractices. In that case moreover, the master has allowed for the witnesses; but he has refused to allow anything for the inquiries by which the attendance of those witnesses was procured. As to the consultations, considering the nature of these cases and the different aspect they assume from time to time, they are very necessary, and ought to be allowed. The master said they were included in the refresher fee.

[BRETT, J.—That has never been the practice.] He cited.

Young v. Fernie, 1 De G. J. & S. 353; 9 L. T. Rep. N. S. 590;

Doe dem. Hyde v. The Mayor &c., of Manchester, 12 C.B. 474.

The judgment of Bovill, C.J. and Brett, J. was read by BOVILL, C.J.—The principle upon which the costs on election petitions are to be taxed is settled by the 41st section of the Parliamentary Elections Act 1868, which enacts that they are to be taxed "according to the same principles as costs between attorney and client are taxed in a suit in the High Court of Chancery." When the costs in these cases were taxed, the master of this court appointed to perform the duties required under the Act obtained the assistance of one of the taxing masters of the Court of Chancery. We have in like manner availed ourselves of the assistance of the senior taxing master of that court, who was kind enough to favour us with his attendance during the argument, and to give us such information as we required as to the practice of the Court of Chancery, and for which we are much indebted to him. The peculiarity of the case arises from the costs being payable as between party and party, and having to be taxed as between attorney and client, and this not absolutely, but only as a suit in Chancery. The mode of taxation in such a case is stated in Mr. Osborn Morgan's and Mr. Davey's work (p. 1) upon costs in Chancery as follows:—"Costs as between solicitor and client payable by one party to another will not include all costs to which the solicitor would be entitled as against his client. It is impossible to lay down with exactness any rule upon the subject, but generally it would seem that all such costs would be allowed as a solicitor would ordinarily incur in the conduct of his client's business, including those extraordinary costs which may have been occasioned either by the default of the client, as by his incurring a contempt, or by his express instructions, as to employ an unusual number of counsel." The rule in the Chancery General Orders as to the fees to be allowed to solicitors for instructions for different proceedings is to be found at p. 404 of Mr. Morgan and Mr. Davey's book, and is as follows: "As to bills, and answers, examinations, affidavits, and petitions, when the larger scale is applicable in lieu of the fixed fees for instructions for and for drawing, the taxing master is to be at liberty to take into his consideration the special circumstances of each case, and at his discretion to make such allowance for work, labour, and expenses properly performed and incurred in or about the preparation of the bill or answer, examination, affidavit or petition, as shall appear to him to be just, having regard to the length of the document, the nature of the suit, the interests of the parties, and the fund or person from which or by whom the costs are to be paid." The 40th Order of the Chancery Consolidated Orders, rule 32, which is to be found at p. 350 of the same book, provides for the taxation between party and party of the costs, *inter alia*, of procuring evidence by deposition or affidavit, and the attendance of witnesses, and directs the allowance of all such just and reasonable expenses as appear to have been properly incurred, but directs that in "allowing such costs the taxing master shall not allow to such party any costs which do not appear to have been necessary for the attainment of justice or for defending his rights, or which appear to have been incurred through over caution, or negligence, or mistake, or merely at the desire of the party." It appears, therefore, that in Chancery, even as between party and party, a liberal scale of costs is to be allowed on taxation, and when the costs are

C. P.] THE TAMWORTH, PENRYN AND FALMOUTH, AND SOUTHAMPTON ELECTION PETITIONS. [C. P.]

to be taxed as between attorney and client, it would seem that there should be an extension of this allowance. Even this, however, must be subject to some limitation, and we think the allowance must be confined to such costs, as, having regard to the rules and orders before enunciated, may be said to have been reasonably incurred. In the case of *Doe dem. Hyde v. The Mayor of Manchester*, 12 C. B. 479, where under a local Act which gave "full costs and expenses" the master had allowed liberal costs as between party and party, and the court construed the Act to mean that the costs were to be taxed as between attorney and client, the order to review the taxation was qualified by confirming it to such costs as had been reasonably expended in the litigation. It is true that the 41st section of the Parliamentary Elections Act 1868 enacts that all costs, charges, and expenses of and incidental to the presentation of a petition under that Act, and to the proceedings consequent thereon, shall be defrayed in such manner as the court or judge may determine, regard being had to any vexatious conduct or unfounded allegations or objections on either side, or the causing of any needless expense by either party. That, however, seems to apply rather to the question what costs are to be allowed than to the mode of taxing costs. The order for costs in each of these cases was general and without qualification on either of the grounds mentioned in this section of the Act of Parliament, and it therefore appears to us that the parties entitled to their costs under the orders were entitled to an indemnity for all costs that were reasonably incurred by them in the ordinary course of a matter of this nature, but not to any extraordinary or unusual expenses incurred in consequence of over-caution or over-anxiety as to any particular case, or from considerations of any special importance arising from the rank, position, wealth or character of either of the parties, or any special desire on his part to insure success. We think also that such extraordinary costs as an attorney would not be justified in incurring without distinct and special instructions from his client ought not to be allowed, nor the costs of purely collateral proceedings upon which a party has failed, nor those which may have been occasioned by his default, negligence, or mistake. A rule very much to this effect was, we believe, adopted by the Court of Session in Scotland in the *Dumfriesshire Election Petition*, and by the Court of Common Pleas in Ireland upon the *Youghal and Belfast Petitions*. We are also of opinion that when the election judge or the court orders payment of the costs without qualification, it was the intention of the Legislature that the taxation should be liberal in favour of the successful party, and that the master should tax the costs accordingly. A very wide discretion must necessarily be left to the taxing officer, which must be exercised by him after a careful consideration of the particular circumstances of each case, and, where after properly considering the matter the master has arrived at a decision, it lies upon those who impeach his decision to satisfy the court that he is wrong. Where a principle is involved the court will always entertain the question, and if necessary give directions to the master; but where it is a question of whether the master has exercised his discretion properly, or it is merely a question as to the amount to be allowed, the court is generally unwilling to interfere with the judgment of their officer whose peculiar province it is to investigate and to judge of such matters, unless there are very strong grounds to show that the officer is wrong in the judgment which he has formed. The first question that was argued in these cases was as to the fees allowed to the leading and junior counsel, and in all the cases one uniform fee of 100 guineas was allowed

upon the briefs to the leading counsel, and 75 guineas to the junior counsel, being much less in each case than the fees that were actually paid. If these fees were allowed as being an uniform standard of allowance, without reference to the particular case, we think this course would be wrong, and that the master ought to exercise his judgment and discretion in each case; but at the same time we see no objection to the master adopting such a scale as an average for ordinary cases, and unless there be some special circumstances we see no objection to these fees being treated by the master as the proper sums to be allowed. The cases of *Tamworth* and *Penryn* seem to us to have been only of the ordinary description. The master appears to have so treated them, with the exception of allowing an additional fee in the latter case on account of the great distance from London; and we think there is no ground upon which we can properly interfere with or review his decision, either in point of principle or as a matter of discretion or amount. The *Southampton* case appears to us to stand upon a somewhat different footing. The master seems rather to have allowed the fees in that case as in accordance with a general rule, than upon a due consideration of the particular case; and, looking to the affidavits and voluminous briefs in that particular case, we think it will be more satisfactory that the case should be reconsidered by him; and upon the principle which we have laid down. With regard to the refreshers to the different counsel, we see no reason to doubt the principle of the master's decision, or that he has not allowed a sufficient amount in all the cases; but as to the consultations we think that the master in allowing only one consultation has assimilated the practice and the allowance on taxation rather too closely to the practice in ordinary actions at law, in which only one consultation is usually allowed. From the nature of the proceedings on an election petition, and the mode in which they are conducted, we think it most reasonable and proper that consultations should be held from time to time when different points and phases of the case are developed, as they necessarily must be in the course of such inquiries; and we think that such consultations are not only reasonable, but would be really necessary in most cases in the proper conduct of the case. We think also that the fees for the consultations should be allowed according to the usual mode of charge in ordinary suits, and in addition to the refreshers for each day's attendance upon the inquiry. In this respect, therefore, we think the master should review his taxation in each of the three cases, unless the parties are willing to agree upon the amount to be added to the master's allocatur on this head. Another important question raised in each of the cases was as to the costs incurred after the presentation of the petition and before the hearing; and as to these the master seems to have allowed a gross sum in each case, under the head of instructions for brief. In the *Tamworth* case there could be no objection to his adopting this course, because these preliminary expenses were all charged, in accordance with a practice which has been adopted, in one item as instructions for brief, and in which the details involved in the general charge were stated. The master has exercised his judgment and discretion upon the item and the amount, and reduced it to 100 guineas; and, from the nature of the details of this item and the services stated to have been performed, and from the affidavits, we see no reason to doubt that the master has exercised a right judgment upon it; and we think there are no sufficient grounds shown to induce us to remit this matter to him for review. It is true that Mr. Shaw's charges are disallowed, as well as the charges for railway fares, carriage hire, &c.; but Mr. Shaw's bill is not before us,

C. P.]

In the Matter of the NORWICH ELECTION PETITION.

[C. P.]

and from the report of my brother Willes, who tried the case, we are not satisfied that his bill of costs was properly chargeable against the appellant. The railway fares and carriage hire are mere matters of amount with which we cannot interfere. In the *Penryn and Falmouth* case the respondent's agent had charged, not only 100 guineas as instructions for the brief, but also all the preliminary expenses in detail in addition. The master has struck out the preliminary charges and increased the amount charged as instructions for brief from 100 guineas to 150 guineas, in order to cover in this amount the preliminary expenses which, in his judgment, ought to be allowed. The master in this matter has clearly exercised his judgment and discretion, and upon looking at the bill of costs and the amounts charged for preliminary expenses, and which would be properly chargeable for such preliminary expenses, we see no reason to doubt the propriety of the master's decision, and the rule will, therefore, be discharged in the *Penryn* case also upon this point. The *Southampton* case seems to us to be somewhat different. As to the preliminary expenses, the costs and charges amounted to nearly 1000*l.*, and 100 guineas has been allowed. The master has not a very distinct recollection as to the principle on which he acted; and looking to the affidavits and the absence of any answer to them, to the particulars and number of the voters objected to, the length of the briefs as allowed by the master, the number of witnesses and the other circumstances of this case, we think the decision of the master should be reconsidered by him. We think also that the parties are entitled to have his judgment upon the particular items in the preliminary expenses if they think fit, instead of their being included in the allowance of one sum in gross to cover the whole of what the master may think ought to be allowed. In the *Penryn and Falmouth* case a further question arose as to the costs of an unsuccessful appeal to this court by the sitting member against the decision of my brother Willes at chambers; but that appears to us to have been entirely a collateral matter, and the court having disposed of the question of costs upon the motion which failed, we think the respondent cannot be entitled to them, and that the master was therefore right in disallowing them. The result will be that the rules will be absolute in all the cases to review the taxation as to the consultations, and the rule will also be absolute in the *Southampton* case, as to the counsel's fees and costs preliminary to the hearing of the petition; and as these rules are part of the proceedings consequent upon the petitions, and incidental thereto, we think the costs of them must also be allowed.

WILLES, J.—I concur as to the consultations. I also agree that the rules ought to be discharged as to the *Penryn* and *Tamworth* cases. As to the *Southampton* case, having tried that and also the other cases moved, I am unable to concur in the distinction drawn by the rest of the court in favour of the respondent. I do not doubt that extraordinary pains were taken and expenses incurred, because of the high judicial rank and eminent position of Mr. Russell Gurney—a course natural enough in his case, but which would have been highly unreasonable in the case of an ordinary respondent. I think it would be unjust to saddle such costs upon the petitioner, and I am satisfied that the master has in this case, as in those of *Tamworth* and *Penryn*, taken extraordinary pains to be right. Having read his written report of the principle of his decisions, viz., that of allowing in each case, as instructions for brief, such preliminary expenses as he thought the petitioners were entitled to, I cannot concur in a rule that he shall do the same thing over again in the *Southampton* case. I see no ground

for interfering with the master's decision except as to the consultations.

Rule accordingly.

Attorneys for petitioner Hill, Young, Maples, Teesdale, and Nelson.

Attorneys for petitioners Broad and others, Wyatt and Hoskins.

Attorneys for petitioner Pegler, Cox and Willoughby.

Attorneys for respondents Peel and others, Freshfields.

Attorneys for respondents Fowler and another, Baxter, Rose, and Norton.

Attorneys for respondent Gurney, Wilson, Bristowe, and Carpmael.

Monday, Jan. 31.

In the Matter of the NORWICH ELECTION PETITION.

TILLET v. STRACEY.

Taxation of costs—Expenses of witnesses, preliminary investigation, and attorneys.

Upon the trial of an election petition alleging that the respondent had been unduly elected, and claiming the seat for the petitioner, who had been the unsuccessful candidate, it was declared that the respondent had been unduly elected, but the petitioner withdrew his demand for a scrutiny. The petitioner's costs were ordered to be paid by the respondent so far as they related to the charges against the latter, but the costs to which the respondent had been put in order to meet the scrutiny were ordered to be paid by the petitioner.

The court refused to interfere with the master's taxation of the petitioner's costs, (1) in disallowing witnesses who were not called, although some of them before a subsequent royal commission admitted they had received bribes; (2) in fixing a lump sum for the costs of preliminary investigation; (3) in allowing a folio and a half as the length of evidence of each witness; (4) in disallowing many of the expenses actually incurred by the attorneys and their clerks.

This was another application to review the taxation of costs upon an election petition.

The following was the affidavit of the managing clerk of the petitioners' attorneys:—

I attended before Master Gordon on the taxation of the bill of costs of the petitioner's attorneys.

The charges in the petition were those of bribery, treating and undue influence. The petition also asked for a scrutiny on various grounds, and claimed the seat. The case was tried before Martin, B., who opened the proceedings on the 14th Jan. 1869, and they were continued on the 15th, 16th, and 18th Jan. 1869. Great difficulty had been anticipated in the proof of agency, but at an early period his Lordship intimated that an agency was sufficiently proved, and thus the petitioner's case was greatly shortened. The petitioner abandoned the request for a scrutiny and the claim for the seat.

The order for costs provided that the respondent should pay the petitioner the costs incidental to the said petition, and to the proceedings consequent thereon, so far as related to the determination and proof that the respondent was not duly elected, and so far as related to the recrimination against the petitioner; and that the petitioner should pay to the respondent the costs of meeting the claim of the petitioner to the seat.

The bill of costs amounted to 3,015*l.* 7*s.* 8*d.*, of which upwards of 1400*l.* was for money out of pocket. The total amount included a portion of the charges as to a scrutiny as well as to the case for unseating the respondent. The greater part of the case for the scrutiny went also to the case for unseating, inasmuch as most of the electors whose votes were challenged were objected to as being either bribers or bribed. The amount of the petitioner's costs allowed was 703*l.* 3*s.* The claim for the respondent's costs as to the scrutiny amounted to 793*l.* 14*s.* 2*d.*, and was reduced on taxation to 163*l.* 6*s.*

The number of witnesses actually subpoenaed to prove bribery was upwards of 400. The master allowed but 72 in all. The money actually paid to the witnesses was 377*l.* 0*s.* 6*d.*, of which the master allowed but 76*l.* 18*s.* 6*d.* There was a corresponding reduction of all the items depending on the number of witnesses.

C. P.]

In the Matter of the NORWICH ELECTION PETITION.

[C. P.]

The principle on which the master proceeded as to witnesses was as follows:—If a witness had not been examined he would not allow him (except in the cases of five witnesses), unless the brief showed a proof either that the person himself had bribed or been bribed, or of some other person who gave the precise information about which it was proposed to cross-examine the witness.

It is contended on behalf of the petitioner that this rule was wrong. A very large proportion of the witnesses who were subpoenaed to prove bribery were hostile. The manner in which much of the evidence was got up was as follows: We collected the various rumours which were flying about, and sent clerks to investigate the truth of them. Generally we went direct to the person alleged to have been bribed, but he almost invariably denied the fact, and refused to give any evidence. Sometimes we received information from other persons that the person in question had been actually bribed. Sometimes the information was not that he had been actually seen to bribe or to take a bribe, but of circumstances which raised a strong suspicion that he had bribed or taken a bribe; as, for instance, that he had never been known to vote without a bribe; that he had been actively concerned in bribery or taking bribes at former elections; that he asked for a bribe from the petitioner's agents and had been refused, and had afterwards voted for the respondent; that he had been taken up to the poll between three and four o'clock on the polling day by persons acting on behalf of the respondent, who it was believed and in some cases known had been bribing, and with persons believed and in some cases known to have been bribed. In all such cases we made such investigations as we could to test the probable accuracy of our information; we rejected a large number of such cases, and only subpoenaed the witnesses when it appeared probable that something would be got out of them in cross-examination; and we inserted in the brief under the names of the witnesses such information as we had obtained as information for counsel to cross-examine the witnesses upon, without in a great number of cases inserting a separate proof, or incurring the expenses of subpoenaing the persons who gave us the information, considering that on cross-examination the witnesses would admit that our information was correct. Several of such persons did in fact own on the trial that they had been bribed, and I have been informed by Mr. Abel Tillett, solicitor, Norwich, who assisted us in getting up the evidence and in the case generally, and I believe, that upwards of fifty of those who were not called and were disallowed by the master have since admitted, before the Royal Commissioners who have been sent down to Norwich, that they were bribed by the agents of the respondent at the last election. The master also refused to allow twenty-three witnesses who fell within the above-mentioned rule.

The master disallowed the whole of the attendances and charges for getting up the evidence prior to the preparation of the brief, amounting to over 700*l.*, and allowed instead thereof one lump sum of 126*l.* as instructions for brief; and the only basis upon which he ascertained such amount was the number of witnesses he allowed.

In doing this it followed that the master refused to allow all the attendances to investigate cases in which the information turned out wrong. It is submitted that this was wrong, as it was the duty of the solicitors to investigate many such cases, and it was impossible for them to tell without such investigation whether it was worth while to subpoena a witness or not. In many instances the names of the persons upon whom we had attended were left in blank in the bill of costs on account of the rancorous state of party feeling in Norwich. We offered to supply the names sooner than have the attendances disallowed, but the master declined to go into the particular cases of attendances (even those upon the petitioner himself), allowing only a lump sum as hereinbefore stated.

The master, where he allowed witnesses, made only one general allowance of a folio and a half for their evidence with reference to its actual length. In a very great many cases, if not in all, the actual proofs (which were never longer than was believed to be necessary) were much longer than a folio and a half.

The master refused to allow more than two counsel. Four counsel were employed by the respondent, three only by the petitioner.

The master refused to allow more than 100 guineas to the leader, and 75 guineas to the second, as fees with the brief; and 200 guineas and 100 guineas were the amounts actually paid. The master further allowed refreshers of only 25 guineas and 15 guineas a day respectively, the amounts paid being 50 guineas and 25 guineas respectively. The master refused to allow more than one consultation, though the trial lasted three days, and numerous consultations were held and paid for; and as I believe were necessary.

The solicitors to the petitioners were Messrs. Ashurst, Morris, and Co., of 6, Old Jewry, London. They employed the said Mr. Abel Tillett, the nephew of the petitioner, to help them in getting up the case, but solely for that purpose and in that capacity. He was in no sense solicitor to the petitioner, nor had he in any degree the conduct of the petition, though from his local knowledge he could render great assistance. Messrs. Ashurst, Morris, and Co. sent down four and sometimes five clerks, who were incessantly

employed from the 25th Nov. 1868, till after the trial of the petition, and who were absolutely necessary to get up the case, prepare the briefs, and carry on the business connected with the trial. Their hotel and other expenses out of pocket amounted to over 128*l.*, their travelling expenses to over 39*l.*, and the general expenses for stationery, telegrams, postages, cab-hire, and the like, to nearly 65*l.* The master disallowed nearly the whole of these charges, treated the case as if Mr. Abel Tillett were the solicitor to the petitioner, and allowed only the attendance of the London solicitor for five days for the trial and his travelling expenses, and the attendance of the country solicitor and two clerks for three days, and for telegrams and incidental expenses, making 76*l.* 13*s.* in all.

The consequence of the very large reductions made by the master in the number of witnesses, and of the allowance of only a folio and a half for each witness, was an immense reduction in the allowances for drawing and copying briefs.

Upon this affidavit *Keane*, Q. C., on the 24th Nov. last, obtained a rule *nisi* calling upon the respondent to show cause why the master should not be at liberty to review his taxation of the petitioner's costs in and concerning this petition, on the following grounds: First. The disallowance of the expenses of and the costs as to fifty witnesses who subsequently admitted bribery before the royal commissioners. Secondly. The disallowance of the charges for getting up the evidence prior to the preparation of the brief, and the allowance of 126*l.* as instructions for brief instead thereof; the only basis on which the last-mentioned amount was ascertained being the number of witnesses allowed. Thirdly. The allowance for drawing and copies of one and a half folios for each witness without regard to the actual length. Fourthly. The disallowance of part of the fees paid to two counsel, and of all the fees paid to one counsel, and the disallowance and reduction of the attorneys' charges consequent thereon, and also of the fees for consultations. Fifthly. The treating of Mr. Abel Tillett as the attorney to the petition instead of Messrs. Ashurst, Morris, and Co., and the disallowance in consequence thereof of payments made by the latter.

Mellish, Q. C. and *F. M. White* showed cause against, and

Keane, Q. C. supported the rule.

BOVILL, C.J.—The rule was granted in this case, as in the others concerning which we gave judgment this morning, in order to discuss the principles of taxation. That judgment (see page 99) will conclude some of the disputed points in this case. With regard to the fees for consultations, the rule will be made absolute; but as to the other points on which the rule was granted the petitioner has not satisfied me that the master was wrong. One difficulty in this case was in discriminating between the costs of the successful and unsuccessful parts of the petition. Only one case was prepared and delivered to counsel for both branches of the petition, and it is impossible for us to interfere with the discretion the master has exercised in separating these branches. The first complaint by the petitioner is that the master allowed only the costs of seventy-two witnesses, although 400 were subpoenaed; it seems to me that they were collected most recklessly, and certainly a large number of them never ought to have been subpoenaed at all. It has been found, however, that fifty of those whose expenses were not allowed, when examined subsequently before the royal commissioners, admitted that they had received bribes. This, however, was not known at the time of the taxation, and the master had to determine from what took place at the trial of the petition how many of these 400 were properly summoned; it was not known what these witnesses would prove before they were called, and it was unlikely they would admit bribery without an indemnity. It is difficult for us to say that the

[Ex.]

CLOWES (Administratrix, &c.) v. HUGHES AND ANOTHER.

[Ex.]

master could have done differently; before we interfere it must be made out that he exercised his discretion improperly. The next point is the allowance of 126*l.* for preliminary investigation; and concerning that sum we are in a peculiar difficulty, for we have no means of determining the matter. The master, although he has allowed a lump sum, informs us that he considered all the items charged, and found that many of them related to the scrutiny. We are not, therefore, inclined to interfere with his discretion; at all events, we do not see our way to make an order for the review of the taxation on that ground. Then the master allowed a folio and a half for each witness, without reference to the length of their evidence; that matter, however, cannot be interfered with, and I am not prepared to say it was not as good a plan of computing the proper costs to be allowed as any other. With regard to the other points, the fees to counsel, and the number of counsel allowed, I do not consider, from what I know of the case, that the court would be justified in interfering; we have not the briefs before us, but, from the length of time the trial of the petition lasted, I think the fees allowed by the master for counsel seem to be sufficient. The last point taken by the petitioner is that the master allowed only the expenses of Mr. Abel Tillett, and not those of the London attorneys; but he reports to us that he has made an allowance for the expenses of both, and we will not therefore interfere as to the amount. The consultations, according to our decision in the other cases, will be allowed; therefore on that point the rule will be made absolute.

SMITH, J. concurred.

BRETT, J.—The only doubt I have entertained in this case was concerning the allowance of 126*l.* for the preliminary investigation; if this sum had been arrived at without going into the items, I think it ought to have been reviewed. But as the master has considered all the items charged, and as most of them had reference to the scrutiny, I cannot say that the master was wrong.

Rule absolute as to fees for consultations; discharged as to other points. Costs for petitioner.

Attorneys for petitioner, Ashurst, Morris, and Co.
Attorneys for respondent, Holmes and Co.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Jan. 18 and Feb. 11.

CLOWES (Administratrix, &c.) v. HUGHES AND ANOTHER.

Mortgage-deed—Clause creating tenancy on mortgagor's default in payment—Alteration of relation between the parties—Previous notice by mortgagee of intention to treat mortgagor as tenant—Mortgagee's right of distress.

Under a clause in a mortgage-deed, that if the mortgagor should at any time make default in any one or more of the several payments therein mentioned and thereby secured, "then immediately, or at any time after any such default, the mortgagor should hold the mortgaged premises as yearly tenant to the mortgagee from the date of the deed, at a yearly rent of the amount and payable as therein mentioned, and that the mortgagee should have the same remedies for recovering the said rent, as if the same had been reserved on a lease," the mortgagee is not, upon default being made by the mortgagor, warranted in treating the latter as a tenant, without having previously given him notice of an intention so to treat him and to change the relation

between them from that of mortgagee and mortgagor to that of landlord and tenant; and therefore a distress levied by the mortgagee, without any such notice, upon the goods of a third party upon the mortgagor's premises, for rent alleged to have accrued due since the mortgagor's default, cannot be justified.

So held by the Court of Exchequer (Kelly, C.B., and Martin, Channell, and Pigott, B.B.), in trover against the defendants by the owner of the goods distrained.

This was an action of trover by the plaintiff as administratrix of the personal estate of Edward Clowes, deceased, to recover the value of certain goods and furniture taken by the defendants under a distress for rent. The declaration contained a count against the defendants for the conversion of the goods by them in Clowes's lifetime, and a second count for a conversion of the goods of the plaintiff as administratrix as aforesaid, and there was also the usual money count.

The defendants pleaded:—1. To the first count, not guilty. 2. Further to the first count, that the goods were not the goods of the said Edward Clowes. 3. Further to the second count, denying that the goods were the goods of the plaintiff as administratrix. 4. To the residue of the declaration, never indebted.

Upon all these pleas issue was joined.

At the trial before Bovill, C.J., at the last Carnarvonshire summer assizes, at Carnarvon, 1869, the following appeared to be the facts of the case.

On the 21st June 1866, one Lewis Davies being indebted to the deceased, Edward Clowes, executed to him, as a security for the debt, a bill of sale of all his household furniture, goods, chattels, and effects, in or about his dwelling-house and premises at Llandrillo, subject to a proviso for redemption, and to an agreement that if Davies should instantly on demand pay to the said E. Clowes, his executors, administrators, or assigns, the principal and interest moneys therein mentioned, the said indenture should be void; with power to the said E. Clowes, his executors, administrators, and assigns, and his or their agent or agents, in case of default in payment of any of the said moneys, upon demand made as aforesaid, to enter upon the said premises, and to remain therein and peaceably, &c., to receive and take into his and their possession, all and every the said furniture, &c., and at his or their pleasure, and without the consent of the said mortgagor, to sell the same in manner therein mentioned.

Subsequently to the date and execution of the said bill of sale, Davies became a member of, and a subscriber for ten shares, in a building society called "the Llanrwst and North Wales Benefit Building Society," of which the defendants were the trustees, and the rules of which society were duly registered and certified under the Act of Parliament in that behalf. By the fifth of such rules it was declared and provided that "every mortgage-deed granted to the society should contain all powers, &c., applicable to a mortgage in such cases, including a power authorising the trustees to proceed to a sale of the hereditaments comprised therein, in case any advance or repayment agreed to be paid by the mortgagor should be in arrear as therein mentioned, and further, that in all cases where the premises mortgaged to the society should be in the occupation of the member occupying the same, he should become annual tenant to the society in respect thereof, at a rent equal to, and payable at such times as the advance repayments agreed to be paid by him should be payable and due.

Subsequently to the giving of the before-mentioned bill of sale to Clowes, Davies executed a mortgage to the said building society of the house and premises in which he resided, and in which the goods comprised in the said bill of sale were. The

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CLOWES (Administratrix, &c.) v. HUGHES AND ANOTHER.

[Ex.]

mortgage-deed was dated the 24th Dec., 1866, and thereby, after reciting (*inter alia*) that Davies was a member, and had subscribed for ten shares in the said society, and by the said rules was entitled to receive out of the funds thereof 500*l.*, upon a mortgage being executed to the trustees, securing the payments to become due in respect of such shares. Davies assigned the said dwelling-house and a piece of land, at Llandrillo aforesaid, unto and to the use of the defendants (W. E. Hughes and J. Williams, the said trustees), their heirs and assigns, upon trust for sale as therein mentioned, in case of default by Davies, at any time thereafter, in any one or more of the said payments therein specified, and then or thereafter required to be made by the said rules. And, for further securing the payments of the moneys expressed to be thereby secured, it was agreed that if Davies, his heirs, &c., should at any time thereafter make default in any one or more of the said payments, then or thereafter required to be made by the rules of the said society at the time being in force, in respect of the said several payments, whether for subscriptions, redemption money, fines, or otherwise, or in the observance or performance, in all respects, of the same rules, *then immediately or at any time after any such default should have been made*, the said L. Davies, his executors, administrators, and assigns, should hold the said premises expressed to be thereby conveyed, *as yearly tenant*, to the said several parties thereto of the fourth part (the defendants), their heirs and assigns, or the trustees or trustee for the time being of the said society, *from the day of the date of the said mortgage*, at and under the yearly rent of 57*l.* 11*s.* 8*d.*, payable by two equal portions on the 1st May and 1st November in every year; and that they, the said trustees or trustee for the time being, *should have the same remedies for recovering the said rent as if the same had been reserved upon a common lease*. And it was thereby declared that the said rent, to be so received by the trustees, should be applied in payment of the moneys for the time being payable by Davies, pursuant to the said rules, in respect of the shares so received by him in advance as aforesaid.

The deceased Clowes was an executing party to the said mortgage-deed, for the purpose of giving to the 500*l.* thereby secured to the defendants, priority, as a first charge upon the said hereditaments, therein comprised, over a prior mortgage security held by him upon the same property.

Davies having subsequently subscribed for another share in the said society, borrowed 50*l.* more from the defendants thereon, and executed to them a further charge for the amount upon his said house and land.

The goods and furniture comprised in Clowes' bill of sale remained, under the provisions thereof, in the possession of Davies in his said dwelling-house, from the date of the said bill of sale in June 1866, until the taking possession of them by the plaintiff next hereinafter mentioned. Clowes died in the month of Feb. 1869, and thereupon the plaintiff, as his administratrix, desiring to realise the security, made the necessary demand upon Davies of payment of the principal and interest due thereon, and in default of payment took possession of the said goods and furniture by putting a bailiff in possession of them upon the said premises, under the bill of sale, upon the 13th April following.

Davies had made default in March 1868 in payment of the moneys required by the said rules to be made by him, and on the 5th May 1869 the defendants levied a distress upon the goods in the dwelling-house comprised in their mortgage-deed of 24th Dec. 1866, for one year's rent, claimed to be due to them on the 1st May 1869, under the provisions of their said mortgage-deed, having on the previous day, the 4th May, served the following notice on

the plaintiff's bailiffs in possession of the said goods:

To the legal personal representatives of Edwd. Clowes, late of, &c., and to E. Thomas and Thos. Hallworth, their bailiffs or agents. We, the undersigned, trustees of the Llanrwst and North Wales Benefit Building Society, hereby give you and every of you notice that there is now due and owing to us, as trustees as aforesaid, from Lewis Davies, of Llandrillo, &c. (whose goods and chattels you have seized under a bill of sale executed by the said L. Davies in favour of the said E. Clowes), the sum of 67*l.* 2*s.* 5*d.* for rent and arrears of rent in respect of the dwelling house and premises situate at Llandrillo aforesaid, and now in the occupation of the said L. Davies, whereof you have this notice. Dated the 4th May 1869.

W. E. HUGHES.
ISAIAH WILLIAMS.

Upon this an arrangement was come to, between the respective attorneys for the plaintiff and the defendant, on the 10th May, that the auctioneer should retain out of the sale moneys the sum of 84*l.*, and if within a specified time the plaintiff should bring an action against the defendants, for the purpose of trying their right to distrain, as against the plaintiff under the bill of sale of the same property, then the auctioneer should retain such moneys until a verdict or judgment in such proceedings, and the same moneys should abide the result thereof; but if no proceedings were taken within such time, then the said 84*l.* was to be paid to the defendants. The sale took place on the 12th May, and 84*l.* was retained by the auctioneer, and this action was brought in pursuance of the above arrangement.

It was admitted that, with the exception of the before-mentioned notice of the 4th May 1869 to the plaintiff's men in possession, the defendants had given no intimation whatever to Davies of any intention on their part to change the position in which they stood, the one to the other, of mortgagor and mortgagee, into that of landlord and tenant, and to treat him as a tenant under the before-mentioned clauses of their mortgage-deed of 24th Dec. 1866.

Upon the above facts being stated at the trial by the respective counsel on each side, a verdict was found for the defendants, and leave was reserved to the plaintiff to move to enter a verdict for her for 76*l.* 5*s.* Accordingly, in Michaelmas Term last (6th Nov.), *M. Lloyd*, on the part of the plaintiff, obtained a rule to set aside the defendant's verdict, and to enter a verdict for the plaintiff for 76*l.* 5*s.* (unless the defendants consent to the facts being stated in a special case) on the ground that the deed of 24th Dec. 1866 did not give lawful authority to defendants to distrain the goods of a third person. Against that rule

McIntyre and *Willis*, for the defendants, now showed cause.—Default in payment by Davies under the mortgage-deed to the defendants was made in March 1868. The repayments under that deed were to be 14*l.* 7*s.* 9*d.* quarterly, and the relation of landlord and tenant existed, under the express terms of the deed, immediately on default being made in any one of them, and the rent was then to be paid half yearly in May and November. The distress was made for a year's rent, 57*l.* 11*s.*, which, with the amount due for fines incurred, and the interest due on the 50*l.* further charge, amount in all to 67*l.* 11*s.* 8*d.* [MARTIN, B.—Do you contend that if a man has goods lawfully on another man's premises they can be distrained for under an agreement such as that in this case?] Certainly, that is what is contended for on the part of the defendants. [MARTIN, B.—It is contrary to justice and reason. If the owner of premises permits A. to keep goods on them, and then demises the premises to B. at a rent, can he distrain those goods for rent which has become due? It is not as though the goods had been put on the premises after the demise.] But they are allowed to remain there.

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CLOWES (Administratrix, &c.) v. HUGHES AND ANOTHER.

[Ex.]

[MARTIN, B.—The plaintiff knew nothing of the arrangement between the defendants and Davies.] The plaintiff's intestate was a party to the defendant's mortgage-deed, and so had notice. He could not be in a better position than a person bringing goods upon demised premises. [MARTIN, B.—How do you make this a demise, which must be from a day certain?] It is made certain by reference to the happening of a certain event. On principle the goods on the premises demised by this deed were liable. There is no distinction between a tenancy so created and an ordinary one, for all tenancies are the creatures of agreement. There may be a fore-hand rent, and to distrain for it is as much an incident of tenancy as distress in respect of past occupation for rent due by effluxion of time. The goods are put there at the party's own risk, and though he may have a remedy against the lessee as for a fraud, the landlord's rights are not thereby affected. As a general rule, everything, with certain well-known exceptions, found on the premises, whether belonging to the tenant or a stranger, is distrainable, the reason being that the landlord has a lien on them in respect of the place in which they are found, and not in respect of the person to whom they belong: (Woodfall's Landlord and Tenant, 9th edit. p. 395.) If this deed created, as it is confidently submitted it did, the relation of landlord and tenant, and if there may be a lease *in futuro*, then the incident of distress on all goods on the premises follows as of course. Had Davies removed all his goods and brought other goods there, then if the plaintiff's argument is to prevail, there would be no remedy for the landlord by distress at all. Then it is said that this clause is inconsistent with the clause for payment of the quarterly interest, and so must be rejected on the authority of *Walker v. Giles*, 6 C. B. 662; 18 L. J. 323, C. P., where it was held that a clause somewhat similar did not operate as a demise so as to sustain an avowry alleging a tenancy under the mortgagees, the general scope of the deed being inconsistent with such a construction. But that case was doubted in the subsequent case in this court of *Pinhorn v. Souster*, 8 Ex. 763; 22 L. J. 18, Ex., since which latter case it has been clearly established that a mortgagor may, by the mortgage-deed, create a tenancy in himself from the date of the mortgage, provided the deed contains provisions that the amount paid as rent shall, in fact, be paid in satisfaction of the mortgage-debt. In *Walker v. Giles* there was no such clause as that, but in the present case there is. The present case is distinguishable from *Walker v. Giles* and *Pinhorn v. Souster* (*ubi sup.*), and *Turner v. Barnes and others*, 2 B. & S. 435; 31 L. J. 170, Q. B.; 6 L. T. Rep. N. S. 418, for here there is to be no tenancy until default in payment. They cited also

Bird v. Baker, 1 El. & El. 12; 28 L. J. 7, Q. B.;
Shaw v. Kay, 1 Ex. 402; 17 L. J., N. S., 17, Ex.;
Brown v. The Metropolitan Counties and General Life Assurance Society, 1 El. & El. 832; 28 L. J. 236, Q. B.;
 Per Tindal, C. J. in *Miller v. Green*, 8 Bing. 92.

M. Lloyd, and *Jos. Sharpe* for the plaintiff, *contra*, in support of their rule. It has been acknowledged by the court that the privilege of distress, as against the goods of third parties, ought not to be extended. No doubt it is competent to make a mortgage security in the form of a lease, the two being contemporaneous, the mortgage being a lease and the lease being a mortgage. But that is not so here. In the first place this deed violates the rule of law with regard to certainty; the tenancy is not to commence unless the mortgagee chooses it to be so. Now it is common learning that all leases whether *in presenti* or *in futuro*, "must have a certain commencement

and a certain determination:" (Shep. Touch. 267.) Here there is uncertainty as to the commencement. He is to become tenant "immediately upon, or at any time after, making default." An option is to be exercised, and here it was not exercised till the 4th May. Again it is to be "in default of payment." But of payment of what? Why, of any sum of money which the society may by their rules choose to impose. It is void, therefore, for uncertainty. Again, there is inconsistency in the provisions of the deed. At the execution of the deed the mortgagor is not a tenant at all, but on default he is to be tenant from its date; therefore he may be, at one and the same time, tenant and not tenant. As was said by Parke, B., in *Pinhorn v. Souster* (*ubi sup.*), this cannot be done. Again, the right to rent from the date of the deed accrues on default in payment of any one of the instalments. So that if default were made in the last instalment, the trustees might, if the clause be good, distrain for the entire rent from the date, which might fivefold exceed the amount actually due. For the same reason as in *Walker v. Giles* (*ubi sup.*), this clause in the mortgage-deed is inoperative to create a tenancy. It is only by the court's putting a construction on the clause which the words do not warrant that these goods can be held to be distrainable. At the most it amounts only to a licence, from the mortgagor to the mortgagee, to take the goods of the mortgagor on the premises, in the nature of a distress, and cannot, therefore, extend to give a distress upon goods of a third party. To construe it as a licence would be proper enough between the parties, and would give effect to every word. Again, in order to change the relation between the parties from that of mortgagor and mortgagee to that of landlord and tenant, some notice of an intention on the defendants' part so to change it should have been given to the plaintiff. Here none was given, except that of the 4th May to the bailiffs in possession, and that notice cannot have such an operation as would be necessary for the purpose. They cited also *Wyburd v. Tuck*, 1 Bos. & Pul. 454.

Cur. adv. vult.

Feb. 11.—The judgment of the Court (Kelly, C. B., and Martin, Channell and Piggot, B.B.) was now delivered as follows by

MARTIN, B.—This was an action of trover, which was tried before the Lord Chief Justice of the Common Pleas at the last summer assizes for the county of Carnarvon, when, without calling any witnesses, it was agreed between the parties and counsel on both sides, that the facts should be taken to be as they were stated by counsel, and that a verdict should be entered thereon for the defendants, with leave reserved to the plaintiff to move to set aside that verdict, and to enter a verdict for the plaintiff for the sum mentioned in the rule (unless the defendants consent to the facts being stated in a special case) on the ground that the deed of the 24th Dec. 1866 gave no lawful authority to the defendants to distrain the goods of a third person. The case was argued before us during the preceding Hilary Term, and the facts appear to be as follows: The action was in trover. The plaintiff claimed the goods in question, under a bill of sale dated the 21st June 1866. By the provisions of that deed the goods remained in the possession of Davies, the maker of it, on the premises of which he was the owner and occupier, from the date of the bill of sale to the 13th April 1869. Upon the death of Clowes, the holder of the bill of sale, in February 1869, the plaintiff, as his administratrix, on the 13th April put a man in possession of the goods under the bill of sale, who continued in such possession

NISI PRIUS.]

AYRES v. ELBOROUGH.

[NISI PRIUS.]

until after the defendants took possession of the same goods, under a distress, as next mentioned. Now this distress was made by the defendants under a deed bearing date the 24th Dec. 1866, and made between Davies and the defendants, and which was in the nature of a mortgage-deed, whereby, for the better securing the payments expressed to be secured by the deed, it was agreed and declared that if Davies, the mortgagor, "should at any time thereafter make default in any one or more of the several payments therein mentioned, then immediately or at any time after any such default should have been made, Davies should hold the said premises as yearly tenant to the defendants, at and under the yearly rent" therein mentioned, and payable as therein mentioned, and that the defendants "should have the same remedies for recovering the said rent as if the same had been reserved upon a lease." Default in payment was made by Davies in March 1868, and in May 1869, the defendants, who insisted that upon such default Davies became their tenant of the premises, distrained the goods of the plaintiff (who was a stranger so far as the defendants were concerned) upon the premises of Davies, for one year's rent alleged by them to have accrued due, under the terms of the above clause in their mortgage-deed, since the default made by Davies as above mentioned. It does not appear that any notice had ever been given by the defendants to the mortgagor, Davies, of any intention on their part to alter the relation in which the parties respectively stood, the one towards the other, from that of mortgagor and mortgagee to that of landlord and tenant. Now we are all clearly of opinion that, for the purposes of altering the relation in which the parties stood to each other, of mortgagor and mortgagee, and before that clause in the plaintiff's deed of the 24th Dec. 1866, to which I have referred, could be acted upon so as to create a tenancy between the parties, some notice should have been given or some communication have been made by the mortgagees to the mortgagor, of their intention so to treat him. Until that were done, the defendants could not treat the mortgagor as a tenant, and therefore this distress cannot be justified. We give no opinion upon the question whether the goods of the plaintiff were liable to this distress in any case, the mortgage being long subsequent to the bill of sale. The plaintiff's rule, therefore, will be made absolute.

Rule absolute.

Attorneys for the plaintiffs, *Rooks, Kenrick, and Harston*, 16, King-street, Cheapside, E.C., agents for *J. Griffith Jones*, Conway.

Attorney for the defendants, *E. W. Le Riche*, 8, Warwick-court, Gray's-inn, W.C., agent for *J. R. Griffith*, Llanrwst.

NISI PRIUS.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

COURT OF QUEEN'S BENCH.

Thursday, Feb. 24.

(Before BLACKBURN, J.)

AYRES v. ELBOROUGH.

Malicious prosecution—Want of reasonable and probable cause—24 & 25 Vict. c. 96, s. 84.

The mere fact that a report and balance sheet prepared and published by the secretary of a public company, contains errors or misstatements, does not afford "reasonable and probable cause" for charging him criminally under 24 & 25 Vict. c. 96, s. 84, and will be no defence to an action for malicious prosecution brought by him if he has been so charged, unless some

proof be given that he made and circulated the report and balance-sheet as a wilful falsehood and with a fraudulent intent.

Action for malicious prosecution.

Murphy and H. R. Mansel Jones, for the plaintiff.

Parry, Serjt., Besley, and Shaw, for the defendant.

The plaintiff was the Secretary of the Northern Railway of Buenos Ayres Company (Limited), and the defendant had formerly been the secretary of that company.

In the month of Oct. 1868, the defendant laid an information before the Lord Mayor, and obtained a summons directed to the plaintiff, charging him with an offence under the 24 & 25 Vict. c. 96, s. 84, viz., that he, in the month of Sept. 1866, then being a public officer of the said Northern Railway, unlawfully made, circulated, and published, a certain written statement and account, to wit, a report and balance-sheet relating to the said company's affairs, knowing the same to be false in a material particular, with intent to defraud.

The plaintiff attended in obedience to the summons, and the charge against him was dismissed.

This was the malicious prosecution complained of.

It appeared that the defendant had preceded the plaintiff in the office of secretary to the company, but that in April 1866 the board of directors came to a resolution to dispense with his services, and the plaintiff was appointed. In a subsequent conversation with the chairman of the company, the defendant said, "You and Mr. Ayres need not flatter yourselves you will have an easy time of it. I shall never let the matter rest."

In Aug. 1866, the plaintiff prepared a balance-sheet and statement of accounts which were approved by the directors and passed at the annual meeting of the shareholders. The report of the company's affairs submitted by the board to that meeting contained the following paragraph:

"It will be observed that in the revenue account many items appear which have been charged hitherto to capital in the annual balance-sheets. As the whole line has been completed throughout the past financial year, the directors have deemed it right to debit the revenue account with all that is fairly chargeable to it, in order that every shareholder may clearly understand the actual result of the year's working."

The defendant objected to the balance-sheet and statement of accounts on two grounds, alleging, first, that they made the position of the company appear better than it really was, by the omission of certain debentures held as collateral security for a loan which appeared in the accounts, and of a large claim of the contractor which was in dispute; secondly that they made the position of the company appear worse than it really was by placing certain expenditure alleged to be on capital account to revenue.

The chairman and directors justified and explained the accounts to the defendant. In the same year one Mr. Fielden raised similar objections to the accounts, and laid an information before the Lord Mayor against three of the directors of the company, containing nearly the same charges as those subsequently made by the defendant against the plaintiff.

The charge against the directors was dismissed.

On the 26th March 1867, the defendant caused a special general meeting of the company to be convened, and laid before it the whole of his charges against the accounts, when the auditor defended and justified the accounts, and the chairman offered to meet any shareholders at the office to go into the accounts and satisfy them of their correctness.

These explanations were reiterated on different

BANK.]

Re JONES—THE LADY FRANKLIN.

[ADM.]

occasions during a course of protracted litigation between the defendant and the company, in Chancery and elsewhere. Nevertheless, in the year 1868 the defendant prosecuted the plaintiff as aforesaid.

To support the present action for malicious prosecution, the plaintiff called the chairman of the company, who gave a reasonable explanation of the report and balance-sheet, which the defendant had impugned.

At the close of the defendant's case,

BLACKBURN, J., said: I believe that the question of "reasonable and probable cause" is for the judge. Now, I ask—What if the accounts were false? The charge against the plaintiff before the magistrates was for circulating, making, and publishing a written account which he knew to be false in a material particular, with intent to defraud; and, assuming that these accounts were wrongly stated, I cannot see what evidence there was before the defendant in 1866 to give him grounds for making this personal charge against Mr. Ayres. The facts, of course, must be found by the jury, but grant in the defendant's favour that the accounts were wrong, and that the amounts were charged to revenue and not to capital, and granted a mistake as to 25,000*l.*, that does not prove that the thing was done as a wilful falsehood with fraudulent intent.

*Verdict for plaintiff—damages 50*l.**

Attorneys for plaintiff, *Ashurst, Morris and Co.*
Attorney for defendant, *Jones.*

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

Thursday, Feb. 17.

(Before the CHIEF JUDGE.)

Re JONES.

*Petition for liquidation—Adverse resolution of creditors
Act of bankruptcy—Nature of petition for adjudication—Practice.*

A petition for liquidation, presented under the 125th section of the B. A. 1869, under which the creditors resolved that the debtor's estate should be wound-up in bankruptcy, is an act of bankruptcy, upon which any creditor may present a petition for adjudication.

In such petition all the facts should be fully stated.

This was an *ex parte* application on behalf of a creditor seeking to obtain a petition for adjudication against a debtor, and came before the court under the following circumstances:—

On the 26th Jan. 1870 the debtor filed a petition for liquidation under the provisions of the 125th section of the Bankruptcy Act 1869 and the 252nd General Order of the 1st Jan. 1870, in the form prescribed (No. 106) in the schedule annexed, stating that he was unable to pay his debts, and was desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors.

The statutory meeting referred to in the 254th General Order was held on the 11th Feb., when the creditors resolved to have the debtor's estate wound-up in bankruptcy, and not by way of liquidation. The resolution was duly registered, and thereupon the applicant on the 16th Feb. presented a petition for adjudication of bankruptcy against Jones wherein was contained an allegation that the act of bankruptcy was the filing of the petition for liquidation by arrangement under the 125th section; that a meeting was convened for the 11th Feb.; and that at such meeting the creditors neglected to

pass any such resolution as that referred to in the 262nd General Order, or any special or extraordinary resolution under the 266th General Order, in reference to the liquidation of the affairs of the debtor by arrangement or composition.

Upon the presentation of the petition the registrar, before whom the case was heard, expressed his opinion that he had no power to deal with the matter, and that the powers delegated to him by the General Orders of Jan. 1 and Jan. 18, 1870, did not extend to this case, and thereupon he remitted the matter to the Chief Judge.

By the 267th General Order of Jan. 1, 1870, it is provided that "in the event of any neglect on the part of the creditors to pass such resolution, the court may, on the application of any of the creditors, and after notice to the debtor, make an order of adjudication against the debtor, or direct the bankruptcy to be proceeded with as the case may be."

Rooks, solicitor, now applied to the court under the 267th General Order of 1st Jan. 1870, to fix a day for the hearing of the petition in order that notice might be given under that rule to the debtor.

THE CHIEF JUDGE.—I think this matter is clearly within the power delegated to the registrars. This is the first case of the kind, and I shall not hesitate to give the applicant some little trouble in order that this case may be quite correct as a precedent. The petition must, I think, be amended. A petition of this nature ought not to be too curt; the allegations ought to be comprehensive. All dates should be supplied, and it should be stated what action the creditors did take, and what was the nature of the resolution passed by the creditors. It must also state that the meeting was duly convened and held. When the petition shall have been amended, or a new petition presented there will be no difficulty, and the registrar will answer the petition; but the applicant must produce before the registrar office copies of the debtor's petition and of the resolution. The stamp upon the present petition will be allowed.

Solicitors: *Rooks, Kenrick, and Harston.*

SUPREME COURT OF THE UNITED STATES.—IN ADMIRALTY.

THE LADY FRANKLIN.

(Before DAVIS, J.)

Bill of lading—Mistake—Lien.

A bill of lading was given for goods shipped on board the Lady Franklin, but these goods had been shipped on board another vessel which was lost. The bill was given under a mistake by a common agent, but the ships did not belong to the same owner.

Held, that the consignees had no lien upon the Lady Franklin for the goods mentioned in the bill of lading which had not been delivered, a bill of lading being merely an acknowledgment and prima facie evidence of the receipt of goods, not conclusive but open to contradiction by parol testimony.

DAVIS, J.—The libel in this case alleges that the libellants, in the month of Nov. 1863, by their agent, Edward Sanderson, caused to be delivered at Milwaukee, to the steamer *Lady Franklin*, 340 barrels of flour, to be transported to Port Sarnia, on the St. Clair river, for which shipment they received a bill of lading, but that 290 barrels of the flour were never delivered, and, as a consequence of this state of things, they claim a maritime lien on the vessel for the value of this flour. The answer denies that the flour in controversy was ever delivered to the master, or shipped on board of the steamer. The

ADM.] FOLEY v. THE UNITED FIRE AND MARINE INSURANCE COMPANY OF SYDNEY. [EX. CH.]

facts in the case, which raise the question to be decided, are few, and not seriously controverted. There were, in 1863, a line of steamers engaged in the lake service from Milwaukee to Port Sarnia, and running in connection with the Grand Trunk Railway — of which the *Lady Franklin* was one; but each boat had separate owners, and there was no joint undertaking that any one of the boats should be responsible for the breach of a contract or misconduct of another. This line of steamers had a particular warehouse in Milwaukee, owned by Goodrich, at which they stopped, which was used to receive and store freight for them, of which Courtenay was the agent, who also acted as agent for the boats in engaging and shipping freight. The cargo of flour in dispute was received by Courtenay for the libellants through Sanderson, their agent, with an agreement to ship it for them on one of this line of steamers; and, in point of fact, fifty barrels were shipped on the *Antelope*, one of the line, and received by the libellants. The remaining 290 barrels, for which the lien is claimed on the *Franklin*, were also shipped on the 7th Nov. by the *Water Witch*, another boat in the same line, and consigned to the libellants, but were not received by them, because the boat foundered at sea. Notwithstanding these shipments, a clerk in the warehouse, under Courtenay, in the absence of Courtenay, in ignorance that the flour had been previously shipped on the *Antelope* and *Water Witch*, but supposing it still in the warehouse for shipment, by mistake gave to Sanderson the bill of lading attached to the libel. The attempt made in the prosecution of this libel to charge this vessel for the non-delivery of a cargo which she never received, and, therefore, could not deliver, because of a false bill of lading, cannot be successful, and we are somewhat surprised that the point is pressed here. Courtenay was a warehouseman in Milwaukee, and, although he acted as agent for the different steamers of the Grand Trunk line, he did not receive the flour to be sent by one particular steamer in preference to another. His engagement had this meaning, and nothing more—to forward the flour with all practical expedition by the first suitable steamer of the line which arrived in port that would carry it. Having actually shipped it in good condition in advance of the arrival of the *Franklin* in port, by seaworthy steamers, against which nothing is alleged, he discharged his obligations to the libellants. It would be strange, indeed, if the owners of the *Franklin* were made to suffer because the common agent of all the boats had, through inadvertence, given a receipt for merchandise not on the boat, or in the warehouse even, but which was then on board other boats on its way to its destination. The case is not embarrassed by any question of a *bona fide* purchase on the strength of the bill of lading, for the libellants themselves were the real shippers. Such is the claim of the libel, and it is supported by the evidence, for Sanderson swears the flour belonged to the libellants on its delivery at the warehouse. In so far as a bill of lading is a contract, it cannot be explained by parol; but if a contract, it is also a receipt, and in that regard it may be explained, especially when it is used as the foundation of a suit between the original parties to it—the shippers of the merchandise and the owner of the vessel. The principle is elementary, and needs the citation of no authority to sustain it. In this case the bill of lading acknowledges the receipt of so much flour, and is *prima facie* evidence of the fact. It is, however, not conclusive on the point, but may be contradicted by oral testimony. The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed

and so long settled, that it would be useless labour to restate it on the principles which lie at its foundation. The case of the schooner *Freeman v. Buckingham*, decided by this court, 18 Howard, 192, is decisive of this case. It is true the bill of lading there was obtained fraudulently, while here it was given by mistake; but the principle is the same, and the court held in that case that there could be no lien, notwithstanding the bill of lading. The court say “there was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security.” The judgment of the circuit court is affirmed.

EXCHEQUER CHAMBER.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

BILL OF EXCEPTIONS FROM THE COMMON PLEAS.

Monday, Feb. 7, 1870.

(Before KELLY, C. B., MARTIN, B., MELLOR, LUSH, and HANNEN, JJ., and CLEASBY, B.)

FOLEY v. THE UNITED FIRE AND MARINE INSURANCE COMPANY OF SYDNEY.

Insurance on chartered freight—At and from—Commencement of voyage upon which freight is to be earned.

The defendants insured the plaintiff's ship at and from Mauritius to Rice ports, and at and thence to a port or ports of call in Europe, on chartered freight valued at 1150l. By the charter-party the ship was to “sail and proceed on her present voyage from Calcutta to Mauritius, and having discharged her cargo there, proceed to Akyab,” to load and carry thence a cargo to Europe. The ship was lost in Port Louis, Mauritius, before she had discharged the whole of the cargo which she brought from Calcutta:

Held, that the loss was within the terms of the policy, and the plaintiff was entitled to recover his insurance upon the chartered freight.

This was a bill of exceptions to the ruling of Bovill, C. J. at Nisi Prius. It appeared from the judgment roll and the exceptions that the declaration was upon a policy of insurance upon chartered freight valued at 1150l. The premium paid was 84l. 10s. 6d., and the policy, which was in the usual form, contained the words, “whether lost or not lost, at and from Mauritius to Rice ports, and at and thence to a port or ports of call and discharge in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive, on chartered freight, valued 1150l.; including the risk of craft and running down as annexed, on board the good ship *Edmund Graham*, whereof is master or whoever else shall go for master in the said ship, or by whatsoever name or names the same ship, or the master thereof is or shall be named or called, beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, and shall so continue and endure during her abode there, upon the said ship, &c.; and further until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever shall be arrived at as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c. in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever, without prejudice to this insurance.”

The declaration proceeded: “And the plaintiff thereupon paid to the said company the sum of 84l. 10s. 6d

EX. CH.] FOLEY v. THE UNITED FIRE AND MARINE INSURANCE COMPANY OF SYDNEY. [EX. CH.]

as a premium for the said insurance, and the said ship was by a certain charter-party let and hired for certain chartered freight payable for the use of the said ship upon the said insured voyage. And the plaintiff was then and thence until, and at the time of the loss hereinafter mentioned, interested in the said subject-matter of insurance to the full amount of all the moneys by him insured thereon, and the said policy was made for the use and benefit, and by the authority of the person or persons so interested as aforesaid, and the said ship was in good safety at Mauritius; and afterwards, during the continuance of the said risk, the said vessel and the said chartered freight was, by the perils insured against, wholly lost; and all conditions precedent necessary to entitle the plaintiff to be paid by the defendants the said sum so insured by them as aforesaid, have been performed and fulfilled. Yet the defendants have not paid the same. And the plaintiff also sues the defendants for money payable by the defendants to the plaintiff for money had and received by the defendants for the use of the plaintiff, and for interest upon money due from the defendants to the plaintiff, and forborne at interest by the plaintiff to the defendants at their request. And for money found to be due from the defendants to the plaintiff upon accounts stated between them.

The first five pleas traversed the allegations in the first count.

And for a plea to the last count of the declaration the defendants paid into court the sum of 84*l.* 10*s.* 6*d.*

The jury found for the plaintiff for 1210*l.* beyond the sum paid into court.

At the trial it appeared by the plaintiff's evidence that the said ship *Edmund Graham* sailed from Calcutta with a cargo of rice in bags on the 10th Jan. 1868, and arrived at Port Louis, Mauritius on the 20th Feb. 1868, and was there anchored in good safety, and immediately proceeded to discharge her cargo. That on the 11th March 1868, when about 6500 bags of grain had been discharged from the said vessel, and about 9000 bags residue of the cargo were still on board, there was a violent hurricane at Port Louis aforesaid, from the effects of which the said ship parted from her anchor and was driven ashore and became a total wreck. The Lord Chief Justice directed the jury that if they believed the evidence, the policy had attached at the Mauritius at the time of the loss, and that the defendants were liable. Counsel for the defendants excepted to his Lordship's ruling.

The following is the material part of the charter-party:

It is this day mutually agreed between Captain W. H. Daviss, master, and Messrs. Gladstone, Wyllie, and Co. agents of the good ship or vessel called the *Edmund Graham*, 887 tons register, or thereabouts, now lying in the river Hooghly, on the one part, and Messrs. Wattenback, Heilgers, and Co., agents for Messrs. Burot, Gerber, and Co., of Akyab, merchants and charterers, on the other part.

That the said ship, being tight, staunch, and strong, in every way fitted for the voyage, shall, with all convenient speed, sail and proceed on her present voyage to Mauritius, and having discharged her cargo there, shall, with all convenient speed, sail and proceed to Akyab for orders (which are to be given within twenty-four hours), to load there or at Rangoon or Bassem (one port only), or so near thereunto as she may safely get, and shall load from the said charterers or their agents a full and complete cargo of rice in bags, which the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded, shall therewith proceed to Cork or Falmouth for orders (which shall be delivered within forty-eight hours after arrival there, otherwise demurrage at 20*l.* per day to accrue), to discharge at a safe port in the United Kingdom, or on the Continent between Havre and Hamburg, both included, or so near thereunto as she may safely get, and deliver her cargo with all reasonable despatch on being paid freight.

Thirty-five running days (Sundays excepted) are to be allowed the said charterers (if the ship is not sooner despatched) for loading the said ship, to commence and be computed from the day on which the ship shall be ready to

receive cargo, the master giving charterers notice of such readiness in writing; charterers to have the option of keeping the said ship ten working days on demurrage over and above said laying days at 200 rupees (two hundred) per day, to be paid daily as incurred. The vessel to be consigned at the port of discharge to freighters' agents free of commission on this charter-party. Freighters to have the option of cancelling the charter-party if the vessel does not arrive at Akyab on or before the 1st May 1868. Captain to sign bills of lading at any rate provided the aggregate amount equals the chartered rate. The owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage. Sufficient cash for ship's ordinary disbursements to be advanced to the master if required by him by freighters or their agents at the port of loading at current rate of exchange for the due appropriation of which the advancers shall not be responsible, not exceeding 600*l.* free of interest, but subject to a commission of 2½ per cent. and cost of insurance, such advance to be on account of the chartered freight from which it is to be deducted at settlement of the same, and is to be indorsed in bills of lading if required by the freighters or their agents. This charter-party is subject to an address commission of 2½ per cent. on the freight earned to be paid to the charterers or their agents at port of loading. Penalty for non-performance of this agreement, the estimated amount of freight.

Dated in Calcutta this 21st Dec. 1867.

Quain, Q. C. (with him J. C. Mathew) argued for the defendants.—The charter-party here on its face shows that another charter for a cargo from Calcutta to Mauritius was in existence; this charter takes the ship up at Mauritius at the termination of the other, and the contract upon the previous charter was not completed until the cargo was discharged. The question is when did this policy upon chartered freight first attach? We say that whatever may be the case with the ship, the policy upon the freight did not attach until the ship broke ground upon the voyage by which she was to earn the freight; she need not perhaps have actually set sail, but she must be ready to receive the cargo, and her cargo must be ready for her. In this case the inward cargo had not been discharged when she was lost. The rule is laid down in Arnould, vol. 1 (3rd edit.), p. 412, "That where a cargo has been contracted for, and is ready to be shipped on board at the time of the loss, and the ship being otherwise in a condition to receive the cargo is only prevented from doing so by the intervention of the perils insured against, the policy on freight attaches, and the underwriters are liable for the loss of the whole freight that would have been earned on the voyage, even though no part of the cargo has ever been shipped on board at all." The words "at and from" apply quite differently to policies on goods and ship and to policies on freight. There is a difference also between policies on ordinary freight, and on chartered freight; the cases on freight, strictly and properly so called (reward, that is, to be earned for the shipowner by the carriage of the merchant's goods), establish the rule, according to Arnould, p. 418, that, "unless therefore some goods were in fact shipped on board or only prevented from so being by the intervention of the loss, the shipowner's inchoate right to freight, as the price of the carriage of such goods, could obviously not have accrued." But in cases of chartered freight (p. 419), if "she has once broken ground upon the voyage on which freight is to be earned under the charter-party, and is prevented by the perils insured against from earning the freight, the assured is entitled to recover the whole amount insured upon freight, quite irrespective of the question whether at the time of loss she had taken any goods on board for voyage insured, or whether any were contracted to be shipped." When was the inception of this voyage? The ship must have broken ground upon the voyage on which freight was to be earned under the charter-party; that voyage is described in the charter-party here as "having discharged her cargo there" (at Mauritius), "shall with all convenient speed sail and proceed to Akyab," shall load there, "and being so loaded, shall there-

Ex. CH.] FOLEY v. THE UNITED FIRE AND MARINE INSURANCE COMPANY OF SYDNEY. [Ex. CH.]

with proceed to Cork," "and discharge at a safe port in the United Kingdom or in the continent." We do not contend that breaking ground means necessarily leaving the place from which the voyage begins, but the other cargo must have been discharged, as in *Devaux v. J'Anson*, 5 Bing. N. C. 519, which, however, was a case concerning ordinary freight. The case of *Thompson v. Taylor*, 6 T. R. 478, was a decision upon chartered freight; there the voyage described in the charter-party was from London to Teneriffe, there to take on board a cargo and proceed to Barbadoes; the ship was taken as a prize before she arrived at Teneriffe; the policy on the freight for the carriage of this cargo was held to attach from the sailing of the ship from London; but Lord Kenyon said, p. 481, "The property against the loss of which the assured wished to be indemnified is that which he had a right to receive under the charter-party; and it seems now admitted that if the contract had its inception, if anything were done under it by the plaintiff who let his ship to hire, his right to freight commenced. That depends on the words of the charter-party." Now it is shown on the face of this charter that there was another charter from Calcutta to Mauritius; and at the time of the ship's loss she was in the performance of another voyage from that which was the subject of this charter-party. [HANNEN, J.—That does not appear. MARTIN, P.—Or suppose she was doubly covered at the time of the loss.] This charter cannot be otherwise interpreted but that there was another charter from Calcutta, and there is nothing in it to show an intention to insure a previous voyage. Manifestly one charter was to be in succession to the other. In no decided case was a policy upon freight held to attach during the existence of a contract upon a preliminary charter. Our argument is that in the case of a policy upon chartered freight, "at" must mean at the place where the ship is ready to take the cargo which will earn the freight. In *Barber v. Fleming*, a case recently decided, L. Rep. 5 Q. B. 59, the loss was clearly within the policy because the ship got on shore when in ballast on her way, with the sole object to earn her freight. *Thompson v. Taylor* was followed by *Horncastle v. Suart* 7 East, 400, in which it was held that an insurance on freight at and from Dominica to London attached while the ship lay at Dominica delivering her outward cargo, but that decision was upon the ground that the contract of affreightment by the charter-party from London to Dominica and back was one entire contract. So also *Davidson v. Willasey*, 1 M. & Sel. 313. And in *Forbes v. Cowie* 1 Camp. 519, Lord Ellenborough referred to *Horncastle v. Suart*; he said "there, however, there was one charter-party for the outward and homeward voyage, and the freight was entire. That is the only ground upon which the decision can be sustained." In *Forbes v. Aspinall*, 13 East, 323, which was a case where the ordinary and not chartered freight was in question, it was said that "if the voyage has commenced in which the freight is to be earned, and be stopped by any of those perils, the assured will be entitled to recover to the full amount." In his judgment in *Barber v. Fleming* p. 71, Blackburn, J. cites the following passage from Phillips on Insurance, sect. 335 which is a strong authority against the plaintiff's contention in this case; "if the prior passage is merely preliminary to those for which the vessel is chartered, having no cargo deliverable at A. or any intermediate port, and the object in the passage to A is merely to prosecute the voyage thence to B, the interest in the whole freight under the charter-party accrues on the commencement of the first passage." And Blackburn, J. afterwards guards himself from saying that "if the owners had been carrying freight from

Bombay to Howland's Island (which is exactly the case here from Calcutta to Mauritius) that might not raise a different question" from that which *Barber v. Fleming* decided. Moreover, it appears by the charter-party that the freighters were to have the option of cancelling the charter-party if the vessel did not arrive at Akyab by the 1st May 1868; therefore the subject of the policy was contingent upon an event which did not take place, and the plaintiff had no insurable interest in the policy.

Sir G. Honyman Q.C. (with him Watkin Williams) appeared for the plaintiff, but was not heard.

KELLY, C. B.—The plaintiff insured upon chartered freight at and from Mauritius to Rice ports, and at and thence to a port of call in the United Kingdom or continent. This chartered freight was to be earned by the ship *Edmund Graham*, which was lying at the date of the charter-party in the Hooghly; she was to sail and proceed on her then present voyage to Mauritius, and having discharged her cargo there, to sail and proceed to Akyab for orders, and to load there or at another of the Rice ports. The ship was lost at Port Louis, Mauritius, before all her cargo from Calcutta was discharged. It is now insisted that her loss was not within the policy and charter-party. Mr. Quain has argued that the policy upon which the action was brought attached only on the ship's sailing out of port; it was enough, however, for him to contend that it did not attach until the cargo from Calcutta was discharged, and the ship was ready to earn the chartered freight. The question for us is whether, upon the ordinary and true construction of the policy, she was at Mauritius when she was lost. It seems to me that it would be a strained construction of the policy to subdivide the period during which the ship was at Port Louis into two portions, and to say that she shall not be insured for more than one of those portions. But the case is also put on another and different ground—it is said that the interest and risk only attach when the voyage commences, that is, at least, after the other cargo has been discharged. If so, it would only amount to this, that insurance could not be effected on freight to be earned upon any voyage not actually commenced if any other cargo is at the time on board. The cases of *Thompson v. Taylor* and *Barber v. Fleming* show that the risk upon chartered freight may commence earlier than the beginning of the voyage upon which the freight is to be earned, whatever be the language of the policy. Upon this point these two cases are conclusive. The real doctrine is, that if the voyage has commenced by which chartered freight is to be ultimately earned, there is an inchoate title to the insurance upon the freight, provided that the language of the policy and charter-party will permit it. In the case of *Barber v. Fleming* the voyage upon which the ship was lost was from Bombay to Howland's Island, where the policy was *de facto* to attach, the risk insured against being upon chartered freight on the voyage at and from Howland's Island to the United Kingdom; the beginning of the earnment of the freight was at Howland's Island, but still by the terms of the policy the vessel was to proceed from Bombay to Howland's Island and thence to the port of final discharge, just in the same way as by this policy the ship was to proceed from Calcutta to Mauritius, and thence to the Rice ports. The loss took place before the ship's arrival at Howland's island, and if Mr. Quain's argument could be supported that policy would have been void. Nevertheless, it was held that the plaintiff could recover against the underwriters. Certainly the ship there was sailing in ballast, and here there was a cargo from Calcutta to Mauritius; but if we look at the

EX. CH.]

Re PHENE'S TRUSTS.

[CHAN.]

other case I have mentioned we find conclusive authority on this point. There the ship was chartered to proceed from London to Teneriffe, and there to take a cargo. There, as here, the freight could not begin to be earned until the ship arrived at the intermediate port; it was held, nevertheless, that a policy of insurance on the freight for that cargo attached from the sailing of the ship from London. Lord Kenyon put the question upon clear and intelligible grounds. After distinguishing the case from *Tonge v. Watts* he said "The property, against the loss of which the assured wished to be indemnified, is that which he had a right to receive under the charter-party; and it seems now admitted that if the contract had its inception, if anything were done under it by the plaintiff who let his ship to hire, his right to freight commenced. That depends upon the words of the charter-party." Now here from this charter-party it appears that the voyage was to commence from Calcutta, the ship "shall with all convenient speed, sail and proceed on her present voyage to Mauritius, and having discharged her cargo there, shall with all convenient speed, sail and proceed to Akyab," there to load, &c. The inchoate right to the insurance on freight from Akyab attached when the voyage was commenced for the purpose of going to the place where the freight was to be earned. The owner of the ship might have incurred expense to put the ship in a condition to proceed from Mauritius to the Rice ports. I think, therefore, that on the principle of the insurance cases the loss took place within the period covered by the policy, and there is left for us to consider only the plain and simple question, what is the plain meaning of the words and terms here used? "At and from Mauritius" in the ordinary and natural signification of the expression imports the whole time from the arrival of the ship at Mauritius to her departure, together with the subsequent voyage. The loss was, therefore, within the terms of the policy, and the judgment must be affirmed.

MARTIN B.—I am of the same opinion, and it seems to me to be a question of the meaning of the simple words in the policy. On the 2nd March 1868, this policy was entered into between the plaintiff and the defendants on chartered freight, valued at 1150*l.* at and from Mauritius to Rice ports. In words as plain as can be written, the insurer undertook his risk upon the policy as soon as the ship reached Mauritius, provided that at the time and place mentioned the freight was lost by the perils insured against. The charter-party recites the agreement between the captain and the agents of the owners of the ship *Edmund Graham* on the one part, and the agents of the charterers on the other. The contract is that the ship being tight, staunch, and strong, in every way fitted for the voyage, shall, with all convenient speed, sail and proceed on her present voyage to Mauritius, and, having discharged her cargo, then proceed to Akyab to load a cargo for a port in the United Kingdom or Continent. Now, if the test of the underwriter's risk was the commencement of the voyage upon which the freight was to be earned, the two cases cited by my Lord would be sufficient to show that the loss here took place within the limits of the policy; but in my opinion it is not necessary to consider that test, for the words "at and from" certainly include the time during which the ship was discharging her cargo. What the plaintiff wanted to insure was the loss of the chartered freight. What occurred? The ship arrived safely at Mauritius, and was as much lost "at Mauritius" as if the cargo had been entirely discharged. Why should not the plaintiff be indemnified? This is, I think, about as plain a case as there possibly could

be, and there cannot be any ground for not applying to it the reasonable meaning of the words used. If an authority were wanted, which I think is not, that of Cockburn, C.J., in *Barber v. Fleming* is sufficient. In every word of his judgment I concur, for I think it good law and good sense. The plaintiffs are entitled to recover.

MELLOR, LUSH, and HANNEN, JJ., and CLEASBY, B., concurred.

Judgment for plaintiffs.

Attorneys for plaintiffs, *Thomas and Hollams.*

Attorneys for defendants, *Ellis, Parker and Clarke.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by T. BROOKSBANK and E. STEWART ROCHF., Esqrs.,
Barristers-at-Law.

Dec. 18, 21, 22, 1869, and Jan. 14, 1870.

Re PHENE'S TRUSTS.

(Before Lord Justice GIFFARD.)

*Disappearance of a person—Absence of all tidings—
Presumption of death.*

The authorities at law and equity as to the presumption of death in the case of a person who has not been heard of reviewed and considered, and the law upon the point settled.

A person who has not been heard of in any manner for seven years, will be presumed to be dead at the end of those seven years; but it will not be presumed that he died at any particular moment, nor that he has lived any given time after the latest moment when he is proved to have been alive.

This was an appeal from a decision of James, V.C., who declared that Nicholas Phené Mill, who had not been heard of for upwards of seven years, must be taken to have survived the testator in the matter, his uncle Francis Phené, and that the fund in court, which had been paid in by the trustees, must be paid out to his representative.

The hearing before his Honour is reported in 21 L. T. Rep. N. S. 107, where the facts are sufficiently stated. In the judgment of Giffard, L. J., the circumstances relating to the disappearance of Nicholas Phené Mill are more fully referred to.

Bristowe, Q. C. and Everitt supported the appeal.

Amphlett, Q. C. and Bagshawe, for the respondent, the administrator of N. P. Mill.

Edwards and Langworthy for parties in the same interests as the appellants.

C. J. Hill for the trustees who had paid in the fund.

The authorities referred to were:

Nepean v. Doe, 5 B. & Ad. 86;
Dunn v. Snowden, 2 Dr. & Sm. 201; 7 L. T. Rep. N. S. 558;

Underwood v. Wing, 4 Do G. M. & G. 633;

Wing v. Angrave, 8 H. of L. Cas. 183;

Mason v. Mason, 1 Mer. 308;

Re Green's Settlement, L. Rep. 1 Eq. 238; 13 L. T. Rep. N. S. 541;

Lambe v. Orton, 8 W. R. 111; 1 L. T. Rep. N. S.

Thomas v. Thomas, 2 Dr. & Sm. 298; 11 L. T. Rep. N. S. 471;

Re Benham's Trust, L. Rep. 4 Eq. 416; 16 L. T. Rep. N. S. 349; on appeal 16 W. R. 180;

Re Beasley's Trusts, L. Rep. 7 Eq. 498; 19 L. T. Rep. N. S. 690;

CHAN.]

Re PHENE'S TRUSTS.

[CHAN.]

Re v. The Inhabitants of Harborne, 2 Ad. & Ell. 540;

Reg. v. Lumley, L. Rep. 1 Cr. Cas. Res. 196; 20 L. T. Rep. N. S. 454;

Dowley v. Wingfield, 14 Sim. 277;

Re v. Twynning, 2 B. & Ald. 386;

Lakin v. Lakin, 34 Beav. 443; 12 L. T. Rep. N. S. 517.

Everitt having replied, judgment was reserved until the 14th Jan., when

Lord Justice GIFFARD said.—This is an appeal from so much of an order of James, V.C. as directs the residue of a fund, which is standing in court to “the account of the share intended for Nicholas Phené Mill,” to be paid to his administrator. The order was made upon the hypothesis that Nicholas Phené Mill survived Francis Phené, the testator. The learned Vice-Chancellor, in making the order stated that he did so in deference to the authority of three cases which have been decided by Kindersley, V.C., and a fourth by Malins, V.C.; but at the same time he dissented from their opinions, and expressed a wish that the whole matter should be brought before the Court of Appeal.

The testator died on the 5th Jan. 1861. According to one view of the evidence Nicholas Phené Mill was last heard of in Aug. 1858; according to another view, about seven months previously to the testator's death. That he survived the testator was treated by the Vice-Chancellor, but in deference only to the four cases referred to, as to be presumed. It will be desirable, therefore, to examine those cases, and such others as bear materially on the subject, before dealing with the evidence more particularly.

The cases decided by Kindersley, V.C. were *Lambe v. Orton*, 6 Jur. N. S. 61; *Dunn v. Snowden*, 2 Dr. and Sm. 201; and *Thomas v. Thomas*, 2 Dr. & Sm. 298. They were all decided on the same general principles. The propositions enunciated were in substance these—first, that the law presumes a person who has not been heard of for seven years to be dead, but, in the absence of special circumstances, draws no presumption from that fact as to the particular period at which he died; secondly, that a person alive at a certain period of time is, according to the ordinary presumption of law, to be presumed to be alive at the expiration of any reasonable period afterwards; thirdly, that the onus of proving death at any particular period within the seven years lies with the party alleging death at such particular period.

The case decided by Malins, V.C. was *Benham's Trust* (*sup.*) He adopted and acted on the decisions of Kindersley, V.C., but went somewhat further, laying it down “that if you cannot presume death at any particular period during the seven years, then at the end or expiration of the seven years you must presume for the first time that the person was dead, and you must also presume that within that time he was alive.” *Benham's Trust* was appealed from, and Rolt, L.J. in Nov. 1867 discharged the Vice-Chancellor's order, directing further inquiries, and simply stating, according to the only report I am aware of (14 W.R. 180), “that there was no evidence for the court to act upon, and that it was a case not of presumption, but of proof.” In *Dowley v. Wingfield*, 14 Sim. 277, the testator died in Sept. 1833; one of his two sons went abroad in Sept. 1830, and was heard of for the last time about twenty months previously to his father's death. The court ordered a share of the father's residue bequeathed to him to be transferred to his brother, as the sole next of kin of the father living at the father's death. Security to refund was taken. In *Mason v. Mason*, 1 Mer. 308, the father and son were shipwrecked together. The rules

of the civil law and of the Code Napoléon were relied on. Sir Wm. Grant said: “There are many instances in which principles of law have been adopted from the civilians by our English courts of justice, but none that I know of in which they have adopted presumptions of fact from the rules of the civil law. In the present case I do not see what presumption is to be raised; and since it is impossible you should demonstrate, I think that if it were sent for an issue, you must fail for want of proof. An issue was directed whether the son was living at the death of the father; nothing appears to have come of it. In *Underwood v. Wing*, 4 D. M. & G. 633, which was also a case of *commorientes*, a testator bequeathed personal estate to J. W. in the event of his wife dying in his lifetime. The testator and his wife were shipwrecked and drowned at sea. On the question being raised between the next of kin of the testator and J. W., who claimed under the will, it was held, first, that the onus of proof that the husband survived his wife was upon J. W. Secondly, that it was necessary to produce positive evidence in order to enable the court to pronounce in favour of the survivorship; and, thirdly, that no such evidence having been produced, the next of kin were entitled. *Underwood v. Wing* was heard before Lord Cranworth, Wightman, J., and Martin, B. Wightman, J., in the course of delivering judgment, stated: “If there be satisfactory evidence to show that the one survived the other, the tribunal ought so to decide independent of age or sex, and if there be no evidence the case is the same as a great variety of other cases, more frequent formerly than at present, where no evidence exists, and of consequence no judgment can be formed;” and he afterwards added, “We think there is no conclusion of law on the subject—in point of fact we think it unlikely that both actually did die at the same moment of time, but there is no evidence to show which was the survivor.” In *Wing v. Augrave*, 8 H. of L. Cas. 183, another branch of the same case, the House of Lords concurred in the view which had been taken by Lord Cranworth and the learned judges who sat with him. In *Green's Settlement*, L. Rep. 1 Eq. 288, Mr. Green was murdered in the Indian Mutiny on the 3rd June, 1857, Mrs. Green on the 16th Nov. following. Mr. and Mrs. Green's child escaped with its native nurse on the same 3rd June, but was never afterwards distinctly heard of. After the lapse of seven years and upwards, a petition was presented, and the present Lord Chancellor, then Vice-Chancellor, delivered the following judgment: “I think the rule which the court should follow in this case is analagous to that laid down in *Underwood v. Wing*. The whole question is, on whom is the onus of proof thrown? The lady, on the devolution of whose estate the question arises, is shown to have died on the 16th Nov., her husband is shown to have died before her; a number of persons claim as her relatives, and prove their kindred within a certain degree, and, so far as now appears, there is no one nearer in kindred. On the other hand the representative of another person claims the property also, and shows that the person through whom he claims was nearer of kin than the petitioner, and would have been entitled if he had survived his mother. But a person claiming under such a title must go further, and must show, not only that the person through whom he claims would have been entitled if he had survived, but that he actually was entitled, or, in other words, that he did survive. I am of opinion also that in this case there was some evidence to go to a jury, that the child died in the mother's lifetime, but I do not rest my decision on this evidence. I prefer to rely on the grounds which I have before stated.” There are three other cases in equity—viz., *Lakin v. Lakin*, L. Rep. 34 Beav. 443; *Re Beasley's Trusts*, 7 Eq. 498;

CHAN.]

Re PHENE'S TRUSTS.

[CHAN.]

and *Re Henderson*, referred to in that case. In all of these the period of the death was inferred as a matter of fact from the circumstances proved, not in any sense presumed. This appears to be the state of the authorities in the equity courts.

The leading case, however, is one at law—viz., *Nepean v. Doe*, which is reported before the King's Bench, in 5 Barn. & Ad. 86, and before the Exchequer Chamber in 2 M. & W. 894. In that case the lessor of the plaintiff claimed as grantee in reversion of a copyhold estate on the death of Matthew Knight. Matthew Knight went to America; the last account that was heard of him was by a letter written by him from Charleston, and received in England in May 1807; ejectment was brought within twenty-five years from the date he was last heard of, and within twenty from the date of the right accruing, if he was to be taken to have died at the end of the seven years from 1807. The Court of Queen's Bench was of opinion that the lessor of the plaintiff, who gave no other evidence of Matthew Knight's death than his absence, failed in establishing that his death took place within twenty years before the ejectment brought. With reference to the argument of inconvenience Lord Denman said, "If, for the sake of preventing inconvenience, we were arbitrarily to lay down a rule that seven years' absence abroad, the party not having been heard of, was *prima facie* evidence of his death at the end of the seven years, such a rule would in the very great majority of cases, nay, in almost every case, cause the fact to be found against the truth, and as the rule would be applicable to all cases in which the time of death became material, it would in many be productive of much inconvenience and injustice." The Exchequer Chamber adopted the doctrine of the Court of King's Bench in these terms, viz.: "We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof." It is obvious from these passages that there is an inconsistency between that which the courts of King's Bench and Exchequer Chamber laid down and what I have quoted from the judgment of Malins, V. C. as going beyond what was laid down by Kindersley, V. C. The Vice-Chancellor Kindersley, however, seems to have founded his opinion on certain portions of these two judgments; there are, therefore, other parts of them which it will be desirable to quote and examine. Thus in the Court of King's Bench it is stated: "There is no doubt that the lessor of the plaintiff must recover by the strength of his own title, and in order to do so must prove that he had a right to enter on the lands sought to be recovered within twenty years before the ejectment brought; and consequently, as the presumption is that a person once alive continues so until the contrary is shown, the lessor of the plaintiff was bound to prove, first, the death of Matthew Knight, and, secondly, that it took place within twenty years before ejectment brought;" and in the judgment of the Exchequer Chamber the following are the material passages bearing on this part of the subject: "The court is called on to review the decision of the Court of King's Bench in *Nepean v. Doe*. The doctrine there laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; and that, if it be important to anyone to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of. After fully considering the

argument at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of Jac. 1 relating to bigamy, and more particularly to the statute of 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the fact of death, but not of the time; it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rex v. The Inhabitants of Harborne*. It is true the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death by proving the absence of Matthew Knight, and his not having been heard of for seven years; whence arises at the end of those seven years another presumption of law, namely, that he is not then alive, but the onus is also cast on the lessor of the plaintiff by showing that he has commenced his action within twenty years after his right of entry accrued, that is after the actual death of Matthew Knight. Now when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day, and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years."

Kindersley, V. C. appears to have acted on the passages in both these judgments, which are to the effect that the onus of proving the death of Matthew Knight lay on the plaintiff, because the law presumes that a person shown to be alive at a given time remains alive until the contrary be shown. Those passages are not essential to the conclusions arrived at, or sound in point of reasoning. The other parts of the same judgments go to prove that there is not, and ought not to be, any such presumption of law; if there was such a presumption, it would be no ground for throwing the onus of proof on the plaintiffs where seven years had elapsed from the date of the last proof of existence; on the contrary, it would carry the period of death, as suggested and laid down by Malins, V. C., to the end of the seven years; but both the decisions are that it did not, and because it did not the plaintiff failed, and did not recover the property he sought. In the recent case of *Reg. v. Lumley*, 20 L. T. Rep. N. S. 454, it was held, consistently with another judgment delivered by Lord Denman in *Rex v. The Inhabitants of Harborne*, 2 Ad. & Ell. 540, that there was no presumption of law in favour of the continuance of a life up to a particular period; but that it was a question for the jury as a matter of fact. The case was heard before the Chief Baron, Byles, Lush, and Brett, J.J. and Cleasby, B., and Lush, J. delivered the judgment of the court in these terms: "We are of opinion that the direction to the jury in this case, viz., that there being no

CHAN.]

Re PHENE'S TRUSTS.

[CHAN.]

circumstances leading to any reasonable inference that he had died, Victor must be presumed to have been living at the date of the second marriage was erroneous. In an indictment for bigamy it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is surely a question of fact. The existence of the party at an antecedent period may, or may not, afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would, in all probability, find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw such an inference. Thus the question is entirely for the jury; the law makes no presumption either way. The cases cited of *Rex v. Twynning*, *Reg. v. Harborne*, and *Nepean v. Doe* appear to us to establish this proposition. Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The provision in the Act 24 & 25 Vict. c. 100, s. 57 then comes into operation, and exonerates the prisoner from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The Legislature, by this provision, sanctions a presumption that a person who has not been heard of for seven years is dead, but the provision affords no ground for the converse proposition, viz., that when a party has been seen or heard of within seven years, a presumption arises that he is still living. That, as we have said, is always a question of fact."

True it is that *Reg. v. Lumley* was a criminal case, and that the seven years had not elapsed from the date of the first husband having been last heard of; but though a jury might be more ready to draw an inference in a civil than in a criminal proceeding, it cannot be that the rules of evidence in each case should be so far different as that there should be a positive legal presumption in the one proceeding, and no legal presumption in the other. A prosecutor and a person seeking to recover property each have to prove their case, and in each instance the object is to arrive at, and act on, the real truth. Lord Denman, who delivered both judgments in *Nepean v. Doe*, thus expressed himself in *Rex v. The Inhabitants of Harborne*: "I must take this opportunity of saying that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Nepean v. Doe* the question arose much as in *Rex v. Twynning*. The claimant was not barred if the party were presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff, because, if there was a legal presumption there was nothing to be submitted to the jury. But this court held that no legal presumption existed, and set the verdict aside. That is quite consistent with the view which we take in the present case, and *Rex v. Twynning* is explained in the same way. I am aware that in the latter case Bailey, J., founds his decision on the ground of contrary presumptions; but I think that the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it?" Other learned judges concurred in this opinion. The

notion of a legal presumption in favour of life originated, I believe, with the civil law, and we have Sir William Grant's opinion in *Mason v. Mason* as to adopting presumptions of fact from that law. It is a general well-founded rule that a person seeking to recover property must establish his title by affirmative proof. This was one of the grounds of decision in *Nepean v. Doe*, and to assert, as an exception to the rule, that the onus of proving death at any particular period, either within the seven years or otherwise, should be with the party alleging death at such particular period, and not with the person to whose title that fact is essential, is not consistent with the judgment of the present Lord Chancellor, when Vice-Chancellor, in *Re Greenwood*, or with the dictum of Rolt, L. J., when he said, in *Re Benham's Trusts*, that the question was one not of presumption, but of proof; or with the real substance of the actual decisions, or the sound parts of the reasoning in *Nepean v. Doe*, or with the judgments in *Rex v. The Inhabitants of Harborne*, and *Reg. v. Lumley*, or with the principles to be deduced from the judgment in *Underwood v. Wing*. The true proposition is, that those who found a right upon a person having survived a particular period, must establish that fact affirmatively by evidence. The evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail.

This case happens to be one of an alleged number of a class of legatees. A legatee's survivorship of a testator is requisite to clothe him with that character, is a tacit condition annexed by law to every ordinary immediate gift by will, and it follows that the representatives of a person alleged to be a legatee must prove, as against the other members of the class who prove their survivorship, that he survived the testator; otherwise he was not a legatee at all. For these reasons, and upon a review of the authorities and the judgments on which they rest, I am of opinion that there is no presumption of law as to the particular period at which Nicholas Phéné Mill died—that it is a matter of fact to be proved by evidence, and that the onus of proof rests on his representative.

This brings me to an examination of the evidence. At the hearing a further inquiry as to the facts was offered, and declined by each of the parties. It was not admitted by the appellants that Nicholas Phéné Mill was the Nicholas Mill referred to in the communications from the American officials, but these communications were not objected to, and were read and commented on by both sides. There are three affidavits—the earliest in point of date is that of Nicholas Phéné Mill's mother. She states that she is the widow of William Mill the elder, that she left England many years ago to reside abroad, that Nicholas Phéné Mill was born at Ostend in the year 1829, that on the 19th Aug. 1853 he left home, and went to reside in America, that he wrote letters to her and her family from America, that she received from him a letter addressed from on board the United States frigate *Roanoke*, dated the 15th Aug. 1858; that neither she, nor, as she believes, any member of the family has heard from him since, and that she believes him to be dead. She speaks of inquiries that have been made for him. The next affidavit is that of the petitioner in the court below. He is a brother of Nicholas Phéné Mill. He speaks of his brothers and sisters, and says that the last that has been, or can be, ascertained or heard about Nicholas Phéné Mill is that, being a sergeant of marines in the United States naval service, and unmarried, he deserted from the *Roanoke* United States frigate on the 16th June 1860. He further says that he was himself in America from Aug. 1853 till April 1862; speaks of many fruitless inquiries and advertisements, and adds that his infor-

ROLLS.]

WILKINSON v. LINDGREN.

[ROLLS.]

mation as to Nicholas Phené Mill's desertion was derived from an official letter written in answer to one from his solicitors to the Government authorities in America. The last affidavit is that of the clerk to the petitioner's solicitors. He speaks of letters of administration being granted to the petitioner, and proves the correspondence with the Government officials in America. There were two letters from the petitioner's solicitors; each was answered. The answer to the second was the most explicit, and the only one necessary to refer to—it is indorsed on the letter to which it is an answer, and is in these terms:—

Na. Department, Bureau Equipment and Recruiting, Washington, Dec. 11, 1867.

Nicholas Mill was a sergeant in the Marine Corps, and deserted June 16th, 1860, while on leave from New York to join the Philadelphia Station. He has not been heard of from since that date.

M. SMITH, Chief of Bureau.

This was in answer to a letter which it is stated that Nicholas Phené Mill wrote to his mother on the 15th Aug. 1858, from on board the United States frigate, *Roanoke*, Boston Navy Yard, Massachusetts, stating he expected to be long absent, but would write on his return from his voyage.

If this correspondence is excluded there is no other evidence than that Nicholas Phené Mill was last heard of in 1858; there would, therefore, be no sufficient evidence of his having survived the testator, nor does the admission of the correspondence supply the necessary proofs; for though I assume that the Nicholas Mill was the Nicholas Phené Mill who wrote from the *Roanoke*, I cannot infer from the statement of his desertion on the 16th June 1860, that he was alive when the testator died in Jan. 1861. I should not do so if it was a simple statement of desertion and no more; but the statement is not simply that he deserted, but that he deserted while on leave from New York, to join the Philadelphia Station, June 16th 1860, and has not been heard of "from since that date;" the reasonable conclusion from which is that he never re-appeared after he went on leave, that his leave was up on or before the 16th June 1860, and that so his name was on the books as a deserter. If I am to draw a conclusion at all, I should infer that a person in the position of a sergeant having nothing against his character would not desert, and that he had died while on leave, and so was not heard of by the authorities. It is enough, however, for me to state that, in my opinion, the burden of proof is on the representative of Nicholas Phené Mill, and that Nicholas Phené Mill's representative has not proved affirmatively that Nicholas Phene Mill survived the testator, a proof which I consider essential to his title.

The order of the Vice-Chancellor must be discharged, and an order made as prayed by the petition of appeal, but the costs below and here must come out of the share.

Solicitors, *A. C. Briant, M. Pope, Fielder and Co.*

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

June 28, and July 13 and 14, 1869.

WILKINSON v. LINDGREN.

Will—Construction—Charitable gift—Uncertainty—Resulting trust.

A testatrix, after bequeathing certain sums to various religious and charitable institutions by name, gave the residue of her personal estate to trustees upon trust to divide the same, to and amongst the different institutions, or to any other religious institution or purposes

as they (the trustees) might think proper, which disposition she left entirely to their discretion:

Held, that the word "religious" applied to "purposes" as well as "institution," and that the residuary clause, therefore, contained a good charitable bequest.

This was a suit for the administration of the estate of Mary Davison, which now came on for further consideration.

The testatrix, by her will which bore date the 5th March 1840, after bequeathing certain sums to various religious and charitable institutions, specifically named in the will, gave the residue of her personal estate to T. Fletcher and J. Wilkinson, whom she appointed executors of her will, upon trust to divide the same "to and amongst the different institutions or to any other religious institution or purposes as they, the said T. Fletcher and J. Wilkinson, may think proper, which disposition I leave entirely to their discretion."

Sir Richard Baggallay, Q. C., and C. Hall, for the plaintiffs, the trustees of the will, submitted that the residuary bequest was either a good charitable bequest, or that the trustees had a discretion as to the disposal of the residue, whether they would pay it to the charitable institutions or to the next of kin.

Roxburgh, Q. C., and Phear, for the defendants, the next of kin, contended that the bequest, being for general purposes at the discretion of the trustees was void, and that there was, therefore, a resulting trust for the next of kin. They cited

Morice v. The Bishop of Durham, 9 Ves. 399; 10 Ves. 522.

Lord Romilly held, on the authority of *Morice v. The Bishop of Durham*, that the residuary bequest was void for uncertainty, and that there was a resulting trust for the next of kin.

The religious institutions, which had not been represented at the hearing of the case on the 28th June, obtained leave to be heard, and the case was re-argued on the 13th July.

Southgate, Q. C. and Bunting, for the institutions, contended that the word "religious" applied to "purposes" as well as "institutions," and that there was, therefore, a good charitable bequest. They cited

Baker v. Sutton, 1 Keen, 224.

Roxburgh, Q. C. and Phear, for the next of kin, contended that the alternative gift was for any other purposes and was void.

July 14.—Lord ROMILLY.—Upon consideration I think that the conclusion at which I arrived the other day was wrong. I do not think that I can properly hold that the word "religious" applies to "institutions" and not to "purposes." This would be an arbitrary way of reading the sentence for the purpose of creating an intestacy. There must, therefore, be a declaration that there was a good charitable bequest of the residue.

Solicitors for the plaintiffs, *Gregory, Rowcliffe, and Rawle*, for Cooper and Son, Manchester.

Solicitors for the other parties concerned, *Greaves, Walker; Masterman.*

ROLLS.] *Re* CAMBRIAN RAILWAYS COMPANY—*Re* RUSH (a Solicitor). BAREHAM *v.* HALL. [V.C. J.]

Thursday, Jan. 20.

Re THE CAMBRIAN RAILWAYS COMPANY;*Ex parte* JONES AND PARRY.*Railway company—Act restraining proceedings without leave of court—Unpaid vendors—Leave to sue.**The 36th section of the Cambrian Railways Act 1868 provides that after the passing of the Act no actions, suits, &c., against the company, with certain exceptions therein specified, shall be continued or commenced during the period of five years, unless with the leave of the High Court of Chancery.**On a motion by an unpaid vendor for leave to file a bill for specific performance :**Held, that the court would grant leave only if it were shown that the company had the means of paying and refused to pay.**Motion accordingly refused, but without costs, and without prejudice to any further application after the expiration of six months.*

This was a motion by unpaid vendors for leave to file a bill for specific performance against the Cambrian Railways Company, notwithstanding the provisions of the 36th section of the Cambrian Railways Act 1868, by which it is provided that from and after the passing of the Act, and except as by the Act provided, no actions, suits, or other proceedings against the company, or affecting the property of the company, except proceedings against the company as carriers of goods or passengers, or in respect of liabilities contracted after the passing of the Act, shall be continued or commenced during the period of five years, unless with the leave of the High Court of Chancery, to be obtained on summons or motion in a summary way, and upon such terms as the court may impose; provided that the costs of any action or suit, or other proceedings against the company, or affecting their property, which shall be discontinued pursuant to this Act, shall be in the discretion of the court, and, if allowed, may be added to the debt.

A railway company, which was afterwards incorporated with the Cambrian Railways Company, took possession in 1863, under their compulsory powers, of certain lands in the county of Cardigan belonging to C. R. Jones and Ann Parry, who after the date of the amalgamation, viz., in 1866, entered into a formal contract with the Cambrian Railways Company for the sale of the land, at the price of 475*l.*, to the company; and by the contract it was agreed that the purchase-money should bear interest at the rate of five per cent. from the time when possession had been taken of the land. The title had been approved, and a draft conveyance agreed upon, but the company were unable to complete.

Osborne Morgan, Q. C. and E. G. Herbert, in support of the motion, submitted that the amount of the purchase-money being small the payment of it would not be inconvenient to the company, and that the court ought to give leave to the applicants to file their bill, as it was a great hardship for them to be deprived of their money. They cited

Griffith v. The Cambrian Railway Company, 21 L. T. Rep. N. S. 290;*Symes v. The Cambrian Railway Company*, 3 W. Notes 284.

Jessel, Q. C. and A. C. Humphreys, for the company, were not called upon.

Lord ROMILLY.—I cannot take into account the smallness of the amount of the purchase-money. The object of the Cambrian Railways Act 1868 was to protect the company from the expenses of litigation;

the case of the present applicants does not differ from that of the other unpaid vendors, and if I were to give them leave to file a bill I should be obliged to give the same leave to every other unpaid vendor, and the object of the Act would be defeated. The court will give leave to institute a suit against the company only when it is shown that the company have the means of paying and refuse to pay. The motion must, therefore be refused, but without costs, and without prejudice to a renewal of the application after the expiration of six months, if the applicants shall be so advised.

Solicitors for the applicants, *Dean and Taylor*.Solicitors for the company, *N. C. and C. Milne*.

Thursday, Feb. 10.

Re RUSH (a Solicitor).*Practice—Sequestration—Order for sale.**An order for the sale of goods under a sequestration for disobedience to the order of the court will be made on a motion ex parte, where the disobedient person has gone out of the jurisdiction.*

In this matter the sheriff made the return *non est inventus* to the writ of attachment which issued in pursuance of his Lordship's decision, which is reported in 21 L. T. Rep. N. S. 692; L. Rep. 9 Eq. 147. Upon the sheriff's return a commission of sequestration issued on the 25th Jan., and certain goods belonging to Rush were taken possession of by the sequestrators. Rush having gone out of the jurisdiction, the sequestrators now moved *ex parte* for an order for sale of the goods, on the ground that Rush, being out of the jurisdiction, could not be served with notice, which had been deemed necessary in *Mitchell v. Draper*, 9 Ves. 208.

Jessel, Q. C., and F. H. Colt, appeared in support of the motion.

Lord ROMILLY made the order, but directed it not to be carried into effect for ten days.

Solicitors: *Langley and Gibbon*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Feb. 19 and 20.

BAREHAM *v.* HALL.*Practice—Nuisance—25 & 26 Vict. c. 42—Jurisdiction.**A bill to restrain a nuisance is within the provisions of 25 & 26 Vict. c. 42, and, unless the case is an exceptional one, the court will not require the plaintiff to establish his right before a jury at law.**A brick-kiln, sufficiently near a dwelling-house to affect it with smoke, is a nuisance, and the owner's prescriptive right to another kiln, nearer to the house, and almost in a line with the kiln complained of, cannot be urged as a reason for the court's not granting an injunction.*

This bill was filed for an injunction to restrain the defendant from using two brick-kilns, called respectively the new kiln and the old kiln, in such a way as to be a nuisance to the plaintiff, his family, and property.

The facts were shortly these:—The new kiln had been recently constructed by the defendant at a distance of about 100 yards in front of the plaintiff's house. The old kiln had been worked by the defendant for upwards of fifty years. It stood nearer to the house, and almost in a line with the new kiln, and the plaintiff's evidence went to show that when the wind blew from the quarter in which the

V.C. S.]

BAREHAM v. HALL.

[V.C. S.]

kilns were situated it carried the smoke from both kilns over the plaintiff's house and grounds.

The case generally made by the bill was that the two kilns together constituted a sufficient nuisance to call for relief from this court. At the bar, however, the plaintiff abandoned so much of his case as related to the old kiln, being of opinion that the uninterrupted user of it by the defendant for so many years had legalised his otherwise untenable position.

The cause now came on by way of motion for a decree for a perpetual injunction. The evidence with respect to the alleged nuisance was very voluminous and contradictory, but the legal point in dispute mainly turned upon the defendant's right to an issue to have the question tried before a jury at common law.

Greene, Q. C. and Hadden, for the plaintiff, were stopped by the court.

Karslake, Q. C., and B. B. Rogers for the defendant contended that the kiln could not be considered a nuisance, or at any rate a sufficient nuisance to call for the interference of the court. It was no ordinary kiln, but a Dutch one, and the evidence went to show that there was neither smoke nor effluvia emitted from it. But even if there were, considering what the plaintiff had come to endure and must continue to endure from the old kiln, he could not complain of the mere addition of the new kiln as a nuisance. Further, the defendant was entitled to have an issue granted to try the question of nuisance. The Act of 1862 (25 & 26 Vict. c. 42), which was framed with a view to the convenience of the suitors of this court generally, empowered the court in cases of disputed fact (like the present) which could be more conveniently tried by a jury at common law, to grant an issue for that purpose. The recent authorities on the subject went to show that where the court was satisfied that the administration of justice could be more conveniently exercised by a court of law, it granted an issue; in fact it had been held in a similar case, *Crumph v. Lambert*, L. Rep. 3 Eq. 409; 17 L. T. Rep. N. S. 133, by Lord Chelmsford, overruling the Master of the Rolls, that if a defendant wished an issue he was entitled to it as a matter of right. The case had not been reported on appeal, but that was the effect of the decision. They also referred to

Cooke v. Forbes, L. Rep. 5 Eq. 166; 17 L. T. Rep. N. S. 371;

Walter v. Selfe, 4 De G. & Sm. 315;

Eaden v. Firth, 1 H. & M. 373;

Morgan's Chancery Practice.

The VICE-CHANCELLOR.—I will not trouble you, Mr. Greene, to argue the question of the plaintiffs' right to an injunction, but I should like to hear you upon the point affecting the defendant's right to have an issue granted.

Greene, Q. C., submitted that the modern practice and authorities were entirely opposed to granting an issue except in cases of manifest convenience to the parties in the suit, and then only when it was at the wish of all the parties. The word "conveniently" in the Act of 1862 had reference to the convenience of the suitors in the particular case in which the application was made, and not to the interests of the general body of the suitors of the court. The Act provided in most positive terms that this court should decide every question of law and fact arising out of a cause before it; and in an exceptional clause it also provided for certain exceptional cases, but the present was not one of them. Lord Westbury, in *Young v. Farnie*, 1 De G. J. & S. 353; 10 L. T. Rep. N. S. 861, in construing the statute, laid it down as a rule that all cases of this

description were for the future to be heard and decided by this court. That case had been followed by other authorities, and, in fact, the rule as laid down by Lord Westbury had become the recognised practice of the court. He also cited

Inchbald v. Barrington, L. Rep. 4 Ch. App. 388;
The Directors of the Imperial Gas Light and Coke Company v. Broadbent, 7 H. of L. Cas. 607.

The VICE-CHANCELLOR.—In this case, the question is, whether the brick-kiln (which may be called the second brick-kiln, or the new brick-kiln) built within one hundred yards and in front of the plaintiff's house is, or is not a nuisance. *Prima facie*, a brick-kiln within a hundred yards in front of a mansion-house, would be a nuisance unless the process used for burning the bricks was one of an unusual kind. This is a Dutch brick-kiln, and it has been argued, that the injury and nuisance from a kiln of this description is less than the nuisance from an ordinary brick-kiln. That argument is answered to my mind by the weight of evidence on behalf of the plaintiff, which shows, that whatever difference of construction there may be between a Dutch brick-kiln and an ordinary brick-kiln, yet that burning bricks in a Dutch kiln occasions smoke and effluvia which to a house sufficiently near to be affected by it, is a nuisance. Mr. Dugald Campbell, a gentleman who has been for twenty years the Lecturer on Chemistry at the University College in London, and who is familiar with the working of brick-kilns of both constructions, has given evidence on the subject, and in his affidavit, he says, "No kiln that I have ever seen or read any description of, or with the construction of which I am acquainted, consumes its own smoke, or nearly so, and in particular, I say most positively, that it is impossible for a Dutch kiln, or a kiln constructed on the principle thereof, to do so. In fact there is no peculiarity or difference in this respect, viz., that of consumption or emission of smoke and effluvia, between the Dutch kiln and an ordinary or rectangular kiln commonly used in Nottinghamshire, Suffolk, or other English counties. In that respect they are all alike, and those called Dutch kilns emit as much smoke and effluvia as other kilns of the same capacity and number of furnaces." The positive evidence of the witnesses for the plaintiff as to the actual existence of a degree of smoke and vapour from this brick-kiln, proves that it is as offensive as might have been expected. It has been said, with respect to the scientific evidence, that Mr. Campbell never saw this brick-kiln; but to my mind that has no weight whatever, for the evidence of the plaintiff's other witnesses, persons living in the neighbourhood, shows that what Mr. Campbell, from his knowledge of brick-kilns says might have been expected, actually occurs. The plaintiff's evidence, however, is met by that of witnesses on the part of the defendant, who swear that owing either to the peculiar construction of this Dutch kiln, or something else, no smoke, but only a slight flickering blue vapour, issues from it. To that evidence I attach little or no importance. I think that if this Dutch kiln is worked in the ordinary way, it is impossible that it can be used without emitting the usual amount of smoke and effluvia which occurs in the burning of bricks, and that these witnesses, though they may have seen nothing but a slight blue vapour, have seen it only when the kiln was newly lighted. I have no hesitation therefore in saying that a kiln of this description, within a hundred yards of a man's house is clearly a nuisance. I have observed during the argument, that in questions of this kind, you may get an indefinite number of people to give negative evidence, to say that they have seen no smoke, have smelt

V.C. S.]

BAREHAM v. HALL.

[V.C. S.]

nothing, and have observed no injury; but the positive evidence of a man who swears to the degree of injury is of much greater value to my mind. I do not think it necessary to read the passages of the plaintiff's affidavit in which he swears to what he has suffered. The facts themselves show that what he has suffered was likely to ensue. It is said, however, and this is rather a question of law than otherwise, that long before the new brick-kiln was built, there existed what is now the old brick-kiln, and which is rather nearer the plaintiff's house, that that has been submitted to for years before the plaintiff took possession of the house, and that the addition of this Dutch kiln considering what the plaintiff had come to endure from the old kiln, cannot be complained of as a nuisance. That is an argument that to my mind will not bear stating or examining into. To say that because there is one brick-kiln which must be submitted to as a nuisance, the addition of another kiln must also be submitted to is preposterous. The defendant has no right to set-off the existence of the nuisance against the fact that he has doubled the nuisance by erecting an additional kiln. Upon this point the evidence is that these kilns are sometimes worked alternately, and sometimes together. The fact that they are sometimes worked together is quite enough to justify the plaintiff in coming to this court for its assistance. Therefore I can see nothing in the defendant's case, so far as it relates to the previous existence of the old kiln, that justifies the use of the new kiln to the extent stated in the evidence. No doubt the court is bound to be very cautious in coming to decision in this case, because it is not now dealing with the question whether there should be an interim injunction until the hearing of the cause. These parties, I think, with great good sense, have agreed to have the question between them determined once and for all, and, with that view, have asked the court now to decide on the merits of the case, as at the actual hearing. The injunction, therefore, to be granted, if the plaintiff is entitled to one, will be a perpetual injunction. Under the old practice, wherever the right of a plaintiff seeking an injunction in this court depended upon a purely legal right, the court almost invariably left the defendant who was sought to be restrained to his remedy of having the legal question discussed at law; and for that purpose it was almost the invariable course of the court to grant an injunction, but to put the plaintiff on terms to bring an action, or otherwise to put the question in a course for the decision of a court of law. Fortunately for the public that practice has been put an end to. The oppressive effect of the old law was such that Lord Cottenham, a judge of the highest learning and experience, once said that he thought there was hardly any case of injunction in which, if it was sought to make the injunction perpetual, the court could deprive the defendant, if he wished it, of having his right tried by an action at law. The Act of Parliament of 1862 has enacted in positive terms that this court shall decide every question of law and of fact arising in a cause before it, and of which it has cognisance. My duty, therefore, is to decide this question; and if I had any doubt upon my mind, my duty would be to have it decided by a jury summoned before this court. The Act of Parliament, however, in a clause of exception, provides that where the court sees that it may be more convenient to the parties—for instance, in the saving of expense or delay—to send the case to be tried at the assizes, it is authorised to pursue that course. The present case, however, does not appear to me to be in any respect an exceptional one. In *Young v. Fernie*, (*sup.*), which was a case of very great importance, involving the validity of a patent, and in

which there were issues of fact to be determined, my opinion was that those issues could be tried before a jury in London or Middlesex with a greater chance of the jury arriving at a proper decision than if I had summoned a jury in my own court. Lord Westbury, however, upon appeal, reversed my order directing the issues to be tried in London or Middlesex, and, in so doing, stated what I now consider to be the undoubted law of the court; and I am very glad that it is the law of the court. What Lord Westbury said was this: "I construe the statute as laying down the rule for the future, that these things shall be heard and determined in this court. The proviso operates by way of exception only to the rule; and in order to bring a case within the proviso, the court must be satisfied that the administration of justice in the particular suit may be more conveniently exercised and promoted by directing issues to be tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues in the common law courts, than by completing the hearing and the inquiry before itself. In a patent case particularly, and in this case, having regard to the nature of the questions raised, I do not think that anything more inconvenient can be suggested than that, where there are mixed questions of law and fact—the one bound up with the other and scarcely capable of being separated—an attempt should be made to cut the cause in halves, and to send one half of it to be tried by a jury in a court of common law, reserving the other half for determination in this court. It is impossible that any satisfactory conclusion can be arrived at by that mode of dividing an investigation, which should be one and entire. Such a division often renders necessary a great number of proceedings, a great number of shiftings to and fro, and very frequently much expense arising from misapprehension, which might have been avoided had the court where the matter originated—the Court of Chancery—kept the whole proceedings in its own hands." In this case I consider myself, therefore, bound to keep the matter in my own hands, and if I had sufficient doubt upon the question to justify me in putting the parties to the expense of summoning a jury, a jury should be summoned; but upon the weight of evidence, as I have before observed, I am satisfied that this brick kiln constitutes a nuisance. Other cases, besides the one I have just referred to, have been cited in the course of the arguments, and undoubtedly there is what would appear to be a great conflict of authority, but when the matter is accurately examined, and when due weight is given to the circumstances under which the various decisions have been pronounced, I do not think there is so much real discrepancy as at first sight seems apparent. For instance, in the case of *Eaden v. Firth* (*sup.*) before the present Lord Chancellor, when Vice-Chancellor, there are some things which are not very reconcilable with what I have just read, but it is to be observed that that case was decided without the Vice-Chancellor having had an opportunity of knowing what was done in *Young v. Fernie*, and without that case being cited at all. In the next place, that case was decided under these very singular circumstances. The plaintiff did not ask for relief against a nuisance causing actual damage to himself or to his property, but merely to be relieved from what he apprehended might prove a nuisance. The Vice-Chancellor in that case directed an issue to be tried at the Liverpool assizes, and I must assume, as the matter went no further, that the parties were content with that decision, and thought that a trial at the Liverpool assizes was the best course. I consider that the parties in a suit have a right to judge for themselves as to the course to be taken; and if in the present case—

V.C. S.] *Re THE ESTATES COMPANY (LIMITED "AND REDUCED")*—YOUNG v. DALLIMORE. [V.C. S.]

both parties had agreed in asking me to allow the matter to be tried by a jury at any assizes, before a court of common law, I should have been very much disposed to comply with their wish, but here the wish is expressed only by one party, and that party the defendant. I ought to observe upon another case which has been referred to, I mean that case which came first before the Master of the Rolls, and afterwards before Lord Chelmsford. There the Master of the Rolls, having come to a conclusion satisfactory to his own mind, that there was a nuisance to an extent entitling the plaintiff to the assistance of the court, granted an injunction. When the case came on upon appeal before Lord Chelmsford, the evidence did not seem to have satisfied him that there was a nuisance, and the weight of the evidence not being sufficient, and the weight of the authority of the Master of the Rolls apparently not being sufficient, he reversed the decree. I am only informed, however, of that reversal. I cannot find any report of the case on appeal, and, in the absence of that, I must believe that there was something more before the Lord Chancellor than there was before the Master of the Rolls. When one judge finds that the mind of another judge, who has previously elaborately examined the matter, has been satisfied on a question of fact, it must be something prodigiously strong that would induce the second judge (however high his appellate jurisdiction) to attribute no weight whatever to the circumstance that the matter had been already fairly concluded, though in a way not satisfactory to his own mind. What is to be considered is, whether there were such circumstances as justified an entire reversal of a decree by a judge, who on such a matter had satisfied his own mind, and I must consider that there was something of the kind. In the present state of the reported decision I can find nothing to my mind in the decision of the Master of the Rolls that is not sound law, and a sound conclusion on the facts that were before him. That case was cited to show that, however strong the opinion of the court below may be upon the facts, if the defendant asks an issue, he is entitled to it as a right. I do not believe that Lord Chelmsford ever decided that it was a right. The Act of Parliament has said that it is a matter for the consideration of the court. It is quite possible, for instance, that if the present case were to go to the Court of Appeal, that that court might not find its mind satisfied, and might direct a trial before a jury, but that jury would be summoned before the Court of Appeal, or in such way as the court may direct. The duty which I have to perform is to decide whether, according to my conscience, this plaintiff has suffered injury from the acts which are complained of. Upon the evidence before me I consider that the plaintiff has sustained substantial injury to his health and comfort, and is therefore entitled to a perpetual injunction, and to the costs of the suit. The order will be for an injunction to restrain the defendant from using the new kiln; from burning any other bricks in any other than the old kiln, so as to be a nuisance to the plaintiff; and from using the old kiln, so as to increase the amount of smoke or other effluvia to the injury of the plaintiff.

Solicitors, for the plaintiff, *Purkiss and Perry*, for *H. W. Jackson*, Haverhill.

Solicitor for the defendant, *T. H. Dixon*, for *W. H. Sams*, Clare, Suffolk.

Friday, Feb. 18.

Re THE ESTATES COMPANY (LIMITED "AND REDUCED.")

Companies Act 1867—30 & 31 Vict. c. 131—Order 20—Company (limited and reduced)—Reduction of capital—Change of name.

Upon an application by a company ("limited and reduced") under the Companies Act 1867, for an order for the reduction of its capital, the court, in granting the order, directed that the words "and reduced," should continue to form part of the name of the company until the date of its dissolution or winding-up.

This was an application under the Companies Act 1867, for an order to reduce the nominal capital of the above company from 500,000*l.* to 250,000*l.*, and to strike out from the title of the company the words "and reduced." The company had power by its articles of association to raise its capital to 100,000*l.*, but that power had never been exercised. The company was stated to be in a prosperous condition.

The application was opposed by only one person, a creditor for 35*l.*, which sum it was proposed to pay into court.

Wickens, in support of the application, submitted that he was entitled under the above Act to the order, and also to ask the court to fix a date at which the words, "and reduced," might be discontinued as part of the title of the company. The 20th order under the Act directed that when the court made an order confirming a reduction, such order should fix the date, until which the words "and reduced" were to be deemed part of the name of the company as mentioned in the 10th section of the Act. He referred to

Re Sharp, Stewart, and Co., L. Rep. 5 Eq. 155; 17 L. T. Rep. N. S. 197.

The VICE-CHANCELLOR.—I consider that the words "and reduced" are even more important as forming part of the title of the company than the word "limited." In making, therefore, the order for the reduction of the capital, I shall direct that the date of the dissolution, or previous winding-up of the company, be fixed as the time until which the words "and reduced" shall continue to form part of the title of the company.

Solicitors: *Walters and Gush*.

Thursday, Feb. 24.

YOUNG v. DALLIMORE.

Practice—32 & 33 Vict. c. 62, s. 4, cl. 3—Defaulting trustee—Attachment.

A defaulting trustee, who has disregarded an order for payment of trust moneys into court, is not protected from attachment by the Debtors' Act 1869.

This was a motion on behalf of the plaintiff in the above suit that the defendant, a defaulting trustee, might be attached for non-payment of a sum of 410*l.* 8*s.* 7*d.*, which had been ordered to be paid by him into court under a decree made in the suit.

An application for attachment had already been made to the clerk of records and writs; but he being in some doubt whether, having regard to the provisions of the Debtors Act 1869 (32 & 33 Vict. c. 62), the order could be drawn up as formerly, the question had been adjourned into court.

Woodroffe, for the motion, submitted that the 3rd clause of the 4th section of the Act expressly

V.C. M.] *Re* BRADFORD NAVIGATION CO.—*Re* WALTERS. THE DYER'S CO. v. KING. [V.C. J.]

excepted from the operation of the Act cases like the present.

The VICE-CHANCELLOR was of opinion that the case clearly came within the exceptions of the Act, and directed that the usual order for attachment should be drawn up by the clerk of records and writs.

Solicitor, *E. Kimber*.

V. C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.

Monday, Dec. 20.

Re BRADFORD NAVIGATION COMPANY.

Practice—Company—*Winding-up*—*Locus standi* of opponents.

A canal company sought to be wound-up on its own petition:

Held, that the corporation of the town through which the canal passed, and a canal company whose canal communicated with the canal of the petitioners, had a right to appear and be heard in opposition to the petition.

This was a petition for the winding-up of the Company of Proprietors of the Bradford Navigation, a company incorporated by Act of Parliament in 1771.

The company had been in 1867 restrained by an injunction (*Attorney-General v. Bradford Navigation Company*, L. Rep. 2 Eq. 71; 14 L. T. Rep. N. S. 248), from diverting into the canal, or allowing to pass into the same, or collecting or keeping, or continuing therein, any filth, sewage, or polluted matter or water, so as to be a nuisance to the inhabitants of the streets, or any of the streets of the town of Bradford; and since that time they had ceased to take water from a stream which had formerly polluted the water of the canal, and the canal had been emptied and had become disused.

The petition was presented by the company, and alleged that the company could not obtain a supply of water from any other source than the polluted stream except at a ruinous expense. The petition was not served on any person.

The corporation of Bradford, and the Aire and Calder Canal Company (the proprietors of a canal communicating with the Bradford Canal), appeared by counsel to oppose the petition.

Pearson, Q.C., and *Hastings*, for the petitioners, objected that the opponents had no *locus standi*, as they were neither creditors nor contributories (25 & 26 Vict. c. 89, ss. 82, 85, 89, 91). They had no more interest in the matter than the public in general, and the public could only be represented by the Attorney-General.

Cole, Q.C., and *Freeling* for the corporation of Bradford, and *Glasse*, Q.C., and *Streeten*, for the Aire and Calder Canal Company were not called upon.

The VICE-CHANCELLOR.—This is an application to wind-up a company established by Act of Parliament for the purpose of making a canal through the large and important town of Bradford. It appears that, for reasons which may be perfectly good and sufficient, the company, who are the petitioners, desire to be wound-up; the petition has not been served on anybody, and if there are no creditors or contributories who object, there will be no one to oppose it except the court. All these cases must depend upon their own special circumstances; in this case the canal runs through the town of Bradford, and it communicates with the Leeds and Liverpool Canal, which again, at a distance of thir-

teen miles, communicates with the canal of the Aire and Calder Company, so that the three canals must be considered as forming a continuous line of communication. Under these circumstances, I think it is plain, that, though they may not come strictly within the words of the Act, as either creditors or contributories, I must hear both the corporation and the Aire and Calder Company, if they choose to appear and oppose the petition.

Solicitors: *Evans and Foster*; *Cann*; *Darley*.

Friday, March 18.

Re WALTERS.

Practice—*Trustee Relief Act*—*Notice of payment into court*—*Cons. Ord. xli. r. 4*.

Where the only person entitled to a trust-fund paid into court under the Trustee Relief Act had gone to America, and had not been heard of since 1868, service of the notice of the payment into court required to be given by the trustees under Cons. Ord. xli. r. 4 was dispensed with.

In this case a trust-fund had been paid into court by the trustees under the Trustee Relief Act on the ground that they were unable to find the person beneficially entitled to the fund.

The trustees stated in their affidavit under the Act that James Walters was the only person beneficially entitled to the fund; that he went to America in the year 1866 and enlisted in the army; that he corresponded with his father till the year 1868; and when last heard of was in Louisiana, but that since that time his father had not heard from him, and had been unable to obtain any information respecting him. Under these circumstances

Nalder asked that service of the notice of the payment into court required by Cons. Ord. xli. r. 4, to be given by the trustees to the persons interested in or entitled to the fund might in this case be dispensed with, and cited

Re Hansford, 7 W. R. 199, 254.

The VICE-CHANCELLOR thought that under the circumstances the notice might be dispensed with.

Solicitors: *Hedges and Stedman*.

V. C. JAMES'S COURT.

Reported by W. H. BENNET, Esq., and Hon. ROBERT BUTLER,
Barristers-at-Law.

Wednesday, Feb. 9.

THE DYERS' COMPANY v. KING.

Light and air—*Injunction*.

Where a plaintiff complains that the defendants are obstructing his light and air by their newly-erected buildings, it is no valid answer to say, though it may be said truly, that by reason of the removal of neighbouring buildings the plaintiff is in the enjoyment of the same amount of light and air as he had before the defendants commenced their alterations.

Semble, if the light and air which the plaintiff had acquired by prescription had been so far in excess of what he required for the reasonably comfortable enjoyment of his house, that the defendants' proceedings could not have sensibly interfered with his comfort and enjoyment, he could not have obtained an injunction.

This was a motion for decree.

At the north-west corner of the intersection of Dowgate-hill, in the City of London, which runs north and south, with College-street, which runs east and west, the plaintiffs, the Wardens and Commonalty

V.C. J.]

THE DYERS' COMPANY v. KING.

[V.C. J.]

of the Mystery of Dyers of the City of London, were at the commencement of this suit, and had been for more than 150 years previously, owners in fee of a piece of land bounded on the east by Dowgate-hill and on the south by College-street.

Prior to 1839, Dyers' Hall stood on part of this plot of land. In 1839 Dyers' Hall was taken down, and a new building was erected on part of the site, and opened as a hall and offices in Oct. 1840. The new building was set back, so as to leave an area in front of it from 4ft. 9in. to 5ft. 6in. wide.

On the south side of College-street, and opposite the western portion of the plaintiffs' buildings, was a house 33ft. 4in. high, the property of the Innholders' Company. College-street here was 14ft. 3in. wide. On the east of the buildings of the Innholders Company, and opposite the middle portion of the plaintiffs' buildings, there stood for twenty years prior to Feb. 1869, a building 85ft. 4in. in height belonging to the Merchant Taylors' Company. On the east of the last-mentioned building, and extending to the south-west corner of the intersection of College-street and Dowgate-hill, there stood, prior to Feb. 1869, another building 23ft. in height, also belonging to the Merchant Taylors' Company.

In Feb. 1869, the defendant John King, to whom the Merchant Taylors' Company had agreed to let the two last-mentioned buildings on lease, began to pull down the same, and had at the date of the commencement of this suit laid foundations for the erection of warehouses on their site to the height of 74ft. from the level of College-street.

The bill was filed on the 25th June 1869, by the Dyers' Company against King praying that the defendants might be restrained from erecting any building on the land so leased to him, so as to darken, hinder, or obstruct the free access of light and air to the windows of the plaintiffs' building, as such access was enjoyed by the plaintiffs and their predecessors in title, and other the occupiers of the said building previously to the taking down by the defendant of the houses or buildings which formerly stood on the ground so leased to the defendant.

An injunction was moved for and granted on the 15th July 1869.

The defendant moved to dissolve the injunction, but the Vice-Chancellor, on the 3rd Aug. 1869, made no order on the motion, except that the costs be reserved to the hearing.

On the 25th Sept. 1869, the defendant filed his answer, wherein he stated that in 1856 the plaintiffs pulled down a building which stood on the east of Dyers' Hall, between that and Dowgate-hill, and in consideration of a large sum paid to them by the corporation of the City of London they set back the new building 5ft. 8in. to the north, so as to be in a line with the front of new Dyers' Hall.

He further said that the Merchant Taylors' Company, his intended lessors, in 1860, sold to the South-Eastern Railway Company a piece of land at the south-west corner of the intersection of the two streets, and that they also afterwards sold to John Kemp Welch another adjoining piece of land, south of the last, and bounded on the east by Dowgate-hill, which Welch re-sold to the South-Eastern Railway Company, and that both those pieces of land had since been thrown into the public way of Dowgate-hill, whereby the width of Dowgate-hill south of the intersection had been increased from 22ft. to 40ft.

Defendant also said that with the consent of the Merchant Taylors' Company, his intended lessors, he had agreed to give up 7ft. more of ground on the south side of College-street, next Dowgate-hill; and that by these means the junction of College-street and Dowgate-hill had been brought 25ft. nearer the

eastern end of Dyers' Hall than it was before; the opening of College-street at the west of the intersection had been increased from 13ft. to 30ft., and the opening of Dowgate-hill on the south of the intersection had been increased from 40ft. to 47ft.

Defendant said (paragraph 10), "I believe that in consequence of the alterations hereinbefore-mentioned the plaintiffs have since the year 1856 had and enjoyed a larger quantity of light and air coming to Dyers' Hall and the rooms therein, than they enjoyed in 1840, or at any period prior to 1856."

He also said that such access of light and air to Dyers' Hall as was enjoyed by the plaintiffs was derived to some extent from the passage of light and air over the buildings of the Merchant Taylors' Company; yet he believed such access of light and air was then and still was mainly derived from the passage of light and air over the buildings belonging to the Innholders' Company.

Kay, Q. C., and Chester for the plaintiffs. They cited

Staight v. Burn, L. Rep. 5 Ch. 163.

Bristowe, Q. C., and *Freeling* for the defendants. If the plaintiffs have from all sources together as much light as they had before the new buildings were raised, they cannot complain. They cited

Lanfranchi v. Mackenzie, 16 L. T. Rep. N. S. 114;

Clarke v. Clark, 13 L. T. Rep. N. S. 403;

and the authorities referred to in *Staight v. Burn* (*ubi sup.*)

The VICE-CHANCELLOR.—I will not trouble you, Mr. Kay. I cannot quite agree with Mr. Freeling on the question of fact, because, in truth, as I look at it, there is no fact substantially in dispute between these parties. The case resolves itself into a question of law; because, as I understand the case as put by the counsel at the bar, and upon all the evidence, it is this: That, assuming the plaintiffs in the month of May 1869, when this thing was begun, to have had, up to that time and for twenty years previously, the light which they enjoyed at that time, the building which the defendants are about to erect would be a very material and serious obstruction to and interference with that light. Assuming them to have made out their legal right to the quantity of light which they enjoyed up to and at the time of the filing of their bill, then their suggested answer (and that is the only point I have to consider assuming it to be admitted or proved on both sides up to the points I have stated), the substantial question which arises on the defence is this: They say, "True it is that we are now going this year very materially to diminish your light as you enjoyed it last year, but your right to light—the right to which you are entitled for the use of your house—is a right which must have existed for twenty years. Your right is a right to that amount of light which you had twenty years ago; and, no matter from what quarter that light came, you had a right to light over all your neighbour's houses; but only to that amount of light which you could show to have been enjoyed by you for twenty years before the bill filed; and you have no right to complain if, taking into consideration all that we are going to do, and all that everybody has done in the interval, you will still in the result have as much light as you had when you started twenty years ago." Certainly I find myself utterly unable to accede to that statement of the legal principle so suggested. The right is a right as between the owner of the dominant tenement and the owner of every servient tenement—he has a right to as much light to and for the use of his house over his neighbour's land as he enjoyed twenty

V.C. J.]

ROSKILL v. WHITWORTH.

[V.C. J.]

years ago; and the neighbour has no right to deprive him of the light which has so come to and for the use of the house over the neighbour's land, because the owner of the dominant tenement has either by purchase from, or by the free gift of, any other person, or by the operation of any Act of Parliament, obtained other light in addition to that which he had a prescriptive right to. Of course in one aspect of the case, it might be very material to take into consideration the light which he had so acquired because, if the light which he had so acquired, in addition to the prescriptive right, was so much in excess of anything he required for the reasonably comfortable enjoyment of the premises as he enjoyed them, you might say, "What is the use of your complaining, you have plenty of light, and what I am going to do will not interfere with you, because when it is done you will have as much light as any reasonable being can ask for," unless he wanted to interfere with his neighbours capriciously and vexatiously. That is not the case here. It is conceded that there was no great access of light in the street. I suppose that, even in 1869, or in the beginning of this year, the people living in Dyers' Hall would have been very glad to have had more light than they had at that time. That being so, that view of the case does not arise; and I certainly cannot think that the owner of this house, any more than the owner of any other house there, can say, "You are going to be interfered with by my erection, but then there is compensation for you; there is an equivalent given you here by somebody else." That is not, in my mind, a just view of the case. The legal principle failing, it is not necessary for me to go into the evidence as to whether there is, in truth, the compensation. If it were necessary to go into it, it would require considerable argument to satisfy me that, in point of fact, the compensation is given, having regard to the nature of the case. I do not go into it at all. I think the case fails in point of law upon the defence with regard to the equivalent, and that the plaintiffs, therefore, are entitled to the decree as asked; of course, with the costs of the suit, which will include the costs of the plaintiffs' motion to dissolve.

Solicitors: *Batt and Son; Heather and Co.*

Thursday, March 3.

ROSKILL v. WHITWORTH.

Motion for direction of issues at law—25 & 26 Vict. c. 42 (Sir John Rolt's Act).

A bill was filed against the owner of a steam hammer to restrain its working, on the ground of its being a nuisance to the plaintiffs. The defendant went to great expense in modifying the working of the hammer with a view to remedying the nuisance. On a motion by the defendants to have issues tried at law as to whether since the hammer had been so worked as to occasion a nuisance to the plaintiffs; and, secondly, as to whether the alterations it had been so worked, the motion was refused on the ground that the alterations made were a partial admission of the nuisance complained of in the bill, and that the plaintiff had been put to great expense in preparing evidence, which would in that case be thrown away.

This was an application on the part of the defendant Sir Joseph Whitworth that certain issues might be directed to be tried by a special jury at the next summer assizes at Manchester.

The facts were as follows:—

In May 1868 the Whitworth Engineering Company (Limited) set up a very large and powerful steam hammer in one of the most thickly inhabited parts of Manchester, and close to the Roman Ca-

tholic Church of St. Augustine, and to the adjoining schools and priest's house. A bill was filed to restrain the defendants from using the hammer so as to occasion an injury or nuisance to the plaintiffs, who were the trustees and the priest of the church.

In June 1869 an interlocutory injunction being applied for, upon the defendants giving an undertaking not to work the hammer before nine a.m., nor after seven p.m., the motion was directed to stand over until the hearing of the cause.

Since the interlocutory motion the defendant has spent large sums of money in making alterations in the hammer, by means of which the nuisance (as contended) had so completely abated as to render the plaintiff's evidence inapplicable. Under these circumstances the defendant now applied to have the following issues tried at the summer assizes at Manchester: First. Whether the hammer has been so worked as to occasion a nuisance to the plaintiffs? Secondly. Whether, since the alterations, it has been so worked as to occasion a nuisance to the plaintiffs.

Little, Q. C. and Lindley, in support of the motion, submitted that this was clearly a case for a trial by jury. It was a simple case of fact. Was the hammer a nuisance, or was it not? It would be very different if there was a matter of fact and a matter of law in dispute. In this case the quantum of nuisance has to be ascertained, a large number of witnesses have to be examined, and it would be necessary for a jury to have a view of the premises; besides, great expense would be saved by sending these issues to be tried by a jury. There is no statutory impediment to this course; by the 25 & 26 Vict. c. 42 (Sir John Rolt's Act) power is expressly given to the court to direct issues whenever it shall appear that any question of fact may be more conveniently tried by a jury at the assizes, or at any sitting in London or Middlesex. The authorities are in our favour:

George v. Whitmore, 26 Beav. 557;
Eaden v. Firth, 1 H. & M. 573;
Davenport v. Golberg, 2 H. & M. 282;
Young v. Fernie, 1 De G. J. & S. 353.

Kay, Q. C. and H. Humphreys, for the plaintiffs, were not called upon.

The VICE-CHANCELLOR said:—I ought not to accede to this application. The fact that two issues are tendered shows a strong probability that at the time of filing the bill the hammer was a nuisance. All that the plaintiffs are bound to show to entitle them to relief is that the hammer was a nuisance at the time the bill was filed. The plaintiffs have been put to very great expense in collecting evidence to this effect, all of which, if I were to allow these issues to be tried, would be thrown away. If the defendant intended to ask for issues, he should have done so last June when the interlocutory motion for an injunction was made. The mere fact that the defendant has made alterations by which the nuisance is diminished or put an end to, does not entitle him to have these issues tried by a jury, though it may have an important bearing on the case when it is brought to a hearing. It was a nuisance, and may, perhaps, have ceased to be so. I am not satisfied that there is any substantial matter of fact to be tried. I shall, therefore, avoid the great expense incurred by a trial at the assizes by refusing, at this stage of the cause, to indulge the defendant in the luxury of the expense of having the issue tried at law. The motion must be refused with costs.

Solicitors for the plaintiff, *Cunliffe and Beaumont*, agents for *Ashworth*, Manchester.

Solicitor for the defendant, *J. E. Fox*, agent for *Earle and Co.*, Manchester.

Q. B.]

WOODWARD v. BUCHANAN.

[Q. B.]

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Saturday, Feb. 12.

WOODWARD v. BUCHANAN.

*Contract—Work done and materials supplied—Evidence—Collateral issue.**In an action for work done and materials supplied to the defendant in respect of certain dwelling houses, the question being whether the defendant was really the owner and person interested in the houses, it was**Held competent to the plaintiff to call other tradesmen as witnesses to prove that the defendant had personally given orders to them to do work and supply materials in respect of the same houses.*

This was a case stated on appeal by the judge of the County Court of Gloucestershire, as follows:

This was an action brought by James Woodward, a plumber and glazier in Gloucester, against James Buchanan, a solicitor of the same city, for 31*l.* 17*s.* 5*d.*, being the balance of an alleged account for work done and materials supplied from the 30th Dec. 1866 to the 5th July 1867, in respect of some dwelling-houses and premises situate in Vauxhall-road and Twyver-street, near Gloucester.The first portion of the plaintiff's account related to the dwelling-houses in Vauxhall-road, which at the commencement of the work being done and the materials supplied, were being erected by one George Lewis, and amounted to 18*l.* 6*s.* 7*d.* for work done and materials supplied from the 30th Dec. 1866, to the 2nd April 1867, and the remaining portion thereof to the dwelling-houses in Twyver-street, which at the commencement of the work being done and the materials being supplied were being erected by one William Burgoyne, and amounts to 23*l.* 11*s.* for work done and materials supplied from the 28th May 1867, to the 5th July 1867, of which last-mentioned sum the defendant paid to the plaintiff, on the 7th May 1867, 10*l.* on account of, and at the request of, William Burgoyne.

George Lewis and William Burgoyne originally applied to the plaintiff to do the work and supply the materials in respect of which he brings this action, but after he had done a small portion of the work he refused to do any more work or supply any more materials. He was then informed by George Lewis and William Burgoyne that they were erecting the houses for the defendant, whereupon (as was alleged by the plaintiff but denied by the defendant) he applied to the defendant, and received from him personal orders to do the work and supply the materials in respect of which he seeks to recover.

The defendant was the owner of the two parcels of land upon which the houses were to be erected, and at the time of the trial of this action it was proved by him that in the month of Oct. 1866, he contracted to sell the parcel in Vauxhall-road to George Lewis, and the parcel in Twyver-street to William Burgoyne. No money was paid either by George Lewis or by William Burgoyne, nor did they at any time have any copy or copies of the said alleged contracts, or of any documents connected with the alleged contracts of sale. On the 25th Feb. 1867 the defendant conveyed the parcels of land respectively to George Lewis and William Burgoyne, and on the same day the parcels respectively, with the houses then partly erected thereon, were mortgaged by George Lewis and William Burgoyne to the defendant.

The whole of these transactions were managed and conducted by the defendant.

Between the months of Oct. 1866 and the 23rd of Feb. 1867, the defendant gave to George Lewis and William Burgoyne respectively, money from time to time to pay labourers employed on the houses, and also paid on their respective orders of requests several accounts due to different tradesmen, and the two mortgages above mentioned were alleged to have been ultimately taken from George Lewis and William Burgoyne respectively, for the money due from them respectively to the defendant for such money and payments, and at the trial it was alleged that the defendant had fully accounted for the whole of the moneys for which the mortgages were given to him, and that he had no money in hand at the time of the alleged claim of the plaintiff belonging to George Lewis or William Burgoyne, or either of them.

The parcels of land so alleged to have been sold to George Lewis and William Burgoyne were subsequently sold by the defendant.

The cause was heard at Gloucester on the 29th of June 1869, before the judge of the said court and a jury, who found a verdict for the plaintiff for 26*l.* 11*s.* 10*d.*

It was contended on behalf of the defendant that credit had been given to George Lewis and William Burgoyne; that the defendant was simply mortgagee not in possession of the premises; that he had not given any orders or made any promises to the plaintiff; and that if he had made any promise to pay him it was made on account of the debt or default of George Lewis or of William Burgoyne, and was therefore void, because it was not in writing as required by the Statute of Frauds.

Evidence was given in support of such contention of the defendant.

It was contended on behalf of the plaintiff that the defendant was really owner and personally interested in the premises; that George Lewis and William Burgoyne were simply his agents; that if he was mortgagee, he was the mortgagee in possession; that he had acted as the owner; and that he had given orders to the plaintiff as well as to other persons to do work upon the parcels of land.

Evidence was given in support of such contention of the plaintiff; and in addition to other witnesses the following persons were called:—John Knight, Thomas Webb, Joseph William Baber, James Tandy, and William Philips, all of whom alleged, and the defendant denied that they had received orders from the defendant personally to do work or to supply materials upon or for the said dwelling-houses.

It was objected on behalf of the defendant that this evidence was inadmissible. The County Court judge admitted the evidence.

The question for the opinion of the Court of Queen's Bench was whether the judge of the County Court was right in admitting the evidence of witnesses in support of the plaintiff's case with the object of showing that the defendant had made promises, or had given orders, directions, or instructions to them, or any or either of them, with reference to work done or materials supplied in respect of the before-mentioned dwelling-houses, or any or either of them, the plaintiff not being present when any of the alleged promises, orders, directions, or instructions were given.

Jelf, for the appellant, contended that the evidence of the witnesses called on behalf of the plaintiff to prove the orders, &c., given by the defendant, was improperly admitted by the learned judge. Evidence to show that the defendant had held himself out to others as the owner of the houses did not bear properly upon the issue between the parties in the case—viz., whether the plaintiff had received orders from the defendant to do the work. [LUSH, J.—Was not the issue this, whether

Q. B.]

FOSTER (app.) v. TUCKER (resp.)

[Q. B.]

the defendant was really the principal in the transaction?] The evidence admitted was collateral to the issue, and should have been rejected. "The rule," says Taylor on Evidence, vol. 1, p. 333, "confining evidence to the points in issue not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the mode of proving even the issues themselves. Thus it excludes all evidence of collateral facts which are incapable of affording any reasonable presumption as to the principal matters in dispute; and the reason is that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead; moreover, the adverse party, having had no notice of such evidence, is not prepared to rebut it." [HANNEN, J.—If meat had been supplied to a particular house by a butcher, could he not, in seeking to recover the amount from the person whom he alleges to be the occupier and to have given the orders, call other tradesmen to show that they also had received orders from the same person to supply goods to that house? Such evidence does not appear to be very remote from the issue.] In *Barden v. De Keverberg*, 2 M. & W. 61, where goods had been supplied by plaintiff to a married woman, who pleaded her coverture, it was held that evidence of the defendant's dealings with other tradesmen, to whom it was alleged she had held herself out as a single woman, was not admissible unless her representations to them were so made as to come to the plaintiff's knowledge. Parke, B. said, "If evidence of her dealings with other parties was admissible, it could only be so on the ground of her having represented herself to them as a *feme sole*, so as it might reach the plaintiff's ears." In *Smith v. Wilkins*, 6 C. & P. 180, it was held that if in an action for goods sold the question be whether credit was given to the defendant's wife or to her father, evidence that other persons had given credit to the father is not receivable. Again, in *Hollingham v. Head*, 4 C. B. N. S. 388, in an action for goods sold and delivered, the question being whether the sale was absolute or subject to a condition, it was held that it was not competent to the defendant to call witnesses to prove that the plaintiff had made contracts with other persons subject to the condition suggested. The judge having allowed the plaintiff to be asked, on cross-examination, whether he had not made such conditional contracts with others, with a view of testing his credit or the accuracy of his memory, it was doubted by the court whether it was proper even to that extent. "The question," said Willes, J., "is whether in an action for goods sold and delivered it is competent to the defendant to set up, by way of defence, that the plaintiff has entered into contracts with third persons in a particular form, with the view of thereby inducing the jury to come to the conclusion that the contract sued upon was not as represented by the plaintiff. I am clearly of opinion that it was not competent to the defendant to do so. I am of opinion that the evidence was properly disallowed as not being relevant to the issue. It is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation begins; but we are bound to lay down the rule to the best of our ability. No doubt the rule as to confining the evidence to that which is relevant and pertinent to the issue, is one of great importance, not only as regards the particular case, but also with reference to saving the time of the court and preventing the minds of the jury from being drawn away from the real point they have to decide." The same learned judge asks, "Does the fact of a person having once or many times in his life done a particular act in a particular way make

it more probable that he had done the same thing in the same way upon another and different occasion? To admit such speculative evidence would, I think, be fraught with great danger. . . . If such evidence were held admissible, it would be difficult to say that the defendant might not, in any case where the question was whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual, and therefore that it was highly probable that the particular charge of assault was well founded. The extent to which this sort of thing might be carried is inconceivable." The opinions of Byles and Williams, JJ. were to the same effect. *Howard v. Sheward*, 36 L. J., C. P., 42; 15 L. T. Rep. N. S. 183, was also referred to. On these authorities it is submitted that the evidence received was inadmissible. [LUSH, J.—If the defendant had been heard to say that Lewis and Burgoyne were his agents, and that he himself was the party interested in the house, could not evidence of that statement have been given at the trial? If so, why should not conduct on his part which tends to show that he was the real owner be also admissible?]

Gray, Q. C. (with whom was Sawyer), for the respondent, was not called upon.

MELLOR, J.—We are of opinion that it has not been made out that the evidence of the witnesses called on behalf of the plaintiff in the County Court was collateral to the issue there raised between the parties. The issue was whether the houses were being built, and the work done and materials supplied for the defendant, and it was quite legitimate and pertinent to that issue to call as witnesses other tradesmen who had received orders in respect to these same houses from the defendant. If they had received orders from the defendant in respect of different houses and not the same, the authorities cited on behalf of the defendant might be sufficient to show that their evidence could not be given in support of the plaintiff's case. Under the circumstances of the case, we all think that the evidence of these witnesses was properly received as being perfectly relevant to the issue, and in itself strong to show that the defendant was really the owner of the houses.

LUSH and HANNEN, JJ. concurred.

Judgment for respondent.

Attorney for appellant, T. W. Burr.

Attorney for respondent, Woodcock and Ryland, for T. E. Jaynes, Gloucester.

Monday, Feb. 14.

FOSTER (app.) v. TUCKER. (resp.)

Toll—Turnpike-road—Artificial manure carried in dealer's cart—Superphosphate of lime—5 & 6 Will. 4, c. 18, s. 1.

Sect. 1 of 5 & 6 Will. 4, c. 18, exempts from toll on turnpike roads, carriages "when employed in carrying or conveying only dung, soil, compost, or manure, for land, sown and except lime."

This exemption includes superphosphate of lime carried for manure in the waggon of the dealer from whom it has been purchased.

Case stated by justices.

This is a case stated by us, the undersigned, two

Q. B.]

FOSTER (app.) v. TUCKER (resp.)

[Q. B.]

of Her Majesty's justices of the peace in and for the division of Salisbury Amesbury, in the county of Wilts, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law which arose before us as hereafter stated.

At a petty sessions holden at Salisbury, in and for the division of Salisbury, in the county of Wilts, on the 22nd June 1869, an information was preferred by John Tucker (hereinafter called the respondent), against Thos. Foster (hereinafter called the appellant) under the 5 & 6 Will. 4, c. 18, s. 1, which provided that from and after the 1st Jan. 1836 no toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage when employed in carrying any dung, soil, compost, or manure for land (save and except lime), and the necessary implements used for filling the manure, and the cloth that may have been used for covering any hay, clover, or straw which may have been conveyed, charging that the said Thos. Foster, of the parish of Coombe Bissett, in the county of Wilts, being the collector of tolls at a certain turnpike gate there situate, called "the Coombe Bissett gate," did demand and take of and from one John Trimby the sum of 1s. as and for the toll payable for the passing through the said gate of a waggon drawn by two horses, he, the said John Trimby being exempt from the payment thereof, and claiming such exemption by reason of the said waggon and horses being employed in conveying only manure for land contrary to the form of the statute in such case made and provided, and was heard and determined by us, the said parties respectively being then present, and upon such hearing the appellant was duly convicted before us of the said offence, and we adjudged him to pay a fine of 20s., and the sum of 9s. for costs, to be paid forthwith. In default of payment it was ordered that the same should be levied by distress and sale of the goods and chattels of the appellant, and in default of sufficient distress that the said appellant should be imprisoned in the house of correction at Devizes, in the said county of Wilts for fourteen days, unless the said several sums, and all costs and charges attending such distress, should be sooner paid.

And whereas the appellant being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute, 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case, setting forth the facts and the grounds of our determination as aforesaid, for the opinion of this court, and hath duly entered into a recognizance as required by that statute in that behalf.

Now, therefore, we, the said justices, in compliance with the said application, and the provisions of the said statute, do hereby state and sign the following case:

That John Rebbeck, a farmer, living at Ebbesborne, in the county of Wilts, had ordered from Charles Prangle, a dealer in artificial manures, a load of manufactured manure, namely superphosphate of lime, for his land.

That on the 18th June inst., the said artificial manure was forwarded to the said John Rebbeck, in a waggon drawn by two horses, belonging to the said Charles Prangle, and driven by his carter, John Trimby; that the said John Trimby passed with such waggon and horses, loaded with the said artificial manure, through the turnpike gate at Coombe Bissett aforesaid, of which the appellant is the toll collector; that the said appellant demanded a toll of one shilling; that the said John Trimby claimed exemption on the ground that he was carrying the manure to Mr. Rebbeck, and that on the appellant refusing to let him pass, he paid the toll.

The above facts were also admitted by the appellant's attorney before us.

It was contended on the part of the appellant that the said artificial manure was liable to toll, inasmuch as it was manufactured merchandise, and had not passed from the dealer's hands; that the said Charles Prangle was not as such manufacturer and dealer entitled to any exemption from toll.

We however being of opinion that it was manure for land, which was exempt from toll when on its carriage to land, whether carried by the owner of the land or the person of whom it was purchased, gave our determination against the appellant in the manner before stated.

It was admitted by the appellant that the proceedings heard before us were legal and regular, and that if the said manure was liable to toll the said conviction was properly made.

The question of law arising on the above statement for the opinion of the court, therefore, is, whether imported or artificial manure, being conveyed to the farmer by the manufacturer and seller, is exempt from toll.

If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said complaint is to be dismissed.

Given under our hands this 9th day of Nov., 1869, at Salisbury, in the county of Wilts aforesaid.

EDWARD HINXMAN.

HENRY J. H. SWAYNE.

A. de Rutzen for the appellant.—There are two questions involved in the case, (1) whether a waggon belonging to the manufacturer and seller of artificial manure is exempt from toll under the enactment. Sect. 1 of 5 & 6 Will. 4, c. 18, that "no toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage when employed in carrying or conveying only dung, soil, compost, or manure for land (save and except lime), and the necessary implements used for getting the manure, &c." It is no doubt said by Lord Campbell, C. J., in *Reg. v. Freke*, 5 El. & Bl. 949, that "the object of the exempting clause was to benefit agriculture; and the agriculturist gains as much by the exemption of the party who sells to him as by an immediate exemption of himself;" but this must be regarded merely as an *obiter dictum*, and was not necessary to the determination of the case. There is a second question, whether superphosphate of lime can be considered one of the sorts of manure exempted where the section says, "save and except lime." [HANNEN, J.—The section says "lime," superphosphate of lime is chemically a different substance.]

Snowden, for the respondent, was not called upon.

LUSH, J.—I do not think we need trouble the other side in this case. The words of sect. 1 of 5 & 6 Will. 4, c. 18, are very general; and the manure in the present case, superphosphate of lime, not coming within the exception "lime," we must give effect to the words of the enactment, and hold it exempt from toll. The opinion of this court, as expressed in *Reg. v. Freke* (*ubi. sup.*), was that it is immaterial whether the manure is being conveyed in the cart of the dealer or not.

HANNEN, J.—I am of the same opinion.

Judgment for the respondent.

Attorneys for appellant, *Sandys* and *Knott*, for *Johns* and *Frail*, Blandford.

Attorneys for respondent, *Venning*, *Robins*, and *Venning*, for *Cobb* and *Smith*, Salisbury.

Q. B.]

REG. v. PEARSON.

[Q. B.]

Monday, Feb. 14.

REG. v. PEARSON.

Assault—Question of title to land—Jurisdiction of justices—24 & 25 Vict. c. 100, ss. 42, 46.

Sect. 46 of 24 & 25 Vict. c. 100 (sect. 42 of which Act gives justices power of summarily convicting for assaults), which provides that nothing therein contained "shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom," takes away from justices all jurisdiction to determine cases of assault where any such question is shown to arise, and they cannot inquire into or adjudicate upon an excess of force or violence which may be used in the assertion of a title to lands.

This was a rule to quash a conviction brought up by certiorari.

The conviction was made under the hands of George Cressy Hill and Chas. Rowland Morewood, Esqrs., two justices of the county of Derby, dated 7th May last, whereby the defendant John Pearson was convicted for that he did unlawfully assault Robt. Turner contrary to the form of the statute.

The affidavit of the defendant set forth as follows:—

I am the owner of real estate in South Wingfield to a considerable extent, and I hold a conveyance to myself of a piece of land situate at South Wingfield aforesaid, over and in respect of which Robt. Turner, of South Wingfield, butler, on or before the 25th April last, claimed certain rights or privileges, which rights I, the said John Pearson, claiming to be the owner of the said piece of land disputed, and do now dispute.

The said Robt. Turner is the owner, as I am informed and believe, of land and buildings adjoining the said piece of land mentioned in the first paragraph of this affidavit, and on the 29th April last I went to the said piece of land mentioned in the first paragraph of this affidavit, and found thereon a quantity of bricks which the said Robt. Turner had, as I was informed and believed, carted or caused to be carted thereupon, and which said bricks I was informed were intended to be used by the said Robt. Turner for building purposes. I, not having a servant with me to do so, myself took some of the bricks and threw them over a wall near to the said piece of land, intending thereby to assert that the placing of the said bricks upon the said piece of land was a trespass. After I had thrown some of the said bricks over the said wall the said Robert Turner came to me and seized a brick I held, and endeavoured to pull it out of my hand, and so prevent me from throwing the said bricks as last aforesaid, upon which I pushed him off from me, and with the force of the push he, the said Robert Turner, staggered backwards, down to the sloping side of an old sawpit, partly filled up with some materials, such sawpit being within four or five feet of where the said Robert Turner was standing, but the said Robert Turner did not fall down or lose his feet, although, as I am informed, he stated that he had to put out his hand to the ground to prevent himself from falling down or losing his feet; and I further say that I should not have touched the said Robert Turner if he had not, as aforesaid, endeavoured to force the said brick out of my hand.

On the 29th April I consulted Messrs. Wilson and Burkinshaw as my solicitors as to taking such steps as they might deem expedient, to vindicate my title to the said first hereinbefore-mentioned piece of land, but left them without coming to any determination as to the steps to be taken, they advising me that it would be better for me to defend any proceedings which, from what had been said by the said Robert Turner, they my said solicitors and myself thought it probable would be instituted by the said Robert Turner, than that I should institute proceedings against him as plaintiff.

• On Friday, the 13th April, I received a letter, of which the following is a copy:—

Alfreton, 29th April, 1869.

Dear Sir,—Mr. Robert Turner has been at my office to-day in reference to his having this day laid some bricks on, and which he temporarily deposited on, a certain piece of uninclosed ground at South Wingfield, but with the intention of using such bricks for the improvement of his property which it adjoins. Mr. Turner states that you went to him, and the men engaged, and forcibly ejected Mr. Turner from off the uninclosed piece of land and violently assaulted him. Mr. Turner wishes to know by what authority or under what title you claim to dispute his using the piece of land in question.—Yours truly,

BENJAMIN SAMUEL RICHARDS.

John Pearson, Esq.

And which said letter I believe came from the office of the said Benjamin Samuel Richards, now lately deceased, who was then acting as clerk to the justices in the Alfreton petty sessional division within which South Wingfield aforesaid is situate. On the same day on which I received the last-mentioned letter I again consulted my said solicitors, and produced to them the said last-mentioned letter, who on Saturday, the 1st May, wrote, and sent by post, as I am informed and believe, to the said Benjamin Samuel Richards, a letter, of which the following is a copy, namely,

Alfreton, May 1 1869.

Dear Sir,—Your letter of the 29th ult., addressed to Mr. Pearson, of Wingfield, has been handed by him to us, with instructions to reply thereto. Your letter seems to be written under a misapprehension of the facts. The land on which your client trespassed by laying of bricks thereon was land belonging to Mr. Pearson, to which he is able to deduce his title in the usual manner, in case the conduct of your client was intended to assert claim to the land as against Mr. Pearson. Mr. Pearson observing that your client had placed bricks on the said land was in confirmation of the information which he gave to your client that he was trespassing on the land, proceeding to remove from the land some of the bricks, when he was forcibly interfered with by your client with the object of preventing him so doing, and the alleged assault mentioned in your letter was the action of Mr. Pearson in repelling with no more than the necessary force your client, when he so forcibly interfered with Mr. Pearson, and in fact resisting an assault upon himself, respecting which and the trespass before mentioned Mr. Pearson had already consulted us before the date of our letter. If you have any further communication to make on the subject, we request you will make it to ourselves.—We are, yours truly,

WILSON and BURKINSHAW.

B. S. Richards, Esq.

I directed my said solicitors to reply to the aforesaid letter of the said Benjamin Samuel Richards as aforesaid, because I understood from the letter, and more especially from the latter part of such letter, in which it is said, "Mr. Turner wishes to know by what authority or under what title you claim using the piece of land in question," that the said Robert Turner and the said Benjamin Samuel Richards, as his solicitor, contemplated instituting civil proceedings respecting the said piece of land, or the acts hereinbefore mentioned; and, because, moreover, immediately after the happening of the events mentioned in the second paragraph of this affidavit, the said Robert Turner threatened me, saying to me the following words, "I'll clap a writ on your back for this," or words to the like effect.

Late on the evening of Tuesday, the 4th day of May last, I was served with the magistrates' summons dated the 1st of May. I instructed the said John Burkinshaw, as my attorney, to appear on my behalf in answer to such summons, to show to the justices that a question as to the title to the said piece of land arose, and on my behalf to submit to the said justices that under the circumstances the change mentioned in the said summons ought not to be adjudicated upon by them.

On the 7th May the defendant's attorney attended and offered evidence as to the dispute of title, and contended that they had no jurisdiction to go on with the case, and quoted 24 & 25 Vict. c. 100, s. 46. The justices, however, taking the advice of Mr. Richards, the attorney of the complainant, said they would hear the case, and finally convicted the defendant.

24 & 25 Vict. c. 100, s. 4, enacts that—

Where any person shall unlawfully assault or beat any other person, two justices of the peace upon complaint by or on behalf of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned with or without hard labour for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of five pounds; and if such fine as shall be so awarded, together with the costs (if ordered) shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, with or without hard labour, for any term not exceeding two months, unless such fine and costs be sooner paid.

Sect. 46 provides—

That in case the justices shall find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same; provided also that nothing herein contained shall authorise any justices to hear and deter-

Q. B.]

DOUGLAS v. DOUGLAS.

[Ex.]

mine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

Robinson, Serjt., now showed cause against the rule, and contended that notwithstanding title came in question, still the magistrates had jurisdiction to adjudicate upon and punish the assault where it was shown to them that excessive force or violence had been used in the assertion of the alleged right. [LUSH, J.—The proviso in sect. 46 is very wide—"that nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, &c." Does not that override the whole preceding part of the Act?] It is submitted that it does not take away the jurisdiction which justices previously had to adjudicate in cases where excessive violence was used. It was not the intention of the Act to take away any jurisdiction which they formerly had, but rather to enlarge it. The information in the present case charged only a common assault, and where excessive violence is used in the vindication of an asserted right, the magistrates may surely treat the excess as a common assault, and adjudicate upon it alone. [LUSH, J.—Granting that there was such an excess as would have been indictable, can the magistrates adjudicate upon that matter summarily, where the dispute arises out of a title to lands? This is what I doubt.] There is nothing in the affidavit to show that the question of title was raised before the magistrates. [LUSH, J.—The letter of the respondent's attorney was before them, in which the complaint is chiefly of the trespass. HANNEN, J.—And I cannot see how the excess of violence can be separated from the original assault, which was committed in the assertion of a title to land]. *Re Thompson*, 30 L. J. 19, M. C.; 3 L. T. Rep. N. S. 409, was referred to.

G. Bruce, in support of the rule, was not called upon.

LUSH, J.—I think we need not trouble the other side. I am of opinion that the rule must be made absolute. It appears very clearly from the facts laid before us in the affidavit and not contradicted by any statement on the other side, that the assault, the subject of the charge before the magistrates, was committed in the course of an assertion of title on behalf of the defendant. The prosecutor had entered upon land which he had claimed to be his, and in order to get him off the land the assault in question was committed, not wantonly or for the purpose of injuring the prosecutor, but as an act asserting the defendant's right to the land and his right to turn every one else off it; and it further appears that that was brought to the notice of the magistrates. That being so, I am of opinion, on the construction of the 46th section of the 24 & 25 Vict. c. 100, that the jurisdiction of the magistrates was at an end, and that they had no right to determine whether the act done was excessive or not. I think the words of the 46th section which show that are beyond all doubt. The jurisdiction which the magistrates have to deal summarily with the case of an assault committed is given by the previous sections of the same Act. Then comes the 46th, which contains these provisions:—"That nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom." The section does not say that the jurisdiction of the magistrates shall be ousted so far as the question may turn on a disputed title to lands; but that nothing therein

contained shall give them jurisdiction to determine any case where such a question shall arise. I think, therefore, as a question of title to lands arose in this case, and the fact was brought to the notice of the magistrates, they should have held their hands, and come to the conclusion that they had no jurisdiction to determine the matter. They did not do that, however, but, acting on the advice of their clerk, seem to have gone against their own better judgment. I must say it is much to be regretted that they did act on his advice, when it was brought to their knowledge that he was the solicitor of the prosecutor in the case, and therefore an interested party. It appears that he had written to the defendant, threatening proceedings, besides acting as the prosecutor's solicitor in the hearing of the case before them. I think I ought not to omit the opportunity of saying that when this was brought to the notice of the justices they should not have acted on his advice. If they had acted on their own opinion they would have done properly, and not have suffered themselves to be led into error. Under the circumstances of the case we can do nothing else than quash the conviction.

HANNEN, J.—I am of the same opinion.

G. Bruce asked for costs against the justices, under the peculiar circumstances of this case, though in ordinary cases it was not usual to grant them.

LUSH, J.—We are not disposed to give costs against the justices, where they have acted *bonâ fide*. If the other party had himself appeared before us the case would be different.

Conviction quashed.

Attorneys for justices, Aldridge and Thorn.

Attorneys for defendant, Real and Philpot for Wilkinson and Burkinshaw, Alfreton.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUXLEY, Esqrs., Barristers-at-Law.

Wednesday, May 5, 1869.

DOUGLAS v. DOUGLAS.

Gift of chattel—Donor and donee—Chattel in possession of third party—No delivery or change of possession—Expression of desire on part of donor—Revocable at donor's pleasure—Vesting of property—Out and out gift—Action of detinue.

In 1850 G. quitted England for Australia, leaving behind him, in the charge and custody of his wife (the defendant), a sword which had come into his possession and ownership on the death of his father, a general in the army, to whom it had been originally presented by the officers of his regiment. G.'s only son having died, G. wrote a letter, from Australia, to his brother H. (the plaintiff) in England, dated 14th Sept. 1863, expressing a desire for him to have possession of the sword, in the following terms: "You only anticipate my wish that you should have charge of our father's sword, which, of course, you will keep in our family if I should not have a son to inherit, which does not seem very probable. I have inclosed an order unsealed to Mary" (the defendant, G.'s wife) "to hand it over to you." This order was as follows: "On receipt of this letter you will be so good as to deliver our father's sword to my brother Henry;" and in a subsequent letter to the plaintiff of 28th Sept. 1863, G. said, "I shall expect a long letter in reply from you. Tell me how the old sword looks." These letters and order were communicated to the defendant, and applications were made to her by the plaintiff for delivery of the sword to him, but without success. G.

Ex.]

DOUGLAS v. DOUGLAS.

[Ex.]

died in Australia in Dec. 1865, having made a will there in 1864, of which he appointed another brother W. executor, who proved the same in that country, and who, in a letter to the plaintiff, announcing the death of their brother G., said, with regard to the possession of the sword by the defendant, "*She is not the proper custodian of our father's sword.*" The defendant still declined to part with the sword, claiming to keep it for her daughter as a memento of G., her father; and in detinue by the plaintiff to recover the sword or its value, and damages for its detention, it was

Held, by the Court of Exchequer (Kelly, C. B., and Martin, Bramwell, and Pigott, BB.), making absolute a rule to enter a nonsuit or a verdict for the defendant, that the words of the letter of the 14th Sept. 1863 were not words of gift at all, but amounted merely to a desire by G. that the plaintiff should have charge of the sword, a charge which was revocable at G.'s pleasure, and did not constitute an out and out gift, or pass any property in the sword to the plaintiff.

Flower's case, *Noy's Rep.* 67, discussed and explained.

This was an action of detinue of a sword of the value of 200*l.*; and by the declaration the plaintiff claimed a return of the sword or its value, and 20*l.* for the detention.

The defendant pleaded several pleas, to wit: 1. *Non detinet.* 2. Denial of its being the sword of the plaintiff. 3. The Statute of Limitations. On all these pleas issue was joined.

The question in the case was whether the property in the sword, which was the subject of the action, had passed to the plaintiff so as to entitle him to maintain the action for its recovery; and at the trial before Cleasby, B. the following appeared to be the facts of the case:

The sword in question had originally belonged to and was the property of the late General Sir William Douglas, having been presented to him many years ago by the officers of his regiment. At his death it passed into the possession and ownership of his eldest son Captain George Douglas, formerly an officer in the army. That gentleman, having left the army and separated himself from his wife, went in 1850 to Australia, where he died in the month of Dec. 1865, having by his last will and testament, made and executed in that country in the year 1864, appointed his brother, Mr. W. A. Douglas, and a Mr. McDonald, his executors. This will was proved in Australia by W. A. Douglas alone, the other executor, Mr. McDonald, having renounced probate. Upon Captain George Douglas leaving England in 1850, the sword was left behind him in this country, and was kept together with a will made by him at that date before going to Australia, which last mentioned will was, of course, revoked by the subsequent will made by Captain Douglas in Australia in 1864. As hereafter mentioned the sword, on Captain Douglas's departure, remained in the charge and custody of his wife, the defendant in the present action. An only son of Captain George Douglas having died, that gentleman wrote a letter from Australia to his brother Henry, the plaintiff, dated 14th Sept. 1863, in which he expressed a desire for him to have possession of the sword, as follows: "*You only anticipate my wish that you should have charge of your father's sword, which of course you will keep in our family, if I should not have a son to inherit, which does not now seem very probable,*" and, he added, "*I have inclosed an order unsealed to Mary*" (his wife, the defendant), "*to hand it over to you.*" The order which was inclosed was as follows: "*On the receipt of this letter you will be so good as to deliver our father's sword to my brother Henry.*" In a subsequent letter from Captain George Douglas to the plaintiff, the former said: "*I shall expect a long*

letter in reply from you. Tell me how the old sword looks."

The above letters and order were communicated to the wife (the defendant), and several applications were from time to time made to her, by the plaintiff, for the delivery to him of the sword, but without success. So things went on, and nothing more was done until after the death of Capt. Geo. Douglas, which event occurred in Australia, in Dec. 1865. The death was announced to the plaintiff in a letter written from Australia to him by his brother, W. A. Douglas, the executor of the will, made by Geo. Douglas in 1864, in which letter the facts of such will, and of his (W. A. Douglas's) being the executor were announced. In that letter also, after stating that he could have no objection to the defendant, or her daughter Emma, taking any little thing which they might wish to keep as a memento of the deceased, W. A. Douglas proceeded to say, with reference to the sword in question; "*but she is not the proper custodian of our father's sword.*"

News of the death of Capt. Geo. Douglas arrived in England in the spring of 1866, and in reply to an application to her, by the plaintiff, for the sword, the defendant on the 11th March in that year, wrote the following letter:

York House, Bognor, March 11, 1866.

My dear Henry,—Touching the sword, you are in error in thinking that I promised to send it to you. I said I would see at the time of his unhappy death. Emma had finished, and was on the point of dispatching, a long letter to her father, in which she asked him, as she had nothing belonging to him, to give her the sword, which, had he lived, would have come into her dear brother's possession. She cannot of course help feeling that George would make a most unnatural will in not leaving her even the slightest memento. George has not, I believe, in his will, made any mention of the sword, and I cannot help feeling that Emma is entitled to keep it—at any rate for the present—though were anything to happen to her, I would at once send it to you. Years ago when I asked George if I should send it to him, he said no, it was far safer with me than with him.

The plaintiff renewing his application for the delivery up to him of the sword, and the defendant still declining to part with it, and claiming to keep it as belonging to her daughter, the plaintiff brought the present action, and at the trial, before Cleasby, B., as before-mentioned, he obtained a verdict. A rule was subsequently moved for and obtained on behalf of the defendant to set that verdict aside and to enter a nonsuit or a verdict for the defendant, on the ground that there was no evidence that the sword was the property of the plaintiff as alleged, and no evidence to show that the property in the sword passed from the defendant's late husband to the plaintiff; and against that rule

Denman, Q. C., and Thrupp, for the plaintiff, now showed cause, and contended that although there might be here and there some *dicta* adverse to the plaintiff's claim, yet, looking at the older cases and *dicta* on the subject, they would submit there was clear evidence to show that on the second plea of the property not being the plaintiff's, the latter was entitled to succeed. The question, in all these cases, is not whether the property in the chattel was irrevocably in the plaintiff against all the world, but whether it was the property of the plaintiff as against the defendant. The principle, in such cases, laid down by Selwyn, in his *Nisi Prius*, p. 580, 13th edit., was applicable. He there says, "*It has been said that as this action proceeds on the ground of property in the plaintiff at the time of action brought, it cannot be maintained if the defendant take the goods tortiously, for by the trespass the property of the plaintiff is divested;*" but the learned author adds, in a note, that the contrary opinion would now seem better founded, and he goes on in the text, at p. 582, to say that "*property in the plaintiff, without his ever having had possession is sufficient;*" and he adds, "*So,*

Ex.]

DOUGLAS v. DOUGLAS.

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if I deliver goods to A. to deliver to B., B. may have detinue, for the property is vested in him by the delivery to his use" (citing 1 Roll. Abr. 606 A. pl. 1.) To the same effect as that is the case of *Gledstane v. Hewitt*, 1 Cr. & J. 565; 1 Tyrw. 445. The case of *Broadbent v. Ledward*, 11 A. & E. 209, is an authority to show that the plaintiff has a right to recover, as against the defendant; and *Browne v. Fosbrooke*, 18 C. B., N. S., 515; 34 L. J. 164, C. P., though it may be relied on *contra*, for the dictum that delivery or deed is necessary to the maintenance of the action, yet is in many parts of the judgment favourable to the plaintiff's claim. Erle, C.J., at p. 526, says, "Possession is a word of ambiguous meaning, and though in most cases it is considered to import the manual custody of the chattel, yet a man may also be said to be in possession of an article which he has not at the moment about his person;" and to the same effect are the judgments of Keating and M. Smith, JJ. in that case. In *Ward v. Audland*, 16 M. & W. 862, Parke, B. doubted the correctness of the holding in *Irons v. Smallpiece*, 2 B. & Ald. 551, and that latter case was treated by Crompton, J., in *Winter v. Winter*, 4 L. T. Rep. N. S. 639, as practically overruled. [KELLY, C. B.—We are not called on to decide whether *Irons v. Smallpiece* was well or ill decided. The question here turns on the words of the letter] These words it is submitted constituted an absolute gift to the plaintiff during his brother George's life; and *à fortiori*, now that he is dead, a gift not revocable except on the contingency, which never occurred, of George's having a son to inherit. There was a clear intention on George's part to transfer the property to the plaintiff, accompanied by a letter to the holder, the defendant. She wrongfully retained it against the wish of her husband, and in so doing was a wrongdoer and cannot take advantage of such a wrong. [BRAMWELL, B.—Had George come back to England and said, "Give me back the sword you have had charge of," could the plaintiff have retained it?] As against George the gift may not have been irrevocable had he survived; but as against his widow it is so, and it does not lie in her mouth to set up her right as custodian. The words constituted an actual right. They cited also in support of their argument

Armory v. Delamirie, 1 Stra. 505; 1 Sm. L. C. 301; *Wilbraham v. Snow*, 2 Wm. Saund. 47, f. note 8 (E.);

Hudson v. Hudson, Latch. 214;

Lunn v. Thornton, 1 C. B. 379 (note of Manning, Serjt. at p. 381);

The London, Brighton, and South Coast Railway Company v. Faircleugh, 2 M. & G. 691 (note);

Flory v. Denny, 7 Ex. 581; 21 L. J., N. S., 223, Ex.; 2 Taylor on Evidence, p. 839, sect. 894;

Worth v. Clifton, Rolls Rep.;

Flower's case, Noy, 67;

Perkins's Profitable Book, title "Grant," sect. 59, ch. 7.

Shep. Touch. 237.

Prentice, Q. C. and G. Shaw, for the defendant were not called on to support their rule.

KELLY, C. B.—I do not think that we are called upon, at present, to say whether we should overrule the case of *Irons v. Smallpiece*, or whether a gift, not made by deed, and unaccompanied by transfer is invalid in law. Whenever that question shall come before me, I feel bound to say I shall require a much higher authority than the note of an editor, however learned or eminent, to induce me to overrule a decision of Lord Tenterden and his brethren in the Court of Queen's Bench. With regard to the text books which have been cited, they are founded upon cases to which they expressly refer, which contain nothing whatever to support the proposition in the

form in which it is laid down. They only give the example of the case in Noy, which is quoted as showing that personal property may pass by way of gift without delivery. But it is not said how the gift was made. The only question here is, whether, looking to the terms of the letter, and all the surrounding circumstances admitted in evidence as applying to that question, there are any words of gift which vested the property in this sword in the plaintiff, either during the life of his brother George, or upon his death. The words are these: "You have only anticipated my wish that you should have charge of our father's sword, which of course you will keep in your family should I not have a son to inherit, which does not now seem very probable." Now in the first place, are there here any words of a gift at all? "You shall have charge of the sword," that merely is, "You are to have possession of the sword." Does the letter go on to say that the sword is to become his own? On the contrary, it says, "which, of course, you will keep in your family should I not have a son to inherit." The meaning is, "If I should have a son the sword is not to be yours, but will remain when I die to my son hereafter." As long therefore as he lived he might have a son. It is perfectly clear that no property passed, or was ever intended to pass to the brother Henry, the now plaintiff. Then was it intended, under these words, if he should have no son, that the property in the sword should pass to his brother Henry at his death? It might possibly be so intended. I do not say that such is the construction of the whole letter taken together; but it might possibly be contended that, under these words, "which, of course you will keep in the family should I not have a son to inherit," the property would be vested in the plaintiff. He would have no power to keep it in the event of his brother George having a son. If such a construction could be put on an instrument of this nature, that it conveyed property to one to whom the letter was written, after the death of the writer, it would be in effect to repeal the Wills Act altogether. Looking, therefore, to the language of the letter itself, it appears to me, beyond all question, that no present property was immediately vested in the receiver of the letter, and he could not, under any instrument of this nature, without delivery of possession, take the property in this article on the death of his brother. Under these circumstances, while I entertain great personal regret that it should be so, I am obliged to hold that the plaintiff is not entitled to the sword, and that this rule should be made absolute.

MARTIN, B.—I am of the same opinion. In the first instance it seems to me that it is necessary clearly to understand the nature of a gift, which, as I apprehend its meaning, as applied to this matter, is that the owner of a present chattel transfers from his own power the property in that chattel, so that the ownership of the donor shall cease, and the ownership of the donee shall commence: (see Sheppard's Touchstone) The real question in this case is, does the letter of the 14th Sept. 1863 show that Capt. Geo. Douglas meant that the property in this sword, which is assumed to have been in him, should pass from him, and vest in the plaintiff? So far from that being the case, I am of opinion that it shows the very contrary. The words of the letter are these: "You have anticipated my wish that you should have charge of our father's sword." I collect from that that the plain meaning is this—the sword was considered by the family as having a value, and George Douglas had written to the plaintiff, saying that he thought, under the circumstances that existed, that he, the plaintiff, was the proper party to have charge of it. "You

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SMITH v. HOWARD.

[Ex.]

have already anticipated my wish that you should have charge of our father's sword, which of course you will keep in our family should I not have a son to inherit, which does not now seem very probable." It seems to me that that clearly shows that what he meant was that the Douglas family was the proper family to remain in possession of it, and that, in the event of his having a son, he should inherit it, and if he came back to England, and desired to have back the sword, he could claim it. Now that is no gift, because a gift is a transfer of the property. Coupling this letter with his usealed letter to his wife, it comes to nothing more than an expression of his desire that the plaintiff should have possession of the sword, and retain it so long as he, George Douglas, thought fit, and it was his wish that he should retain it. That seems to me the plain and obvious meaning of this letter, and in my judgment the plaintiff has failed to establish that it ever was a gift to him at all. Then with regard to the other points, one is as to whether possession is necessary to complete a gift. I have a strong notion that all the cases are reconcilable when they are closely looked at. But with respect to the case which Mr. Denman cited from Noy, as showing that the property in the chattel passed without possession by gift, what is the meaning of "waging his law?" It was that in certain cases of actions a defendant might come in and swear he was not indebted to the plaintiff, and that was an answer to the action. Those who remember the law as it was forty years ago, will know that that was the reason why, before that was abolished, *indebitatus assumpsit* was always used for the recovery of a debt. It will be found in all the old books that the reason for that was, that thereby was taken away from the defendant the possibility of "waging his law." So in *Flowers' case*, which has been cited, the question was whether a man might wage his law. The facts were these:—A. borrowed 100*l.* of F.; that is, a lending of 100*l.* to A., and a debt. There was a day of payment, and A. brought the 100*l.* and began to throw it down on the table; but F. said "Hold!" A., who was his nephew, tendered the money, and F. said, "I will not have it." Therefore what took place was that A., having come to pay the 100*l.* offered, tendered the money to F., and said, "here is your money for you," and F. said, "No, I will not have it." The question was, was that a payment of the money? It is clear it was. He offered the money, it was then a tender, but F. would not take it. That was a gift of the money, and A. put it in his pocket, and the court said it was a good gift by parol, being cast upon the table; and it was not therefore merely a tender of the money, it was, in effect, a payment, and therefore the giving it back again was a good gift by parol. If, then, it was in the possession of F., A. might well wage his law, for he might conscientiously then have come forward and sworn that he did not owe F. any money. But that has no bearing upon the present matter.

BRAMWELL, B.—I am of the same opinion. I think that the terms of this letter clearly do not come within the definition of a gift, and I agree with the definition given by my brother Martin. I may, I think, test it in this way. Suppose George Douglas had come back to England and set up a house for himself, either upon the death of the present defendant, or otherwise, and said "I am the eldest son," I think, beyond doubt, he would have been entitled to demand the sword back. But suppose the defendant had become indebted, and a *fi. fa.* had issued against her chattels, could it be doubted that George would have been entitled to demand the sword? I choose that criterion to show that

George never did, by the language he used, intend to part with the property in the sword, but merely that the younger brother being in England, in which the family were, the family having the custody of it, he left it over to the younger brother. That would not give a right to such an action as this which must be maintainable either in respect of a property in the chattel, or in respect of the possession which has been taken by the possessor, who is a wrongdoer. It seems to me, therefore, that this action is not maintainable. With respect to the case in Noy, I think that the illustration given of that is an accurate one. If there had been only an offer, and it had not been accepted, that would not have done. In such a case it would have required a release. But be that as it may be, "Waging his law" in the case cited, I am inclined to think does not mean that he might have that privilege, but that he could conscientiously so swear.

PIGOTT, B.—I have come to the same conclusion as the rest of the court. I do not think that any terms in the letters have come up to an intention to make a gift out and out of this sword to the brother. He gives him the charge of it, it is true, but he says, "You keep it in the family, should I not have a son to inherit it, which does not now seem very probable." It is clear that he intended to reserve his right to resume it. Looking at the surrounding circumstances, it seems to me only an intention to give the charge of the sword to the plaintiff. If he chose to resume it in one event, he certainly would have reserved the right, and, therefore, he would have a perfect title to it.

Rule absolute.

Attorneys for the plaintiff, *Pickering, Tompson, and Co., Lincoln's-inn-fields, W.C.*

Attorney for the defendant, *Murray, 7, Whitehall-gardens, W.*

Wednesday, Jan. 12.

SMITH v. HOWARD.

Negligence—Fellow servant—Liability of master.

The plaintiff was employed by defendant to work at a steam saw. It was necessary that he should have an assistant in the performance of his work, and M., the defendant's foreman, engaged a boy for this purpose, who proved to be incompetent, and who, although plaintiff complained to M. of his incompetency, was retained in his service. It was M.'s duty as foreman to engage or discharge the person employed for the purpose of assisting plaintiff. An accident happened to the plaintiff while working at the steam saw, through the incompetence of the boy, and for the injuries occasioned thereby he brought an action against the defendant, his employer:

Held, that (in the absence of any evidence to show that M. was incompetent for the position of foreman) the plaintiff could not recover; it being M.'s duty to engage and discharge the boy, his retaining him after knowing of his incompetence, was merely an act of negligence by plaintiff's fellow-servant for which the defendant was not responsible.

This was an action brought by the plaintiff to recover damages for injuries sustained under the following circumstances. The defendant was plaintiff's employer. The plaintiff's duty was to work at a circular steam saw, and a boy was employed to assist him in his work. The accident occurred while he was thus employed through the incompetence of this boy for work of the nature which he had to perform. The boy was engaged by a man named McLaren, who was the defendant's foreman.

[Ex.]

SMITH v. HOWARD.

[Ex.]

It was McLaren's duty as foreman to engage or discharge the person employed for the purpose of assisting the plaintiff. It appeared that shortly before the accident the plaintiff had complained to McLaren, who had promised to provide him with more efficient assistance. The learned judge at the trial, upon proof of the above facts, nonsuited the plaintiff, but took the opinion of the jury as to the damages, and reserved leave to the plaintiff to move to enter a verdict for such damages.

A rule nisi had been obtained accordingly, against which

Hawkins, Q. C. and Popham Pyke showed cause. These were stopped by the court, who called on

Herschell and Nasmyth in support of the rule.—The fact that the plaintiff was himself acquainted with the incompetence of the boy, is no bar to his recovery. In the case of *Holmes v. Clarke*, 6 H. & N. 349, it was held that where machinery is required by Act of Parliament, to be protected so as to guard the persons working near from danger, and a servant complains of the want of protection, and continues to work in the mill near the machinery on the faith of a promise by the master that the required protection shall be afforded, the master will be responsible if any accident occurs to the servant in the interval from the want of such protection, unless the accident has been caused by the negligence of the servant himself. That decision was affirmed in the Court of Exchequer Chamber, 7 H. & N. 937. No sound distinction can be drawn between unfenced machinery and an incompetent workman in this respect, and therefore that case concludes the present. But, putting aside the question of contributory negligence, the question arises whether the master is liable in the present case. It is submitted that he is. The general principle no doubt is that a master is not liable to a servant for injuries resulting from the negligence of his fellow servant while engaged in the course of a common employment; but that rule is subject to the qualification that the master must not have been guilty of any personal negligence. So in *Tarrant v. Webb*, 25 L. J. 261, C.P., it is laid down that the master is bound to use due care in the selection of competent servants, and is liable for negligence in employing incompetent persons. So in the case of the *Bartonshill Coal Company v. Reid*, 3 Macq. H. of L. 266, it is laid down, per Lord Cranworth, that servants must be supposed to have the risk of the service in their contemplation, when they voluntarily undertake it and agree to accept the stipulated remuneration; if therefore one of them suffers from the wrongful act or carelessness of another the master will not be responsible, but that this, however, supposes that the master has secured proper servants and proper machinery for the conduct of the work. So also in *Bartonshill Coal Company v. McGuire*, 3 Macq. H. of L. 144, 300, it is laid down that when the injury caused by the negligence or unskilfulness of a servant is sustained not by the public but by another servant acting in the same employment, the master is not liable unless there be proof of general incompetency on the part of the servant causing the injury, or of insufficiency or defectiveness in the machinery furnished by the master. In the case of *Wilson v. Merry*, L. Rep. 1 Sc. & Ir. App. 827, the accident occurred through a defect in the system of ventilation in a mine caused by a platform which had been erected while the mine was being worked under the superintendence of one Nash, who was employed by the respondents for the purpose of sinking the pit, and making arrangements underground for working it. It was held that the master was bound to the servant in the event of his not personally superintending and

directing the work, to select proper and competent persons to do so. The principle of all the cases is, therefore, that the master is bound to use care to employ competent workmen, and if he has done so he is not liable for damage arising through the negligence of one of their number to another. Here the boy was incompetent. It is true the master did not engage him, but it is contended that he cannot discharge himself of his duty to take due care to employ competent servants by delegating his functions in this respect. If he leaves the appointment of his servants to a foreman, he is liable if such foreman employs incompetent persons. Even if this were otherwise it is submitted that there was evidence to go to the jury of the incompetence and unfitness of McLaren the foreman. His appointment of so manifestly incompetent a person as the boy was, is evidence of considerable weight tending to show that he was not a fit person to have entrusted to him the whole superintendence of the work.

KELLY, C. B.—I am of opinion that this rule should be discharged. The law is well established that a servant cannot maintain an action for injuries occasioned by the negligence of a fellow servant in the course of a common employment. The plaintiff brings this action against the defendant by reason of a boy having been employed to act as his assistant, who was incompetent. That boy was employed by his fellow servant, and this employment of an incompetent person is the breach of duty of which the plaintiff complains. It is shown that the plaintiff made a complaint, not to defendant, but to McLaren, of the boy's incompetence, thus showing that he recognised him as the person whose business it was to engage and discharge the person from whose incompetence the accident arose. This is really then only a case of one servant sustaining injury from the negligence of another. It is said that there is a qualification of the ordinary rule to this extent, viz., that if the servant complains to the master of the incompetence of a fellow workman or the unfitness of a piece of machinery, and is induced to go on working by a promise that the ground of complaint shall be remedied, the master may then make himself liable if an accident arises from his neglect to comply with his undertaking. But here the only complaint made was to the foreman. I think the suggested qualification of the ordinary rule, if correct, only applies where the complaint is made to the master himself. It was urged that the real cause of action was for employing an incompetent foreman, but I do not think that there was any evidence of that; the only suggested cause of action of which there was any evidence was employing an incompetent boy. This was done by the plaintiff's fellow servant, and therefore the ordinary rule applies.

MARTIN, B.—I am of the same opinion. But for the case in the Exchequer Chamber I should have thought that this was clearly a case of contributory negligence, and that when the plaintiff found that an incompetent person was employed he ought to have refused to go on until a competent person was provided. But after that case I do not wish to put my judgment on that ground, but on the other ground which has been mentioned by my Lord. I recollect the introduction of the doctrine of the non-liability of the master for injuries caused by the negligence of a fellow servant. I confess I hardly understand the exact principles on which it rests; it is certainly an exception to the general rule. The same sort of arguments were used against it that Mr. Herschell has used to-day, but it is now clear law that in the case of negligence of a person in the same employment the master is not liable, and this

EX. CH.]

ROBERTS v. THE BURY IMPROVEMENT COMMISSIONERS.

[EX. CH.]

doctrine has been carried very far indeed. It has been put on the ground of a supposed implied contract; but that seems to me rather fanciful, I confess. There are certain exceptions to the rule, and it has been contended that it is the master's duty to employ competent persons to manage his business, and if he does not, he must be responsible for accidents arising from their incompetence; but it is not alleged in the declaration, or proved that this foreman was not perfectly competent; if so, his employing an incompetent boy was merely negligence, and for this the master is not responsible.

CHANNELL, B.—I think the verdict was right. The general rule is that the master is responsible for negligence of his servant in the scope of his employment. An exception has been engrafted on it in comparatively modern times. An exception has been again engrafted on the rule, viz., that the master is not relieved from responsibility when it is shown that he has been guilty of employing an incompetent person, or of other personal negligence; but of this there is really no evidence here. I do not throw any doubt on the case of *Holmes v. Clark*, but I do not think it clashes with our present decision.

Rule discharged.

EXCHEQUER CHAMBER.

Reported by H. H. HOCKING, Esq., Barrister-at-Law.

Dec. 1, 1869, and Feb. 5, 1870.

ROBERTS v. THE BURY IMPROVEMENT COMMISSIONERS.

Contract to erect works—Renunciation—Justification—Due diligence.

The plaintiff contracted to erect certain works by a stipulated day, and it was agreed that the defendant's architect should have power, if he saw fit, to suspend the progress of the works, or to add to the works originally contemplated. Power was given to the defendant's architect to enlarge the time for completion, if by reason of any additions to the works originally contemplated, or for any other just cause arising with the defendants or their architect, or for certain other reasons, the plaintiff should have been, in the opinion of the architect, unduly delayed or impeded. Power was reserved to the defendants to determine the contract and enter on the works if the plaintiff did not, in the opinion of the defendant's architect, use due diligence and make due progress so as to complete the works by the day stipulated. The defendants and their architect made considerable delay in furnishing the plaintiff with the original plans, and they subsequently made considerable additions to them. The architect did not, however, enlarge the time for the completion of the works. Before the completion of the works, and before the day fixed in the contract for completion, the architect reported to the defendants that the plaintiff was not using due diligence and making sufficient progress, so as to complete the works by the time originally agreed upon. The defendants accordingly gave the plaintiff notice that they determined the contract, and they then entered and took possession of the works.

To an action for refusing to permit the plaintiff to complete the performance of his contract, and wrongfully preventing and discharging him from completing the same and wholly, wrongfully and finally renouncing the said contract, the defendants pleaded as a justification that the plaintiff was not in the opinion of the architect using due diligence and making due progress, so as to complete the works by the day stipulated:

Held (per Kelly, C. B., Channell, B., and Blackburn and

Mellor J.J., dissentientibus, Pigott and Cleasby, B.B.), reversing the decision of the court below, that a replication alleging that the architect did not grant an extension of time, and that the alleged failure of the plaintiff to use due diligence and make due progress was caused by the delays and defaults of the defendants and their architect, was a good answer to the plea.

This was an appeal from the decision of the Court of Common Pleas.

The pleadings will be found fully set out in the report of the case in the court below (21 L. T. Rep. N. S. 173).

Manisty, Q.C. (R. G. Williams with him) for the plaintiff.

Holker, Q.C. (Chas. Russell with him) for the defendants.

The arguments were the same as in the court below.

Cur. adv. vult.

Feb. 5—KELLY, C.B.—I now proceed to deliver the judgment of my brother Channell and myself. In this case we should have been content to have simply adopted the judgment of my brother Blackburn, in which we in substance concur, and observing that, inasmuch as it is admitted on the record that the alleged failure by the plaintiff to use such diligence and to make such progress as to enable him to complete the work by the day specified, was caused by the failure of the defendants and their architect to supply plans and set out the land necessary to enable the plaintiff to commence the work, the rule of law applies, which exonerates one of two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party. But, inasmuch as the argument for the defendants and the judgment of the court below assume that, by the terms of the contract, the architect had power to determine whether the delay of the plaintiff to proceed with the works, so as to complete them by the day specified, had or had not been caused by the failure of the defendants to supply the necessary plans and set out the land; and, further, that that power was conferred upon him by the 24th clause, it becomes necessary to consider the real meaning and effect of that clause, which we think will be found to confer no such power, and to have no operation whatever upon the real question in this case. The record shows that the plaintiff contracted with the defendants to erect certain buildings upon their lands, the defendants setting out the land and supplying plans for that purpose; and that, before the plaintiff could commence the execution of these works, the defendants, under the 27th clause of the conditions appended to the contract, entered upon and took possession of the works, and refused to permit the plaintiff to proceed with the performance of his contract; and he alleges that he has thereby lost large profits, which he would have acquired by the execution of the works. The defendants pleaded a justification under the before-mentioned 27th clause, alleging that the plaintiff failed in the due performance of certain parts of the undertaking, and did not, in the opinion and according to the determination of the architect, exercise due diligence and make such due progress as is provided in the 27th clause, and as would have enabled the works to be effectually and efficiently completed at the time, and in the manner provided by the agreement; and thereupon the defendants gave notice to the plaintiff under the clause in question, that they determined the contract, and would proceed to carry on the

Ex. Ch.]

ROBERTS v. THE BURY IMPROVEMENT COMMISSIONERS.

[Ex. Ch.]

works themselves. To this the plaintiff has replied that his alleged failure and non-exercise of due diligence and not making such due progress, were caused and occasioned by the delay and default of the defendants and their architect, in supplying plans and drawings, and in setting out the lands and defining the roads, and giving such particulars as would enable the contractor to commence the works. There are two other replications, which from the view we take of the case, become immaterial, and which need not be further noticed. To the above replication there is a demurrer and two rejoinders, to the effect that the non-exercise by the plaintiff of such due diligence, and the not making such due progress, "were not in the opinion and according to the determination of the architect, caused and occasioned by the acts and orders, or by the negligence or defaults of the defendants or their architect;" and further that the said opinion and determination of the architect were formed after due consideration of the facts and circumstances relating to such failure. And to these rejoinders there is also a demurrer. We are of opinion, looking to the whole record, that the single question which arises is, whether, by the terms of the contract, if a delay shall take place on the part of the plaintiff, which, in the opinion of the architect would disable the plaintiff to complete the works, by the 2nd Oct. 1865, but that delay is caused by a breach of contract on the part of the defendants in not supplying plans or setting out the land upon which the buildings are to be erected, the architect has power to determine that the delay was not so caused by the defendants, and so, whatever may be the truth of the case, enable the defendants to put an end to the contract, and enter and take possession of the plaintiff's materials, under the 27th clause. If the contract has conferred such a power upon him, it may be that the rejoinders sufficiently allege that he has exercised it, and determined against the plaintiff. But if he has no such power, it seems to us beyond all doubt that the well-established rule of law, contended for by the plaintiff, applies to this case, viz., that the plaintiff's breach of contract is excused by reason of its having been caused by the defendants' breach of contract, and that the defendants cannot therefore acquire, by means of their own wrongful act or default, the right to enforce the provisions of the 27th clause. The contract provides that, if the plaintiff shall not, in the opinion of the architect, make due progress, the defendants may determine the contract; and the defendants allege that the plaintiff did not, in the opinion of the architect, make such progress. The plaintiff replies that he was prevented from making such progress by the breach of contract of the defendants. Thus, the contract *prima facie* entitling the defendants to put an end to it, the law says, that the defendants having themselves prevented the plaintiff from making such progress, the defendants shall not take advantage of their own wrong, and put an end to the contract under the 27th clause. Now the replication directly avers that the defendants have prevented the plaintiff from making the required progress. And this the defendants do not deny, but they rejoin, that the defendants have not, in the opinion and according to the determination of the architect, prevented the plaintiff from making due progress. This raises the question, whether the effect of the contract is to confer a power upon the architect to determine, and to bind the plaintiff by his determination, that the defendants have not by their own wrongful act or default prevented the plaintiff from proceeding with the works, though, in truth and in fact they have so prevented him. Now, in considering this question, we agree that we are not to assume a jurisdiction which we do not possess, to mitigate

the hardship upon contractors of clauses, however oppressive, which are sometimes and indeed most commonly introduced into agreements of this nature; but we must take care also not to add to their severity, and to the injustice which they are often the means of inflicting upon a contractor, by imagining stipulations which are not to be found in the contract, and which the parties have never entered into or contemplated. Where then is this power to be found? The contract is wholly silent on the point. The 27th clause gives the architect the power to determine whether the plaintiff has used due diligence and made due progress, but not whether his failure to do so has been caused by the wrongful act or default of the defendants. It must therefore be by the 24th clause, if at all, that the power is conferred. Now, when we look to this clause, we find that it is simply this—if, from any one of a number of causes, the plaintiff shall, in the opinion of the architect, have been unduly delayed or impeded in the completion of his contract, the architect may grant an extension of time for its completion. It is remarkable that it is nowhere averred, that he was even applied to by either party for an extension, or took into consideration, of his own accord or otherwise, whether he should grant an extension. But, under whatever circumstances it may be imagined that he proceeded to act upon the clause, the words of it are plain and clear. If he had been of opinion that the plaintiff had been unduly delayed, he might have granted an extension; but then the contract must have continued in force, the plaintiff must have proceeded with the works, and the defendants could have had no power to put an end to the contract. If, on the other hand, the architect had not been of opinion that the plaintiff had been unduly delayed, the conditions had not been performed, the event had not occurred, upon which alone he had power to grant an extension, or do any other act, he would have been *functus officio*, the clause would have had no operation, and he had no power to do anything at all. The clause contains no provision as to what may be done or not done, or as to any consequence resulting from the architect not being of opinion that the plaintiff had been unduly delayed, which state of things might have existed without the architect having ever taken the question into consideration at all. Still less does it provide for any consequences to follow from the architect having formed an opinion that the plaintiff had not been unduly delayed, and it is almost unnecessary to add that a power which is in effect to inflict a heavy penalty upon one of two contracting parties, must be created in clear and unambiguous terms, or must arise by necessary implication. The plaintiff, after having expressly averred in his replication that his alleged default had been caused by the wrongful acts or defaults of the defendants themselves, and this averment not having been traversed by the defendants, but the rejoinders merely alleging that the plaintiff's default had not, according to the determination of the architect, been caused by the defendants' wrongful act or default, we are of opinion that the architect, having no power under the contract to bind the plaintiff by any such determination, the rejoinders are no answer to the replication, and that the rule of law relied upon by the plaintiff is applicable to this case; that the defendants cannot take advantage of their own wrong, and that they had consequently no power to determine the contract under the 27th clause. The plaintiff is, therefore, entitled to maintain this action, and the judgment of the Court of Common Pleas must be reversed.

BLACKBURN, J. delivered the judgment of himself and Mellor, J.—The questions in this case

Ex. Ch.]

ROBERTS v. THE BURY IMPROVEMENT COMMISSIONERS.

[Ex. Ch.]

are raised by demurrers to the second, third, and fourth replications to the third plea, and to the second and third rejoinders to the second replication to the third plea. The Court of Common Pleas has given judgment that all three replications are bad in substance, and that both the rejoinders are good in substance. I agree with them in thinking that the third and fourth replication are bad in substance, but I have come to the conclusion that the second replication is good in substance, and the two rejoinders to it bad in substance, and consequently that the judgment of the court below ought so far to be reversed. The question depends entirely on the true construction of the contract which is set out in the declaration. By that contract, the plaintiff, a contractor, agreed to execute certain works described in a specification, for the sum of 9767*l.*, according to the terms and conditions in the specification contained. Such of the conditions as are material, are set out in the declaration. The 36th is that if the works are let in one contract, the whole is to be completed on or before the 2nd Oct. 1868. The 4th condition gives power to the architect (employed by the commissioners), to alter the specification and plans, and to order any further works not contemplated by the specification and plans. It was of course contemplated by the parties that this power would be exercised in a reasonable manner; but it is quite unlimited in its terms, so that it is in the power of the architect under the contract, to increase the quantity of the works without limit. The contractor, if he so pleased, might bind himself to execute whatever the architect might require before the 2nd Oct. 1868; but unless the intention so to bind himself appears, the implied contract would be that he should have a further reasonable time to execute such additional works as might be required. No question, however, is now raised as to any extra works ordered; and it is, therefore, unnecessary to express any opinion as to what the contract is as to these. The contractor, also, from the nature of the work, could not begin his work until the commissioners and their architects had supplied plans, and set out the land, and given the necessary particulars; and, therefore, in the absence of any express stipulation on the subject, there would be implied a contract on the part of the commissioners to do their part within a reasonable time; and if they broke that implied contract the contractor would have a cause of action against them for any damages he might sustain, and the commissioners would be precluded from taking advantage of any delay occasioned by their own breach of contract; for it is a principle very well established at common law that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself (Com. Dig. "Condition" L.), and also that he cannot sue for a breach of contract occasioned by his own breach of contract; so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract. These principles have been applied to contracts very analogous to the present in the cases of *Holme v. Guppy*, 3 M. & W. 387; *Russell v. Da Bandeira*, 13 C. B., N. S., 149; and *Westwood v. The Secretary of State for India*, 7 L. T. Rep. N. S. 736, and 1 New Rep. 262, which were cited by Mr. Manisty on the argument in the court below, and also before us; and I do not understand the Court of Common Pleas to question the principles or the authority of these decisions. But it is obvious that, under a contract containing such stipulations, it would be very unlikely that the stipulation requiring the works to be completed by a particular day should be effectual, and in prudence the parties might make

stipulations to fix and ascertain the additional time to be allowed, without leaving it open to a jury to determine what is reasonable. The court below have thought that the parties in this case have agreed to make the architect the sole and exclusive judge of what additional time should be allowed in case the contractor was delayed either by having additional works put upon him under the contract, or in consequence of breaches of contract on the part of the commissioners; and also have made him, and him alone, the judge to determine whether there has been any breach of contract on the part of the commissioners. We agree, that, if the parties have so contracted, the court cannot inquire whether this is a prudent engagement on the part of the contractors, but we think that, where the effect of giving such a construction to the contract would apparently be to put one party completely at the mercy of the other, we ought not to give that construction to the contract unless the intention is pretty clearly expressed. It is not to be inferred that one party meant to bind himself so very stringently unless it is so stated, and the commissioners ought to have taken care to select words which the contractor could not misapprehend, if such was the object. In the present case, the portion of the contract which is relied on as expressing such an intention is the 24th condition which is as follows:—"Provided always that if by reason of any additions to or enlargements of the works (which additions or enlargements the said architect is hereby authorised to make), or for any other just cause arising with the said burial board, with the said architect or his clerk, assistant, or inspector, or in consequence of any unusual inclemency of weather, or for want or for alleged want or deficiency of any orders, drawings or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever and howsoever occasioned, the contractor shall, in the opinion of the architect, have been unduly delayed or impeded in the completion of his contract, it shall be lawful for the said architect to grant from time to time by writing under his hand such extension of time, and to assign such other day or days for completion as to him may seem reasonable without thereby prejudicing, or in any manner affecting the validity of the contract or the sufficiency in the tender, and any and every such extension of time shall be deemed to be in full compensation, and satisfaction for or in respect of any and every actual and probable loss or injury sustained or sustainable by the said contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the said burial board, for or in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been made, but not further or otherwise, or for or in respect of any delay contained beyond the time mentioned in such writing or writings respectively." It is to be observed that in the recital with which this condition begins, no distinction is made between delays arising from additions which are authorised by the contract, delays arising from unusual inclemency of the weather (a risk which the contractor has already taken on himself, though it might give rise to a claim *in misericordiam*), and delays arising from breaches of contract or alleged breaches of contract on the part of the commissioners for which the contractor would have a right to recover damages. In either case, it is provided that it shall be lawful for the architect to grant an extension of time; but it is neither said that the architect must give it, which, in case the delay was from the inclemency of the weather, would not be reasonable, nor that the contractor must accept whatever extension of time the architect is pleased to give in full satisfaction of his claim

EX. CH.]

ROBERTS v. THE BURY IMPROVEMENT COMMISSIONERS.

[EX. CH

for damages, which, if the delay arising from the fault of the commissioners was great, and the damages consequently heavy, might be very unreasonable. It is true that if both parties had confidence in the architect they might trust him with the power to bind both parties; but I cannot find any intention expressed to bind the contractor to abide by his decision. It seems to me that the meaning of the condition is, that the architect shall have authority to bind the commissioners by granting an extension of time, and that if he does so bind them and the contractor accepts it, it shall be taken as full compensation for any damages sustained. If more was intended, which however I cannot think, it seems to me clear that it has not been expressed. At all events there is nothing stipulating that the contractor shall have no remedy for any breach of contract on the part of the commissioners, where the architect has not thought fit to extend the time. The court below have ascribed to the architect a more extensive authority than, as it appears to me, they were warranted in doing. The error into which they appear to have fallen is to be found in the statement of Willes, J. in his judgment, of the effect of the matters stated in the replication in question, in which he is reported to have said that they were "in truth matters which the architect ought to have taken into his consideration in determining whether there should be an extension of the time, and therefore also in determining whether the plaintiff used due diligence." This appears to us to be founded on a misconception of the effect of the 24th clause of the contract for the reasons before stated. If I am right as to the true construction of the contract, the decision of the demurrers follows clearly. The second replication confessed that, as is alleged in the third plea, there was such delay; that, in the opinion of the architect, the works could not be completed in the stipulated time, so that under the 27th condition the defendants were *prima facie* entitled to put an end to the contract, but it avoids this by averring that this delay was occasioned by the defendants' own breaches of contract, and consequently that, on the principle before stated, the defendants cannot take the advantage of the delay thus occasioned; and unless the contract bears the construction put upon it by the court below this is a good avoidance. The two rejoinders to this replication would be good if the parties had agreed that the architect should be the sole judge whether there had been a breach of contract on the part of the commissioners occasioning delay; but if we are right in the construction of the contract, there is nothing to this effect in it, and consequently these two rejoinders are bad. The third and fourth replications are based on the supposition that there is a stipulation in the contract that the architect should grant further time when it is reasonable, or, at least, when he thinks it reasonable, even though the delay may have been occasioned by the inclemency of the weather; but I find no such stipulation in the contract, and consequently agree with the court below in thinking those two replications bad.

CLEASBY, B. delivered the opinion of Pigott, B. and himself.—This is an action to recover damages which the plaintiff alleges he has sustained by reason of the defendants preventing him from completing a contract which he had entered into with them for erecting certain boundary walls and other buildings. The declaration, after setting out the contract, alleged that the plaintiff had performed all conditions to entitle him to complete the contract, but that the defendants wrongfully prevented the plaintiff from completing the same, and renounced the contract on their part. The defendants by their third plea justify having done so under a clause in

the specification (which forms part of the contract); by which they are entitled to determine the contract by notice in writing, and to enter and take possession of the plant, &c., in case the plaintiff shall not in the opinion and according to the determination of the architect, exercise due diligence and make such progress as will enable the works to be completed efficiently and effectually within the time agreed. The plea then alleges that, according to the determination of the architect, the plaintiff did not exercise due diligence and make such due progress, and, after setting out the notice in writing, justifies the act complained of. To this plea there are several replications. The second replication alleges that the architect had not granted any extension of time for the completion of the contract, and that the alleged failure of the plaintiff to make due progress was caused and occasioned by the delay and default of the defendants and their architect in supplying plans and drawings, and in setting out the lands and in defining the roads, and in giving instructions so as to enable the plaintiff to commence the works, and not otherwise. There is a demurrer to this replication, upon which the principal question arises: but there are also two rejoinders to it which are also demurred to. The effect of both is, that, according to the opinion and determination of the architect, the undue delay of the plaintiff was not caused by the acts or defaults of the defendants. The question which arises upon the pleadings is, whether it is a good answer to a plea setting up the authority of the defendants to put an end to the contract upon the determination of the architect that the plaintiff is not exercising due diligence and making such progress as will enable the works to be completed efficiently by the time agreed, to reply that the defendants and their architect had themselves been guilty of delay on their part in providing plans and setting out the ground, and had so caused the delay and want of progress on the part of the plaintiff. This depends upon the proper construction of the contract; and, to arrive at that, we must consider what the subject-matter of the contract is, and what are its terms. The defendants are a public body, the Bury Improvement Commissioners; and, being also a burial board, were about to inclose a cemetery with boundary walls, and to erect chapels and other buildings; and the plaintiff, being a builder entered into the contract stated in the declaration, which bears date the 2nd Oct. 1866, by which he agreed to execute the works for the sum of 9767*l.* within the time and according to the plan and in the manner stated in the specification. The important clauses of the specification form part of the declaration, and from them it appears that the works were to be executed according to certain plans and drawings which were annexed to the specification, that additions and omissions were not to annul the contract, but that they should be added to or deducted from the contract price by the architect; and by clause 4 the architect is to be at liberty to give fresh drawings, and so to vary the mode in which the work is to be done, and also to order further works not comprised in the contract to be executed, and works comprised in it to be omitted; and the plaintiff was to furnish, on signing the contract, a schedule of prices for the purpose of estimating the value of additions and deductions. There is by clause 24 a provision enabling the architect from time to time, for certain specified causes, by writing under his hand, to extend the time for completing the works. This clause will be afterwards more particularly adverted to. The 27th clause is the important one upon which the question in this case turns. It is obvious, from the nature of the works contemplated by the contract, that it was essential that the defendant should

EX. CH.]

ROBERTS v. THE BURY IMPROVEMENT COMMISSIONERS.

[EX. CH.]

have some means of insuring the completion of the works at or about the time agreed. It would not have been sufficient for them to have an action for the delay, or even an action for agreed penalties for delay; what they required was the specific performance of the thing itself; otherwise, the works might be delayed indefinitely, and no legal redress would be adequate. In order to insure this, the 27th clause is inserted, as is not unusual in works of a public nature. By that clause the defendants are authorised in certain events to put an end to the contract by notice in writing, and to enter upon and take possession of the works and materials upon the ground, and plant, and to use or sell them as their own property. In connection with this it is proper to bear in mind that by the 28th clause provision is made for the completion of the works by the defendants themselves, and for the payment to the plaintiff for all work actually done when possession is taken, as well as for the value of the materials, implements, and tools provided by the contractor and taken to by the burial board; so that the 27th clause, for determining the contract, the necessity for which we have pointed out, is thus deprived of its apparently penal character. The events under which the defendants are entitled to put an end to the contract are various—the bankruptcy of the plaintiff, and events of that nature; and then follow the words which give rise to the present question, viz., in case “the contractor shall not, in the opinion of and according to the determination of the architect, exercise due diligence and make such due progress as would enable the works to be effectually and efficiently completed at the time and in the manner aforesaid.” The object of wording the clause in this way, and making the determination of the architect the test, is obvious. The putting an end to the contract, and seizing the property of the contractor, is an act involving serious consequences, as this case shows; and therefore it is essential to ascertain beforehand the existence of the state of things upon which the right depends. If the right to enter depended only upon the default of the plaintiff, the plaintiff would probably deny the default, and there would be a resistance and conflict when the entry was made; and therefore provision is made for placing this matter upon the footing of an ascertained fact: and the determination of the architect that the contractor is not making due progress is to entitle the defendants to take possession and complete the works themselves. The result of this consideration of the contract is to satisfy us that this term is an essential part of the contract as long as the contract subsists, and is being acted on, and that it cannot under any circumstances be struck out of it. To strike it out would be making a new and different contract; and if it remains a part of the contract, it follows that it is lawful to act upon it. That being so, there is no doubt—as appears, indeed, by the declaration—that the plaintiff was executing the works under the contract as originally entered into; it was subject to this right of the defendants, and the plea shows that the determination of the architect had been given, and due notice of it in writing; and therefore the act complained of is well justified. The replication is insufficient, because it does not show that this clause was not in operation, and could not be legally acted on. It alleges in substance that there had been some default in the defendants and in the architect in providing plans, defining roads, &c., and that this default had caused the plaintiff to be behind. It ought not to be lost sight of that the defaults specified are not wrongful acts of the defendants themselves; such, for instance, as keeping the plaintiff out of the possession of the land; but they are more properly neglects of duty on the part of the architect, as will be more particularly pointed

out hereafter. This might have been a good replication, if the plea had been founded on the actual neglect and delay of the plaintiff; but the plea is equally good, whether there had or had not been actual neglect and delay on the part of the plaintiff—the parties having agreed that the determination of the architect shall settle that matter, so as to bar the inquiry into the actual fact. It would clearly be no answer to this plea to allege that there had in fact been no want of due diligence or of making due progress. A very little consideration will show how difficult, almost impossible, it would be for a judge and jury to master a multitude of plans and drawings and voluminous specifications so as to arrive at a satisfactory conclusion, or even to investigate such a matter. The difficulty would only increase the expense of the attempt, which would nevertheless be soon given up. The architect, who prepared the plans and specifications, and who knows what was to be done in the first instance, what had been done, and what remained to be done, and who had watched throughout the progress of the works, and been in constant communication with the builder, is the only person capable of determining such a matter; and the parties have therefore agreed to be bound by his determination. If the plea had been founded upon the actual neglect and delay of the plaintiff, so as to make that a fact to be tried by the jury, as the claims for penalties would have been under the 29th clause, then the case of *Holme v. Guppy*, 3 M. & W. 387, and other authorities to the same effect referred to in the argument, which indeed only apply a maxim of the common law, would have applied. The plaintiff might have answered, “You caused this by your own default;” and the whole matter must have gone to the jury. But you cannot say that the determination of the architect that the plaintiff was not proceeding so as to complete the works effectually and efficiently, was caused by the default of the defendants; and the replication is not so shaped as to do so, and therefore that determination remains unanswered. If in fact the defendants had refused to perform any conditions precedent to the plaintiff’s proceeding with the contract, such, for instance, as giving possession of the ground, the plaintiff would have been entitled to throw up the contract and to recover his damages; but if he afterwards proceeds with it, he waives this so far as it is a condition precedent, and, even in that case, which, as will appear hereafter, is very different from the present, he must proceed upon the whole contract, retaining of course any right of action to recover damages, if there has been a breach of the contract on the part of the defendants. It must be borne in mind that this is not a case of cross money claims. What the defendants claim is, the right to have the works completed specifically; and therefore the conclusion cannot be influenced by the consideration of avoiding circuity of action. The replication now under consideration also alleges that the architect also granted no extension of time for the completion of the contract. It appears to us, however, that the reasons above given are equally applicable. The question is whether, as the contract proceeded, the 27th clause, I mean that part which we are now considering, was in operation. By the contract, the works are all to be completed by the 2nd Oct. 1868; but the architect may extend the time for specific reasons. If he does not, it can hardly be contended that the builder could throw the contract up; and, if he does not throw it up, but proceeds with it, the contract must remain, and with it the 27th clause. The plaintiff by his declaration relies upon the entire original contract as the foundation of his claim. It certainly does not appear to us that the refusal to extend the time could be regarded as having the effect

EX. CH.]

ROBERTS v. THE BURY IMPROVEMENT COMMISSIONERS.

[EX. CH

of striking out of the contract either the time within which the contract was to be completed, or that part of the 27th clause which we are considering. Might it not be said with equal force that, if there was an insufficient extension of the time, the same consequences would follow? If, for instance, it was said that the plaintiff was delayed two months, and the architect only extended the time one month, it could hardly be said that if a jury thought there had not been a sufficient extension of time, the defendants were under such an agreement to lose the whole benefit of this clause, which enables them to complete the works in time, if the plaintiff does not. But, further, when the matter is looked into, the alleged defaults are in reality not defaults of the defendants themselves, but of the architect. And, though the replication speaks of the defaults of the defendants and the architect, yet, if the matters complained of come within the province of the architect, and not of the defendants, the adding the word "defendants" in the replication can make no difference. The alleged defaults consist of not providing plans and drawings, not laying out the ground, not defining roads, and not giving instructions. These were matters to be done by the architect, and not by the defendants. The builder was under no obligation to execute plans and drawings provided by the defendants, or to attend to their instructions. From the time when the contract was executed, the plaintiff having of course licence and permission to go upon the land for all the necessary purposes, the defendants themselves had nothing more to do except to pay the regular instalments upon the certificates of the architect. There were lodges and several other buildings to be executed; and no doubt it was the duty of the architect to lay out the ground where each building was to be placed, and also to give drawings showing the manner in which the various parts of the work were to be done, and, as the builder had some work to do in connection with the roads, to define the lines of the roads and give all necessary instructions. These matters were not all to be done at the same moment, but some at first and others as they were respectively wanted, and must be matters, as we cannot help thinking, more or less in the discretion of the arbitrator as to the time when the several works are to be proceeded with. In carrying into effect a work of magnitude like this, some irregularities would probably occur. The architect complains of the want of progress, and the builder of the want of instructions and plans. But can the common law maxim that a man shall not take advantage of his own wrong, or complain of a breach of contract which he has himself caused, be applied to the dilatoriness of the architect who is intrusted by the agreement of both parties with a complete discretion as to all matters connected with the contract? The 3rd clause in effect gives him an unlimited discretion as to allowance for extras. He may, among other things, by the 4th clause vary the instructions as to the manner of executing the work and order any additions, being himself the judge whether any extension of time under clause 24 shall be given. He may by the 22nd clause, without any recompense, claim, or demand, stop the works for such time as he thinks proper, and impose upon the builder the expense of preserving the work during the interval and making good any damage; and it is entirely in his discretion whether he will grant any extension of time under the 24th clause or not. This clause was, no doubt, chiefly intended to provide for the case of a frost making it injurious to proceed with the work while it lasted; but still it leaves this, which might cause a greater or less delay, entirely in the discretion of the architect. And, finally, not to mention other matters, he is by the

34th clause made sole and final judge of all disputes which can arise between the builder and the employers; and, in order to prevent the possibility of litigation, it is agreed that he is not to be required to answer or explain any matter connected with any certificate or award, or to give reasons or grounds for any determination. Having regard to the powers given to him, and the obvious object of making his determination binding, it does not appear to me to be reasonable to make the validity of his determination depend upon the opinion of a jury whether he has himself been guilty of undue delay. It would, in effect, be making a new contract, by adding a proviso or condition; for the 27th clause provides that the architect himself shall not have been guilty of delay in providing plans, &c.; and such a proviso would be a contradiction to the whole spirit of the contract, which is to make the determination of the architect conclusive and not open to question. If the view now taken of the effect of the replication be correct, and the default set up is that of the architect, whose conduct the defendants cannot control, *Holme v. Guppy* (sup.), and the other cases referred to do not apply, and the objection made to the validity of the architect's determination altogether fails. There is another distinct ground upon which the second replication, which we are considering, is defective. The determination of the architect, upon which the plea is founded, is not a determination only as to the time in which the works will be completed, but as to the manner—as to their being efficiently and effectually completed; and, as I have before pointed out, the architect is not to give his reasons or grounds for any determination. It is quite consistent with the determination of the architect, as set forth, that though, very properly in the words of the 27th clause, it was really founded upon this, that, though the works could be completed by the time, they would be done so badly as to require to be pulled down. The replication gives the go-by to this, and assumes that the determination is only as to the time: it then gives what I have submitted is an imperfect answer as to the time, but is no answer at all to the other matter involved in the determination; for, how could it possibly be said that the delay of the architect in providing plans, &c., caused the works not to be completed efficiently and effectually? For the above reasons we think the third plea is good, and the second replication to it bad, and it is unnecessary to consider the rejoinders. But we by no means say that, if the second replication to the third plea could be read in any way as a *prima facie* answer to it, the rejoinders would not be good answers to the replication. The third rejoinder in reality only states what ought to be assumed to be the case, viz., that the determination of the architect was formed upon a *bona fide* consideration of all the circumstances. It is a mistake to suppose that, because the plaintiff was not in fact making the requisite progress, the architect, as a matter of course, was bound to give his determination so as to entitle the defendants to enter. Before giving out his determination, he ought, being final judge in the matter, to consider all the circumstances connected with the defective progress; and it appears by the rejoinder that he did. With regard to the third and fourth replications to the second plea, we are of opinion that they are clearly bad. They are not founded upon any default of the defendants, but upon some of the events mentioned in the 24th clause as having happened so as to make it the opinion of the architect that the plaintiff had been unduly delayed, and so authorise him to extend the time; and it then alleges that the architect had not extended the time. This determination of the architect not to extend the time though he had authority to do so, cannot make the 27th clause

STAFFORD ASSIZES.]

REG. v. JOHN STONE THOMAS.

[STAFFORD ASSIZES.]

inapplicable, so as to deprive the defendants of the benefit of it. In our opinion, the judgment of the court below in favour of the defendants upon all the demurrers ought to be affirmed.

Judgment reversed.

Attorneys for the plaintiff, *Shaw and Tremellen*.
Attorneys for the defendants, *Gregory, Rowcliffes, and Rawle*.

STAFFORDSHIRE LENT ASSIZES.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

CROWN COURT.

Friday, March 18.

(Before LUSH, J.)

REG. v. JOHN STONE THOMAS.

Misdemeanor under the Debtors' Act 1869—32 & 33 Vict. c. 62, s. 11, sub-sect. 15—Evidence—Costs.

By the Debtors' Act 1869, s. 11, it is enacted that "Any person adjudged bankrupt . . . shall . . . be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour, if (sub-sects 15) within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud."

A grocer obtained goods of his trade upon credit. Soon after receiving them and before they were paid for, he executed a bill of sale in favour of his sister who lived with him. This bill of sale, which was given in consideration of a debt owing from him to his sister, passed away all his stock-in-trade and effects whatsoever, including the above mentioned unpaid-for goods.

Having been made bankrupt, he was indicted for misdemeanor under the foregoing section of the Debtors' Act 1869.

Held, that the production of the adjudication under the seal of the court was sufficient evidence of the bankruptcy. That disposing of the goods by bill of sale was not disposing of them in the "ordinary way of trade;" and therefore that as property which the prisoner had obtained on credit, and had not paid for, had passed by the bill of sale, he came within the section, unless he had no intent to defraud. But that assigning the whole of his property to one creditor, reserving nothing for the others, showed an intent to defraud.

Where the prosecution of a bankrupt under the Debtors' Act 1869 is not ordered by any court, the judge at the trial has no power to allow the costs of the prosecution.

The prisoner was indicted for misdemeanour, under 32 & 33 Vict. c. 62 (The Debtors' Act 1869), ss. 11 and 18.

The indictment alleged that on the 28th Feb. 1870, a petition in bankruptcy was presented, and on the 9th March 1870, John Stone Thomas (the prisoner) was adjudicated a bankrupt in due form of law.

It contained six counts. The first and second counts were framed upon sub-sect. 14 of sect. 11 of The Debtors' Act 1869.

The third count, framed upon sub-sect. 15 of sect. 11, charged that the said John Stone Thomas, within four months next before the presentation of such petition, to wit, on the 19th Feb. in the year aforesaid, being then a trader, unlawfully did dis-

pose of, otherwise than in the ordinary way of his trade, to wit, by making and executing a certain bill of sale to one Anne Elizabeth Thomas, certain property which he the said John Stone Thomas had obtained on credit, to wit, one bag of Indian meal, and one bag of oatmeal, obtained on credit from William Vernon, and two bags of sharps obtained on credit from Thomas Walker and Henry Clarke, and that the said John Stone Thomas, at the time of disposing of the said last-mentioned property respectively, had not, and yet hath not, paid for the same or any part thereof. Against, &c.

The fourth and fifth counts were framed upon sub-sect. 1 of sect. 13, and the sixth count upon sub-sect. 2 of sect. 13.

Bosanquet for the prosecution.

Motteram for the defence.

The accused was a grocer at Cheadle. His sister, Miss Anne Elizabeth Thomas, lived with him, and on the 19th Feb. 1870, he executed in her favour a bill of sale.

*By this instrument—which commenced with a recital to the effect that the accused was indebted to Miss Thomas in the sum of 430*l.* moneys lent—he assigned to her all his stock-in-trade, fixtures, furniture, book debts, and effects whatsoever, in consideration of the sum of 5*l.**

On the 21st Feb. he gave directions that all the property should be sold, and bills were posted in Cheadle on the night of the 23rd Feb., stating that the sale by auction would take place on the 25th, 26th, and 28th Feb.

On the 22nd Feb. Vernon, a creditor, went to the shop of the accused, found the shutters up and the door fastened, and could not gain admission.

On the 24th Feb. a warrant was issued for the apprehension of the accused, but he had absconded, and the officer was unable to execute it for some time. Miss Thomas remained on the premises in possession.

For the prosecution Chas. H. Adams, clerk to the registrar of the County Court at Stoke-upon-Trent was called, and produced the petition in bankruptcy by Messrs. Walker and Clarke against the accused, dated 28th Feb. 1870, and the adjudication dated the 9th March 1870.

*William Vernon, miller, said he was a creditor of the accused, who owed him 53*l.* 3*s.* That sum was owing on the 19th Feb. The last goods he sent in consisted of a bag of beans, ordered by the accused on the 15th Feb. and delivered to him on the 16th. They were sent in on a month's credit. Five bags of flour and three of bran were also ordered in addition to the beans, but were not delivered. On the 22nd he went to the shop; it was closed, the shutters up, and the door fastened; he could not gain admission. On the 24th he saw posters and handbills (produced) on the walls announcing a sale of the whole of the furniture, stock-in-trade, fixtures, and all other effects on the premises of Mr. Thomas, grocer, Cheadle, on the 25th, 26th, and 28th Feb. under a bill of sale. On the 25th witness went to the premises, and there saw two of his sacks containing oatmeal and Indian meal. These sacks of meal were mentioned in the sale catalogue.*

*Henry Clarke, of the firm of Walker and Clarke, creditors to the amount of 106*l.* 11*s.* 6*d.*, for goods sold and delivered up to the 19th Feb. to the accused said that they had their last order for ten bags of flour, &c., on the 11th Feb. but only partially executed it; that was the largest order they had received from the accused. Witness also stated that on viewing the lots prepared for sale he found amongst them two bags of sharps which he had delivered and for which his firm had not been paid. James Nixon said 34*l.* 13*s.* 6*d.* was due to him for*

STAFFORD ASSIZES.]

REG. v. JOHN STONE THOMAS.

[STAFFORD ASSIZES.]

goods sold and delivered to the accused up to the 19th Feb.

William Keates, printer, said that he got out the posters announcing the sale by the direction of the auctioneer and the accused.

The bill sticker said he was told by the auctioneer not to post the bills in Cheadle until after dark.

The bill of sale was put in and read.

A police officer proved that he received a warrant on the 24th Feb., and searched for the prisoner, but could not find him, but apprehended him on the 28th Feb.

At the close of the case for the prosecution,

Motteram submitted that the bankruptcy of the prisoner had not been proved, the counsel for the prosecution having merely put in the adjudication under the seal of the court. Sect. 10 of the Bankruptcy Act 1869 enacts that "a copy of an order of the court adjudging the debtor to be a bankrupt shall be published in the *London Gazette*, and be advertised locally in such manner (if any) as may be prescribed, and the date of such order shall be the date of the adjudication for the purposes of this Act, and the production of a copy of the *Gazette* containing such order as aforesaid shall be conclusive evidence in all legal proceedings of the debtor having been duly adjudged a bankrupt and of the date of the adjudication."

LUSH, J.—The production of the *London Gazette* is merely a compendious mode of proving the bankruptcy, but if the *London Gazette* is not produced, the bankruptcy may be proved *aliunde*. Here the prosecutor need not prove the acts of bankruptcy. Sect. 11 of the Debtors' Act 1869 commences thus: "any person *adjudged* a bankrupt." The provision as to the *Gazette* is merely cumulative, and the bankruptcy may be proved by the *Gazette*, or otherwise.

Motteram.—Then I would ask your Lordship if there is any case to go to the jury?

LUSH, J.—Yes, I think so. The prisoner having been in possession of considerable stock-in-trade, passed it all over to his sister.

Motteram, in addressing the jury for the defence, urged upon them that as the bill of sale had been given in pursuance of a long antecedent promise to execute it when requested, and was really in consideration of the advance of 430*l.*, the making of it was not fraudulent, and the prisoner could not be convicted under sub-section 15 of sect. 11; moreover, by far the larger portion of the goods obtained upon credit had been actually sold to different customers.

LUSH, J.—If those "sharps" mentioned in the third count of the indictment, and seen on the premises amongst the lots prepared for sale, formed part of goods not paid for, then the case falls within sub-sect. 15 of sect. 11, which declares it to be a misdemeanor if anyone, "being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud." You cannot say that disposing of stock-in-trade by a bill of sale is disposing of it in the "ordinary way of trade;" that must be by selling over the counter.

Motteram.—It must follow, then, that no such security as a bill of sale can be safely given by a trader lest it may chance to include some articles not paid for. Assume the bill of sale to be *bona fide* and good, and that the creditor putting it in

force takes away a portion of the goods delivered within a reasonable time of credit, but before they are paid for, if your Lordship thinks that that would be a disposing of them not in the ordinary way of trade, then I have no case.

LUSH, J.—I am clear upon that point.

Motteram.—But the actual giving of the bill of sale must be taken to relate back to the promise to make it.

LUSH, J.—I don't think that signifies. He had no business to promise. The Act says that you shall not get rid of, otherwise than in the ordinary way of your trade, any property you have not paid for. [The learned judge added that as this was the first question which had arisen upon the construction of the section, he would take the opinion of Martin, B. upon it, and on returning into court after so doing, said:] My brother Martin has no doubt in this matter, that disposing by bill of sale is not disposing in the ordinary way of trade, and this being property which the prisoner had obtained on credit, and had not paid for, and which passed by the bill of sale, he is within the Act, unless he had no intention to defraud. Now if he passed away every stick of his property, book debts and all, how can it be said that the bill of sale was not made with intent to defraud? To defraud a creditor is to take away the means of paying him, and surely if all the property is given to one creditor, reserving nothing to the others, those others are defrauded.

Motteram.—If the attorney drawing the bill of sale had excluded these things that came in after the 17th Feb., the prisoner would not have been within this clause.

LUSH, J.—No; not within this clause. [To the jury.] Upon the evidence already given you have no alternative but to find the prisoner guilty. This is a new statute which makes it criminal to defraud creditors. [His Lordship read sub-sect. 15 of sect. 11.] It cannot be said that to give away the whole of one's property by a bill of sale is disposing of it in an ordinary way of trade. Now, part of these things—viz., two bags of "sharps" had not been paid for and are within the very terms of the Act. Are you satisfied that there was no intention to defraud? This bill of sale conveyed away everything the prisoner had; how can you say he had no intent to defraud? If he had such intent he is guilty of a misdemeanor within the Act of Parliament, and you will find him guilty on the third count of the indictment.

Verdict guilty. Sentence, fourteen days' imprisonment.

Bosanquet asked that the costs of the prosecution might be allowed, but as the prosecution had not been "ordered by any court" within the terms of sect. 17, the learned judge said he had no power to allow them, either under that section or by the general Act.

Attorney for the prosecution, *Blagg*, Cheadle.

Attorney for the prisoner, *Slaney*, Newcastle-under-Lyme.

PROB.]

In the Goods of H. BULLAR—TAYLOR v. TAYLOR AND WOLTERS.

[PRIV. CO.]

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Feb. 1.

(Before Lord PENZANCE.)

In the Goods of H. BULLAR.

Administration—Trusts—Attorney.

Where there is an estate the court will not grant administration to a person who has no interest, even though the legatees desire it.

The executor being dead, the persons entitled to administration were four young ladies. There being many trusts to discharge, they were anxious that the administration should be granted to their attorney; but the court declined to make the grant.

H. Bullar died leaving a will duly executed, by which he appointed his four sisters his universal legatees. The executor was dead, and

The Solicitor-General (Sir J. D. Coleridge) now moved on behalf of the four legatees that administration with the will annexed might be granted to Mr. Murray, as their attorney. The deceased was concerned in a great many trusts, in which it was out of the question that ladies could act, and Mr. Murray had intimated his readiness to take the duty upon him in their behalf.

Lord PENZANCE.—What you ask is quite contrary to the practice of this court. Here are four people, each entitled to the grant, and they say we will none of us take it, but we will ask the court to grant it to a person who has no interest. Where there has been only a trust the court has occasionally made such a grant; but it is contrary to the practice of the court, and I cannot grant the application. There is no objection to your clients taking the grant, and their appointing Mr. Murray to be their attorney; but there must be some mode of meeting the case under the Trustee Act.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Feb. 1.

(Before Lord PENZANCE, J.O.)

TAYLOR v. TAYLOR AND WOLTERS.

Dissolution—Damages—Apportionment of costs.

In a dissolution suit the damages were assessed by the jury at 150l. The court ordered the damages to be applied, first of all to the payment of the husband's costs, and afterwards to be settled on the only child issue of the marriage.

This was a husband's petition for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent. The case was tried before the court by a common jury on May 12, 1869. The jury found that the respondent had committed adultery with the co-respondent, and assessed the damages at 150l., whereupon the court pronounced a decree nisi, and condemned the co-respondent in costs.

Inderwick in moving that the decree be made absolute, asked that the damage be applied to the payment of the petitioner's costs.

Cunningham, for the respondent, submitted that they should be settled for the benefit of the wife and the one child of the marriage. He relied on

Latham v. Latham and Gethin, 30 L. J., 42, P. & M.; 4 L. T. Rep. N. S. 308;

Keats v. Keats and Montezuma, 1 S. & T. 335;

Narracott v. Narracott and Hackett, 38 L. J., 132, P. & M.; 10 L. T. Rep. N. S. 389.

The wife had brought into the common stock a legacy of 100l., which her husband had spent in buying furniture now in his possession. He also asked that the wife should have the custody of the child.

Lord PENZANCE, J.O.—Each case must depend on its own circumstances. The court has to deal with the sum of 150l. awarded as damages and the first thing to see to is that the petitioner gets his costs. The 150l. therefore, will be first applied to paying the preliminary costs as between attorney and client or at least so much of them as he fails to obtain from the co-respondent. With regard to the remainder, which may amount to a sum of about 100l. the only thing the court can do is to order it to be settled upon the child. The wife has no claim on any of these damages; as regards the money she brought into stock, the court cannot travel back into that matter. The husband must have the custody of the child, the wife being allowed to see it once a month.

Solicitor for petitioner, *McDiarmid*.Solicitor for respondent, *T. N. Lade*.**Judicial Committee of the Privy Council.**

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Dec. 14 and 15, 1869.

(Present—The Right Hon. Lord CHELMSFORD, Sir James W. COLVILLE, Sir R. PHILLIMORE, and Lord Justice GIFFARD.)

JOHN MOFFATT (app.) v. EDWARD LA TROBE BATEMAN (resp.).

Accident in driving—Gratuitous carriage—Negligence—Occurrence of accident—How far raising a prima facie presumption of negligence—Evidence to go to jury.

The appellant asked the respondent as a favour to paper some rooms at a house belonging to the appellant, and offered to drive him to the place for the purpose. The respondent, after some objections, consented to go, and took his seat in the appellant's carriage. On the way, while the appellant was driving, the carriage broke down, and the respondent was thrown out and hurt.

In an action brought by the respondent to recover damages for the injuries thus sustained, the evidence as to the cause of the accident was that the kingbolt of the carriage broke, and it was suggested that the breakage was caused by the branch of a tree lying across the road. It was also proved, that the appellant had spoken of the horses he was driving at the time of the accident as hard to manage, and had said that he had not examined the carriage before starting, but that, after the accident, he had discovered the kingbolt to be defective. The carriage had been regularly examined by a blacksmith every three months.

Held (reversing the judgment of the Supreme Court of Victoria), that there was no evidence of negligence to go to a jury; for,

First. The appellant must be considered to have carried the respondent gratuitously, and therefore to be liable on an accident occurring, if at all, only for gross negligence;

Secondly. The mere occurrence of the accident raised no prima facie presumption of negligence, because nothing is more usual than for accidents to happen in driving without any want of care or skill on the part of the driver: (Scott v. The London, &c., Docks Company, 11 L. T. Rep. N. S. 888, distinguished);

Thirdly. There was no affirmative evidence of gross or any other negligence on the part of the appellant.

This was an appeal from a judgment of the Supreme

PRIV. CO.]

JOHN MOFFATT (app.) v. EDWARD LA TROBE BATEMAN (resp.).

[PRIV. CO.]

Court of Victoria, by which a rule *nisi*, granted by that court to the appellant, to set aside a verdict obtained by the respondent, and to enter a nonsuit, was discharged with costs.

The first and only material count of the declaration alleged that in consideration that the plaintiff (the respondent), at the request of the defendant (the appellant), had taken a seat and place in a carriage of the defendant, to be conveyed therein by the defendant to Willis-station for profit to the defendant in that behalf, the defendant promised the plaintiff to take due and proper care in conveying the plaintiff as such passenger to the said station, and although the plaintiff afterwards became such passenger, yet the defendant did not take due and proper care, &c., and by reason of the careless and improper conduct of the defendant in the driving, conducting, and management of the said carriage, the plaintiff was injured, &c.

The pleas to the above count were: 1. Non-assumpsit. 2. Denial that the plaintiff became such passenger as alleged; and 3. Denial of the alleged breaches. Joinder of issue thereon.

The facts and the substance of the evidence are sufficiently stated in the judgment.

On May 23, 1868, the action was tried before one of the judges of the Supreme Court and a jury, when a verdict was given for the respondent with 1500*l.* damages, leave being reserved to the appellant to move to set aside the verdict, and to enter a nonsuit.

On June 23, 1868, the appellant obtained a rule *nisi* accordingly.

On Sept. 4 following the rule was argued, and the court (Stawell, C. J. and Barry, J.; Williams, J. *dissentiente*) discharged the rule with costs.

Dec. 14.—*Manisty*, Q. C. and *Macnamara*, for the appellant.—We contend that the conveyance of the respondent having been gratis, the appellant was liable only for gross negligence. The liability is that of a gratuitous bailee. Some remarks were made in the recent case of *Giblin v. McMullen*, 21 L. T. Rep. N. S. 218; L. Rep. 2 Priv. Co. 336, on the term "gross" negligence, and it was approved as a convenient description of the degree of negligence for which such a bailee will be liable. That case was, however, as to the liability of a banker for the loss of valuables deposited with him. The present is more similar to cases of a gratuitous loan of a machine, defective and so dangerous, which while used by the borrower does him an injury in consequence of that defect. Such was the case of *Blakemore v. Bristol and Exeter Railway Company*, 8 E. & B. 1035, in which it was held that the defendants, the gratuitous lenders of a crane, were liable for mischief done to the borrower directly resulting from the unsafe condition of the crane, if that were known to the lender. But it is clear from *McCarthy v. Young*, 3 L. T. Rep. N. S. 785; 6 H. & N. 329, that the gratuitous lender will not be liable, if not aware of the defect. Even carriers for hire are not liable for an accident arising from a latent defect in a carriage such as no care could detect: (*Redhead v. Midland Railway Company*, 20 L. T. Rep. N. S. 628; 9 B. & Sm. 519.) Here there was no evidence that the state of the kingbolt, if defective, was known to the appellant, and he used every precaution in having his carriage regularly examined to provide against any such defect. Again, there is no evidence that the horses were known to be or were actually unsafe to drive; nor that the appellant was unskilful in driving, and so caused the accident. [Lord CHELMSFORD.—If I invite anyone whom I may happen to pass on the road to take a seat in my carriage, and if by my unskilful driving he is thrown out, am I liable to an action?] No; we say that in such a case there is

no guarantee of skilfulness. Further, gross negligence, for which a gratuitous bailee is liable, must directly cause or contribute to the mischief complained of. Here absolutely nothing is known as to the real cause of the accident, though various causes have been suggested by way of conjecture. The mere occurrence of the accident was not sufficient *prima facie* evidence of negligence to go to the jury. As was observed by Erle, C. J., in *Hammack v. White*, 11 C. B., N. S., 594; 5 L. T. Rep. N.S. 676, "I do not assent to the doctrine that mere proof of the accident throws upon the defendants the burden of showing the real cause of the injury. All the cases, where the happening of an accident has been held to be *prima facie* evidence of negligence, have been cases of contract." There must be some affirmative evidence of negligence, and "where the evidence is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury:" (per Williams, J. in *Cotton v. Wood*, 8 C. B., N. S., 573.) In the case of *The London*, 11 Moo. P. C. 311, Lord Wensleydale observed, "with respect to the *onus probandi*, there is no question or doubt about the law. The party seeking to recover compensation for damage, must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the other party." There having been then no evidence of any contract, nor of any negligence on the part of the appellant, we submit that the judgment of the court below ought to be reversed.

Mellish, Q. C. and *Gadsden*, for the respondent.—The respondent was not carried for his own pleasure, but to attend to the business of the appellant, and at his wish. The carrying, therefore, was not, as in the ordinary case of a gratuitous bailment, for the benefit of the bailee, but for that of the bailor. So that the contract alleged in the first count of the declaration is supported. The cases relied on by the other side, as showing that the proof of the occurrence of an accident is no *prima facie* proof of negligence in the defendant sufficient to be left to a jury, were doubtless rightly decided. But the question depends on the nature of the accident. And where the accident (as here) is such as in the ordinary course of things does not happen with proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from negligence: (*Scott v. The London, &c., Docks Company*, 11 L. T. Rep. N. S. 383; 3 H. & C. 596.) The question of negligence, therefore, being one for the jury, their finding in the respondent's favour should not be disturbed.

Manisty, Q. C. replied.

Cur. adv. vult.

Dec. 15.—Judgment was delivered by Lord CHELMSFORD.—The question to be determined in this appeal is whether there was any evidence to go to the jury of the appellant having been guilty of that degree of negligence for which, under all the circumstances of the case, he was responsible? The following are the material facts proved at the trial. The respondent, who is a decorator and ornamental gardener, had entered into an agreement with the appellant to serve him at the rate of 300*l.* a year for three years, in laying out his gardens at his residence at Hopkin's-hill. On the day of the accident the appellant asked the respondent to go to a place called Willis-station, which belonged to the appellant, to paper some rooms for him, and he proposed to drive him there in his buggy. The respondent, in his evidence, stated that after making many objections he consented to go; that his objections to

PRIV. CO.]

JOHN MOFFATT (app.) v. EDWARD LA TROBE BATEMAN (resp.).

[PRIV. CO.]

accompany the appellant were with reference to his mode of driving; that he made excuses, but did not like telling him what his real motive for refusing was. The appellant, in his evidence, said that the respondent refused to accompany him to Willis-station because the morning was wet. The accident happened within a mile of Willis-station. The respondent described the buggy as old and rusty, and one that he would not have been seen in near town, and the horses as a very spirited pair, and he stated that the appellant whipped up the horses to make them gallop, and that at the time of the accident they were going very fast, but he could not say they were galloping. When they came to a spot where there were three tracks, the appellant took the one on the left, and the respondent was suddenly thrown out about two yards on the left-hand side of the buggy. When he came to himself, he found that the horses and the fore wheels of the buggy were gone; that there was the branch of a tree across the road, whether the whole way across he could not say, and that the hind wheels had stopped at this branch. This is the whole account which the respondent is able to give of the accident by which he certainly received very serious injuries. Before considering the evidence to prove negligence on the part of the appellant, it will be proper to determine for what degree of negligence he is responsible. It is admitted that he was not carrying the respondent for profit in the ordinary meaning of that term, but Mr. Mellish argued that as the respondent was going to Willis-station on the appellant's business, and for his benefit, he must be taken to have contracted for a greater degree of skill and care than would be required from a person who was driving another gratuitously. But their Lordships cannot adopt this view. The respondent was not obliged to go with the appellant, but might have found his way to Willis-station in some other manner, and the case amounts to no more than this, that the respondent having agreed to paper the rooms at the station, the appellant offered to drive him there, which imposed no higher duty upon him than in the case suggested during the argument, of a person offering another a seat in a carriage which he is driving, who certainly if liable at all for an accident afterwards occurring, could only be so for negligence of a gross description. Is there, then, any evidence of the appellant having been guilty of gross negligence—a term which is sufficiently descriptive of the degree of negligence which renders a person performing a gratuitous service for another responsible? There is no evidence at all of the mode in which the accident took place. It is probable that it might have been occasioned by running against the branch of the tree which is described by the respondent as lying upon the road, but no further description is given by the respondent of the accident, than the fact of its occurrence, and the place where it occurred. The counsel for the respondent contended that a case of *prima facie* negligence being shown, the appellant was called upon to relieve himself from it, and they cited the case of *Scott v. The London and St. Katherine's Dock Company*, (11 L. T. Rep. N.S. 383; 3 H. & C. 596), where it was held that "in an action for personal injury caused by the alleged neglect of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant the judge in leaving the case to the jury, but that where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care." Now, that was a case in

which the negligence proved was that the plaintiff, who was an officer of the Customs, whilst in the discharge of his duty, was passing in front of a warehouse in the dock, and six bags of sugar fell upon him. Undoubtedly in that case there was the strongest *prima facie* presumption of negligence because it is not in the ordinary course of things that loaded bags should fall out of a warehouse on a person below. But this case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver, and therefore no *prima facie* presumption of negligence having been raised, their Lordships think that it was necessary for the plaintiff in the case—the respondent—to give affirmative evidence of there being gross negligence on the part of the appellant occasioning the accident. The respondent endeavoured to prove this degree of negligence on the part of the appellant by means of admissions made by the appellant to two witnesses. The first of them, Smith, a nurseryman, said, "That night" (that is the night of the accident) "or the next morning, the defendant said that he had to blame himself for what had occurred, that he had not examined the vehicle, and that after the accident he discovered the defective state of the kingbolt." And the same witness said that on another occasion, on his way to Willis-station, defendant said that he never would go out with one of the horses—that he had served him the same trick before, and had ruined the other horse besides. This witness, on being cross-examined, said the appellant said, "the horse had bolted before on previous occasions, that he had bolted and made the other horse bolt too." The other witness, Margaretta Perry, said, "The defendant said it was neglect; the buggy was not looked to. He said the kingbolt had broken." She also heard the defendant say that he could scarcely drive those horses, and she added that she had heard him tell the boy to be ready to jump out, as he could not manage them. With regard to the proof of negligence by the admission of the appellant that he had not examined the vehicle, and discovered the defective state of the kingbolt, their Lordships are of opinion that this amounts to no proof whatever of negligence. It appears that the carriage was regularly examined by a blacksmith every three months, and it is very unlikely that the appellant before going out for a drive or using the buggy would examine very strictly and carefully what was its state with regard to its bolts and fastenings, or that he could fairly be accused of negligence for not having done so. Then as to the evidence of the appellant's admissions with respect to the horses. Undoubtedly, if the accident had happened by reason of any of those circumstances to which the appellant spoke in his admissions to the witnesses, if the horses had bolted, if they had become unmanageable, if they had been too much for him, and the accident could be referred to the occurrence of any of these circumstances, there might have been a case made out against him. But so far from this being proved, it appears from the respondent's evidence, who had been driven with these horses by the appellant before, that "on the road to Willis-station he did not observe anything unusual, except the appellant's whipping up the horses, as he said they were sluggish. And the respondent made no special complaint at the rate at which they were going, or of the vehicle in which they were going, or of the horses." Under these circumstances, there really is no evidence whatever of any negligence of any description on the part of the appellant. The whole case against him is that in the course of driving to the Willis-station the horses and front wheels of the carriage separated from the hinder wheels, possibly from coming in contact with the branch of the tree; but

ROLLS.]

HOBSON v. JONES.

[ROLLS.]

even that is mere conjecture. But that the accident occurred from any negligence which would have rendered the appellant liable is entirely destitute of proof. Their Lordships are very unwilling to interfere with the judgment of the learned judges who decided in this case that there was proof of negligence sufficient to entitle the plaintiff to recover; but they cannot help coming to the conclusion that the case ought to have been withdrawn from the jury at the close of the plaintiff's case, on the ground that he had offered no evidence to establish a case of gross negligence against the defendant. Under these circumstances, their Lordships will recommend Her Majesty to reverse the judgment. The costs will follow the usual course.

Judgment reversed.

Solicitors for the appellant, *Wedlake and Letts.*

Solicitors for the respondent, *Tamplin and Taylor.*

Equity Courts.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

January 19, 20, and 31.

HOBSON v. JONES.

Inspectorship-deed—Receiver—Default—Agency—Liability of inspectors.

By an inspectorship-deed the debtor agreed to allow A., or such other person or persons as the inspectors might from time to time appoint, to receive the moneys due to the debtor, and to keep his books. The deed contained no assignment of the debtor's property, and the debtor continued to carry on his business under inspection. The debts were ultimately paid in full, and an end was put to the inspectorship. On taking the accounts it appeared that a considerable sum was due from A., which he had not, as he ought to have done, paid over to the inspectors.

On a bill by the debtor to render the inspectors liable for his default:

Held, that A., if the agent of anyone, was rather the agent of the debtor than of the inspectors, and that therefore the inspectors were not liable for A.'s default.

The relation and liabilities of inspectors with reference to receivers under an inspectorship-deed examined.

Adjourned summons.

The plaintiff in the suit, George Hobson, being unable to pay his debts in full, executed, in Dec. 1858, a deed of inspectorship, which contained no assignment of his property, but by which, in consideration of time being allowed him by his creditors, he covenanted to pay his debts in full by six instalments, and to allow one John Heard Clarke, an accountant, or such other person or persons instead of the said John Heard Clarke, as the inspectors might from time to time appoint, to collect and receive all moneys due or to become due to the plaintiff, and to pay the same into an account to be kept at the City Bank, or such other bank as the inspectors might from time to time appoint, after deducting certain expenses therein specified, and to allow the said John Heard Clarke, or such other person as the inspectors might appoint, to keep and make all necessary or proper entries in the books, and for that purpose to retain and keep possession of the books or any of them during such time as might be necessary.

In 1863 the plaintiff entered into partnership, and all the debts were paid, and the inspectorship terminated. On taking the accounts, it appeared that the sum of 640*l.* was due from John Heard Clarke,

which he ought to have paid into the bank to the account of the inspectors. Clarke, being insolvent the plaintiff filed his bill against the inspectors to make them liable, on the ground that Clarke was their agent, and that they were responsible for his default; and by the decree it was ordered that an account should be taken against the inspectors.

The present summons was adjourned into Court to obtain directions as to the mode of dealing with the sum of 640*l.* due from John Heard Clarke.

The facts of the case are more fully stated in the judgment.

Roxburgh, Q.C., and Herbert Smith appeared for the plaintiff.

Southgate, Q.C. and Cracknall for the defendant Jones, one of the inspectors.

Sir Richard Baggallay, Q.C. and Swanston, Q.C. for the defendant T. Clarke, the other inspector.

Jan. 31.—LORD ROMILLY.—This is an adjourned summons, taken out, in fact, at the instance of the Chief Clerk, asking for directions how he is to proceed in taking the accounts directed by the decree. It raises a question of great importance, not merely to the parties themselves, as it will dispose of the substance of the cause itself, but also because it involves a principle of general application to traders, which, so far as I know, or as I have been referred to any decided cases, has not hitherto been established. The facts which raise it are few and simple. The plaintiff carried on business as a tailor in and prior to 1858. In that year he got into difficulties. In December, 1858, he called his creditors together, and he executed a deed of inspectorship. The deed bears date the 16th Dec. 1858. It was made between the plaintiff of the first part, the defendants, who are the two inspectors, of the second part, and the scheduled creditors of the third part. John Heard Clarke, an accountant, was appointed receiver. There was no assignment to anyone of any of the effects or property of the plaintiff. The deed was to this effect. [His Lordship stated the effect of the deed, and continued:] Up to the 2nd Dec. 1861 the account at the bank was kept in the names of the plaintiff and John Heard Clarke. On that day the title of the account was changed, and it was afterwards kept in the name of the defendant alone at the City Bank. In March 1863 a negotiation was concluded with a gentleman of the name of Hieron, who had inspected the accounts of the business of the firm. A partnership was formed between him and the plaintiff, and his debts were paid off to the creditors in full, and an end was put to the inspectorship. On taking the accounts it appeared that a sum of £640 was due from John Heard Clarke, which he had not, as he ought to have done, paid over to the inspectors. He is insolvent and unable to pay, and in June 1863 this bill was filed calling on the inspectors to account for the moneys received by them, and also to make them liable for the default of John Heard Clarke, on the ground that he was their agent, and that the money received by him was received by the order or for the use of the inspectors. There is an ulterior question arising from the conduct of the inspectors, which is a separate matter, and which I wish to keep distinct. The first question, as I have stated, is simply this: it was the duty of the inspectors to overlook the receiver, and to see that he duly rendered his accounts and paid over the balance in his hands to their account at the bank, was he their agent for getting in the debts of the concern? In other words, what is the peculiar relation which exists in an ordinary deed of inspectorship between the inspectors, the debtor, and the creditors, and

ROLLS.]

HOBSON v. JONES.

[ROLLS.]

when a receiver is appointed to get in the assets of the debtor, whose agent is he? and who, if anyone, is liable for his misconduct in not accounting for his receipts? An ordinary deed of inspectorship is, I think, merely a contrivance to enable the debtor to avoid becoming a bankrupt, and at the same time to give the creditors the best chance of obtaining payment of their debts which the circumstances of the case seem likely to afford. This deed is a fair specimen of such deeds. There is no assignment of any property. The debtor does not part with his full legal rights, nor with the whole of his power over either his business or his assets, but he does so to a considerable extent; he gives the inspectors a right to superintend it, and, whenever they consider it necessary, a power to control his dealings with both. It is consistent with the objects of such a deed that a person should be appointed receiver and collect the moneys and debts due to the business, and that such a person should also be under the control of the inspectors and subject to being dismissed at their will and pleasure; but this does not, I think, make him the agent of the inspectors. All the legal powers which such a receiver possesses in the performance of this employment is derived from the debtor and none of it from the inspectors; all that he derives from the inspectors is their sanction to the exercise of his employment in this particular manner; but for the purpose of rendering any person but himself liable for the moneys he receives and not accounted for by him, he is not in my opinion the agent of anyone in the strict sense of the term; but, if of anyone, he is rather the agent of the debtor than of the inspectors. His position is somewhat analogous to that of a receiver appointed in a mortgage-deed, which is done occasionally where the mortgagee entertains some doubt about the punctual payment of the interest, and yet desires to avoid the consequences which attach to a mortgagee in possession. Accordingly the mortgagor and mortgagee agree on a person who is appointed to be the receiver of the rents and profits of the mortgaged estate, but who is not to be called into action until default has been made in payment of the interest. When that occurs the receiver is authorised and required upon the requisition of the mortgagee to exercise the power entrusted to him, that is to receive the rents, &c., and thereout to pay the interest due on the mortgage to the mortgagee and the balance to the mortgagor, but he is not the agent of the mortgagee nor can he be made liable to account on the principle of wilful default. This view is confirmed by considering what would have occurred if the inspectorship had continued and that after the misfeasance of John Heard Clarke had been discovered the inspectors had taken steps to enforce payment of the balance due from him or had prosecuted him for embezzlement. In either case, I apprehend, it would have been a proceeding in the name or on account of the debtor. If by civil proceeding the action or suit must have been in the name of the debtor, and if by criminal proceeding it must, I apprehend, have been by an indictment against John Heard Clarke for embezzling the property of the debtor. The decree in this case is to compel the inspectors to account for moneys "received by them, or by their order, or for their use." I do not think that the moneys received by John Heard Clarke come within these words, and that the inspectors, though strictly liable for all moneys received by them, are not answerable for moneys embezzled or not accounted for by a person properly and necessarily employed by them, and with the assent of every one interested in the business carried on by them within the terms of the deed by which they were constituted. In these cases, no doubt, everything depends upon the terms of the deed, and unquestionably the frame of

the deed might make inspectors liable for moneys not received by them, if they thought fit to accept such an office; but there are no such words in the deed in question in this case; the strongest are only those which I have read, and they do not impose any such obligation on the inspectors. The remaining question is one apart from that which I have been considering, although in some degree connected with it. It is whether the inspectors have, by their own personal misconduct, made themselves liable for the moneys received by John Heard Clarke. For this purpose I have carefully read and considered the evidence adduced on behalf of the plaintiff. It amounts shortly to this: in September the plaintiff and some of his creditors, who were endeavouring to arrange some mode by which the business might be sold and the inspectorship put an end to, met and required to see and investigate the accounts of the receiver, John Heard Clarke. After some difficulty he produced and allowed the inspection of the accounts, so far as they showed the character, extent and value of the business carried on, but he refused to produce the cash book or any document which might reveal how he had accounted for the moneys received by him. The creditors got alarmed, wrote to the inspectors, complained of their receiver, and required their assistance to compel John Heard Clarke to render these accounts, but without any charge being made by them against him. Only one inspector acted; Mr Jones took no notice whatever of the application. The other inspector, Thomas Thornton Clarke (no relative of the receiver), wrote to the receiver, who returned an evasive answer, but admitting that he had not produced and did not intend, unless compelled by the inspectors, to produce these books. The inspector, Mr Clarke, in answer to the application made to him, sent a copy of this letter, stated his firm belief in the honesty and trustworthiness of the receiver, and refused to compel him to produce these books. This took place in October 1862. The steps carried on for the sale of the business and the termination of the inspectorship were arranged in February following, and the whole was concluded on the 27th of March 1863. On winding up the inspectorship it appeared that John Heard Clarke, the receiver, owed upwards of £600, which he was unable to pay. The question is—does this conduct of the inspectors make them liable? I think the conduct of both the inspectors wrong; one in taking no notice whatever of the application made to him, and the other in supporting John Heard Clarke in withholding his accounts, but I do not think that this misconduct is sufficient to make them, or either of them, responsible for the malversation of the receiver. If it could be shown that the inspectors had distinct knowledge that John Heard Clarke had embezzled the money received by him, and that, having notice of this, they had allowed him to receive additional moneys, and had not removed him from his position, if not answerable directly for the moneys so allowed by them to be received by him, they might probably have been made liable to the plaintiff in an action for damages occasioned by culpable misconduct in their office as inspectors, but the evidence does not amount to this or to anything of that character. It does not appear, indeed, that, prior to the taking of the final accounts in 1863, anyone suspected that John Heard Clarke had not honestly accounted for all the moneys received by him as received, and no such charge is made against him by anyone. I cannot, therefore, on account of the conduct of the inspectors, which I have stated as strongly against them as the evidence will admit, make them liable for moneys which, under the terms of the deed itself, they would not be liable to account for or make good. I am of opinion that I must answer the chief clerk's

inquiry by directing him not to charge the inspectors with the moneys received by John Heard Clarke. I shall give this direction without any order as to the costs of this summons, principally because it is an application by the chief clerk to be instructed how he is to proceed in taking the accounts, which might, as far as I can see, have been determined at the hearing of the cause; and also because I think the inspectors ought to have exercised a more diligent supervision over John Heard Clarke than they seem to have done. If gentlemen undertake an office, they should duly and diligently discharge the duties they have undertaken. I do not go into the question argued before me about the case made by the bill, and the suggestion that the case insisted on by the plaintiff was an attempt to intrude into the decree a case of liability for wilful default. If I had considered the defendants liable on the facts, I should have had no difficulty in making them account either under this decree, or under the power of stating circumstances specially, which I always reserve to myself, and which I exercise whenever I think it necessary in any decree directing accounts and inquiries to be prosecuted in my chambers. This, I presume, will dispose of the suit, and I regret that my opinion on this point was not taken at the original hearing. The order now will be the direction I have stated to the chief clerk, and no order as to the costs of the summons.

Solicitor for the plaintiff, *Baylis*.

Solicitors for the defendants, *O. Richards; Linklaters, Hackwood, and Addison*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Nov. 22, 23, Dec. 6 and 7, 1869; and Jan. 20, 1870.

CHAPMAN v. CHAPMAN.

Solicitor and client—Alleged negligence—Mortgage securities—Advances by client—Bill charging improper motives—Bill dismissed.

In a question between solicitor and client, as to loss from negligence, there must be negligence of a gross and palpable kind to give a right to relief; but where the conduct complained of is more properly to be described as imprudent or indiscreet rather than negligent, and the transactions in question were referred to the judgment of the client himself, who concurred in them, there can be no right to equitable relief.

In such a case where charges of improper motives were made without evidence to support them, the court dismissed the bill with costs.

The object of this suit was to make the defendants, who had acted as solicitors for the plaintiff in negotiating certain advances made by him on mortgage, responsible for the money so advanced, and to compel them, in effect, to take the securities off the plaintiff's hands.

The facts, as stated by the amended bill, were these:

The plaintiff, Henry Chapman, of Westfield House, Canterbury, was a gentleman who for some years had been resident in India, but had recently returned to this country. The defendants were solicitors, carrying on business in partnership under the firm of Chapman and Clarke.

In Aug. 1862 the plaintiff received from his nephew, the defendant George Chapman, the following letter:

My dear uncle,—When you were in town you spoke to me of getting money from India. I could now or at any time within a month or six weeks, if it was now bespoken, invest 3000*l.* on mortgage at 6*l.* per cent. on property estimated at

6000*l.*, but to be valued by a surveyor on the lender's behalf, and the loan to be only up to one-half of the value. I merely mention this in case you should be on the look out for anything of the kind, in which case I could send you full particulars. I know the security to be good; the objection to you would probably be that you could not receive your money under a three months' notice.

After the receipt of the above letter, the plaintiff called upon George Chapman in order to ascertain the particulars of the proposed mortgage, and was then informed by Chapman that the proposed borrower was a client of the defendants' firm, a Mr. Richard Thomas, a person of independent property worth 1000*l.* a year, and who, in order to carry on expeditiously certain extensive building operations, required more capital than he then had available; that the property which Thomas proposed to mortgage was situated at Paddington, and was comprised in a building agreement entered into between him and the Bishop of London and his trustees:

By that agreement, which was dated 20th Feb. 1862, the said trustees covenanted with Thomas that they would—as soon as the messuages and buildings thereafter covenanted to be built should be built, covered in, and the external works completed, as thereafter mentioned—by a good and sufficient lease, or several good and sufficient leases, demise the same unto Thomas, his executors, administrators, and assigns, for a term of ninety-eight years, at the rent of 25*l.* for the first year, 50*l.* for the second, 100*l.* for the third, 200*l.* for the fourth, and 395*l.* for the fifth and remaining years of the said term; and, by the same agreement, Thomas covenanted to erect such buildings as therein mentioned.

Chapman also assured the plaintiff that the property was, at that time, an ample security for 3000*l.*; and that, although the nature of the security would require that the houses, when finished, should be withdrawn or released from the security, yet that care would be taken in always having sufficient value comprised in the security.

Upon receiving this information, the plaintiff told Chapman that he did not understand the nature of the proposed mortgage, but that if Chapman was perfectly satisfied with the security, he (the plaintiff) was willing to advance 3000*l.* at 6 per cent., and that he placed himself entirely in Chapman's hands, and trusted to him to guard him against the possibility of losing his money or being led into litigation, which Chapman promised to do.

Accordingly by a deed dated the 16th Oct. 1862, the 3000*l.* at 6 per cent. was advanced to Thomas on the security of a mortgage of the building agreement of the 20th Feb. 1862. The deed *inter alia*, contained a covenant that in case the plaintiff his executors, administrators, or assigns, should so require it, Thomas, his executors or administrators, would accept and take in his and their own name or names any one or more lease or leases of all or any part or parts of the said pieces of land and premises comprised in the said indenture of agreement pursuant to the provisions of the same, and would thereupon forthwith grant to the plaintiff, his executors, administrators, and assigns, an underlease or several underleases of the premises comprised in such original lease or leases for the term or terms for which such original lease or leases should be granted, less the last day thereof respectively, instead of causing or procuring the original lease or leases to be granted pursuant to the said indenture of agreement to be granted or assigned to the plaintiff, his executors, administrators, or assigns, such underlease or underleases to be in all respects subject to the terms of the security now being stated, and to the same right or equity of redemption, powers, and provisions, as if such original lease or leases had been granted or assigned to the plaintiff, his executors, administrators, or assigns.

V.C. S.]

CHAPMAN v. CHAPMAN.

[V.C. S.]

The mortgage-deed was prepared by the defendants, acting as the plaintiff's solicitors, and the draft of it was afterwards settled on the plaintiff's behalf by counsel as follows: "I have settled and approve of this draft. If it is desired to have any of the leases granted to Mr. Thomas without the mortgagee being made a party, the simplest course will be before the lease is granted, to indorse on the security a short release of the particular property intended to be comprised in the lease from the security, without prejudice to the security over the residue of the property. This can be modified to suit the circumstances, either upon payment of a part of the amount owing, or in consideration of the substitution of some other security, or merely in consideration of the property being a sufficient security."

The mortgage was executed shortly after its date, but was not registered until the 13th July 1864.

In consequence of the defendants' alleged neglect in not registering the mortgage sooner, Thomas was enabled to mortgage and sell part of the property and to procure leases of the remainder to be granted to his nominee, without the plaintiff's knowledge or consent; the defendants acting throughout in all such transactions as Thomas's solicitors.

Since the date of the mortgage, the whole of the land comprised in the building agreement of the 20th Feb. had been covered with houses by Thomas and other builders employed by him, some of which were finished and others remained unfinished, and the defendants had procured leases of the whole of the property to be granted to Thomas or his nominees, or to trustees for him, and had also caused underleases of such of the leases as were granted to trustees for Thomas to be made to him, or to trustees for him, for the purpose of creating improved ground-rents.

No lease or underlease of any of the premises comprised in the plaintiff's said mortgage had ever been made or assigned to him, and with the exception of two houses and certain stables (named in the bill) the whole of the property comprised in the plaintiff's security had been sold by Thomas and his trustees, or mortgaged by them for the full value thereof to other persons than the plaintiff. All the leases, underleases, sales of improved ground-rents, and mortgages were negotiated by the defendants, as the solicitors of Thomas, while they were acting as solicitors for the plaintiff, and in no case did they inform the plaintiff that any such transactions were intended to be made, or require his consent thereto. No notice of the plaintiff's security was given by the defendants to any purchaser, or mortgagee, or lessee, upon or previous to any of the transactions, or, if given, it was accompanied by an unauthorised statement, on the part of the defendants, that the plaintiff had waived his equitable claim upon the property.

In Sept. 1863 the plaintiff, at the request of the defendant George Chapman, advanced to Thomas 1000*l.* on the security of a plot of ground and premises in Acacia-road, St. John's Wood, but pending the suit, by an agreement between the plaintiff and the defendants, the security had been realised and produced more than sufficient for payment of the plaintiff's principal, interest, and costs in respect of it.

On the 30th June 1863 the defendant George Chapman wrote the following letter to the plaintiff:—

My dear Uncle,—I send you an order for 43*l.* 13*s.* 9*d.*, and form of receipt to stamp and sign. I should have sent it last week, but I was much out of town, &c. With respect to the security the works have gone on most satisfactorily. I have withdrawn completed houses, and have got permanent mortgages on them at 5 per cent. in the course of less than a year to the extent of 45,000*l.*, and there remains in

work (besides land as yet untouched) to secure your 8000*l.* quite 8000*l.* You have always had an ample margin. As to your 5000*l.* the same client is about to build eighteen houses on a very good site, for which he pays 1000*l.* down. He is willing to borrow this 5000*l.*, at 6 per cent., for three or five years in this way—He will give you first a mortgage on the new site of ground, and a further charge on the old premises for as much as they jointly will secure in the judgment of your surveyor, with the understanding that as the works progress on the new site the whole loan shall be transferred there solely. Mr. Thomas's banker will discount the bill at 5 per cent. if you like, therefore, to complete at once, he will take the bill as cash, paying you, however, only interest at 1 per cent. up to next September, when interest at 6 per cent. will begin. I think this can be worked out to be quite safe if you like to entertain it.

The 5000*l.* referred to in the above letter was a sum which the defendant Geo. Chapman knew the plaintiff was anxious to lend on mortgage at 6 per cent., the person referred to as "the same client" was Thomas, and by the expression "the old premises" the defendant intended the plaintiff to understand the property comprised in his security of Oct. 1862.

On the 5th Nov. 1863 the defendant wrote to the plaintiff as follows:

My dear Uncle,—I sent you the surveyor's first report as to the building site in my neighbourhood. Everything is ready, and therefore you may be so good as to send me an order for the sum reported for 1000*l.*, and the mortgage shall be given at once. The works will proceed rapidly. I have no doubt the surveyor will report for a further sum within a month. The other matter is not quite so forward. I am waiting for the Bishop of London's solicitor to prepare some documents, but a week or two will see it ready. I have got a most satisfactory report from the surveyor, Mr. Hesketh, but I will not lay this before you till it is all ripe. The two matters between them will employ all the money you have in hand, and the first having now nearly worked out, gives greater stability to what is now in hand. In the course of the next ten days I will furnish you with such a statement as you want. I have personally entire confidence in both these matters, for I do not see how they can be other than very successful.

The building site referred to in the above letter was the property before mentioned in the Acacia-road. "The other matter" meant the advance by the plaintiff upon mortgage of a new site on which Thomas was to build eighteen houses, as mentioned in the letter of June 30; and that part of the letter which spoke of the matter referred to as "the first nearly worked out" meant the matter which formed the subject of the building agreement of Feb. 1862, and the plaintiff's security of Oct. 1862.

On the 20th Nov. 1863 the defendant George Chapman wrote to the plaintiff as follows:

My dear Uncle,—As Mr. Thomas is paying you interest for your money, he is of course anxious to make use of it. The second "take" of land to which it will chiefly be applied, and upon which I have an excellent report from Mr. Hesketh, will not be ready as a security for some little time, but meanwhile the first take on which you have lent 3000*l.* is a good security for a much larger sum, and Mr. Thomas suggests that you should make him a further advance on this, to be shifted to the other when further progressed. In order to put this before you in a good shape, I have had a further survey made by Mr. Hesketh, which I inclose. If you feel, as I consider you do, quite satisfied about this, and will send me up a crossed order, I will hand the amount to Mr. Thomas, taking his indorsed charge for the further advance on the existing mortgage. There is no question of the value of the property, and the success of Mr. Thomas's operations. I have kept a constant watch on it, and the most experienced surveyors have recommended the houses as mortgage securities as soon as they are finished. If there were three times as many as there are, I should have no difficulty in getting the money. This of course gives me great additional confidence.

Mr. Hesketh, in his report referred to in the above letter, said he had surveyed the property, consisting of fourteen leasehold houses, in Portsdown-road, Paddington, seven of which were covered in, and the others about to be covered in, and he considered that the leases of the seven houses covered in, subject to such ground-rents, were in their then state of a value of upwards of 8000*l.*, and that the other seven, not covered in, of a value of upwards of 5000*l.* He was, therefore, of opinion that they would be a good security for the loan of 8000*l.* re-

V.C. S.]

CHAPMAN v. CHAPMAN.

[V.C. S.]

quired by Thomas in addition to the 3000*l.* already lent upon the whole site.

On or about the 1st Dec. 1863 the plaintiff, relying upon the representations contained in the above letters, and upon Mr. Hesketh's report, paid the defendant George Chapman the further sum of 3000*l.* for the use of Thomas. The defendants, however, never took an indorsed charge for the 3000*l.* upon the existing mortgage, as promised by the letter of the 20th Nov. 1863. In acknowledging the receipt of this money the defendant George Chapman wrote to the plaintiff that he might depend on his taking every care that he was perfectly secured in the matter.

Accordingly by an indenture dated 16th Jan. 1864, the 3000*l.* was advanced by the plaintiff to Thomas, on the security of a mortgage of a fresh building agreement and the works thereon from the Bishop of London and his trustees, dated 15th Jan. 1864. The covenants and provisoes contained in the indenture were substantially the same as those in the mortgage of the 16th Oct. 1862, and in particular a covenant to cause all leases which should be granted of the premises comprised in the agreement, except such as the plaintiff should think fit to release from the security to be granted to or vested in the plaintiff, subject to redemption; and a covenant by Thomas that he would, if required by the plaintiff, take leases in his own name of the premises agreed to be demised, and mortgage the same to the plaintiff by way of under-lease.

On the 25th Feb. 1864 the defendant George Chapman wrote to the plaintiff as follows:

My dear Uncle,—During the last week I have been carefully into the question of the state of your security on Mr. Thomas's property, and the surveyor, Mr. Hesketh, has sent me a report, which I forward to you. He is quite right as to the facts, for the values he is responsible; but I fancy he is well within the mark. You need not, therefore, I think, hesitate to send me on the remaining sum of 1000*l.* for Mr. Thomas. I may just mention that, in point of fact, there is at the present time about 6000*l.* further security in your hands not included in the report, because the rest being ample this will be allowed to be withdrawn very shortly.

"The remaining sum of 1000*l.*," referred to in the above letter, was a sum of money which the plaintiff had at the request of George Chapman agreed to advance upon the same security as the 3000*l.* advanced in Dec. 1863.

Mr. Hesketh's report concluded with the observation, "Altogether, therefore, I consider the undisposed value of what Mr. Thomas has done towards the completion of his first and second takes is not less than 12,575*l.*"

With respect to the several items mentioned in the report, the plaintiff stated that the first valued at 3400*l.* had, as before mentioned, been wholly withdrawn from his security; that as to the second, the stables valued at 2800*l.* had never been finished, and would require at least 800*l.* for their completion; that as to the third, the surplus ground-rents, valued at 400*l.*, never existed; that as to the fourth, the valuation was purely speculative, and the property, valued at 5175*l.*, never existed, and the statement that Thomas had under-let to three other builders the plots for forty-seven houses in Canterbury-road, at ground-rents of 5*l.* each, amounting to together 235*l.*, was wholly untrue; and that as to the fifth the property valued at 800*l.* had been withdrawn from the plaintiff's security.

On the 28th Feb. 1864, the plaintiff, relying on the above representations and report, paid to Chapman, for Thomas, the sum of 1000*l.* referred to in the above letter, making, with the sums already advanced by him, 8000*l.* A considerable part of the 1000*l.* was retained by Chapman in satisfaction of costs and other claims of the defendants against Thomas, and the balance was paid to Thomas.

In Sept. 1864 the plaintiff saw it announced in a

newspaper that Thomas had been adjudicated a bankrupt, and he immediately wrote to Chapman for an explanation. Whereupon, on the 8th Sept. 1864, he received the following letter from Chapman:

My dear Uncle,—Your money is perfectly well secured and is wholly unaffected by Mr. Thomas's bankruptcy. Those proceedings were taken at his own instance for a special purpose relating to a part of the estate in which you are not interested. The bankruptcy will, in all probability be annulled in a short time. In all these cases I do not regard as having any money value, the person of the borrower, but only the property offered as security. I hold on your behalf at the present moment, as security for your 8000*l.*, actual reliable property 10,300*l.*, besides a lien on other property to which I can, if necessary, resort, value 9000*l.*, and this is not all. I assure you you may, therefore, be perfectly easy, but if you would like it I will take a day ticket and go down to Canterbury and place all the documents before you, and explain the state of the business. You see the report states (and it is quite correct) that you and the mortgage creditors are fully secured, and that there is sufficient to pay the trade or unsecured creditors, 40*s.* in the pound. Of course it seems a startling thing under these circumstances for a man to be bankrupt. The facts are as follows:—Mr. Thomas agreed with a person for a sum of 21,000*l.* to be lent on mortgage of twenty-one houses, as built. Afterwards it was verbally arranged that houses of a larger class should be built, and another 10,000*l.* advanced. The houses have been built, but 21,000*l.* only has been lent, and the lender was about, most unfairly, to foreclose and take possession in discharge of his loan. To stop this, Mr. Thomas becomes bankrupt, and all his creditors concurring, has obtained time to make some fresh arrangement, probably to pay off the present lender, and then annul the bankruptcy and proceed. The worst that will happen to you will be a delay of three or four weeks in payment of the quarter's interest due this month. If this should be any inconvenience to you, I will undertake to pay it to you. I will let you know how matters go on. If you hear of any good securities that you would be satisfied to take in lieu of the present mortgage, will you let me know, because I have offers for the purchase of some of the property you hold pressed upon me, and could repay you at almost any time. Money is valuable now, and it is a good time for investing.

The plaintiff alleged that the statements in the above letters as to the value of his security, and that the defendant had offers for some of the property pressed upon him and could repay the plaintiff at almost any time, were respectively inaccurate, and were calculated to mislead, and did in fact mislead him. The defendants alleged that they ceased to act as the solicitors of Thomas upon his becoming bankrupt, but the plaintiff charged the contrary, and further, that even if it were the fact they ought forthwith to have given notice to the Bishop and his trustees, not to grant any more leases to Thomas or his nominees, without the plaintiff's consent. The result being, that by their not doing so, many leases were granted after the bankruptcy, without the plaintiff's knowledge, and to the detriment of his security. On the 15th Dec. the defendant Chapman wrote to the plaintiff the following letter, with respect to the interest due on his security.

My dear Uncle,—I send you an order for 50*l.*, for which please send me back a receipt. I purposely avoid making up the full sum of interest due last September, because I want to effect some sales I am now negotiating, which I cannot do unless you have interest in arrear. As long as you are fully paid up your interest you cannot realise during the period of the mortgage loan, I am working hard at this, but I am told I shall not make way till the new year, still I have been encouraged with very good reports from the surveyors, and money is getting easier.

Between the months of August 1864 and May 1865, the plaintiff made several applications to Chapman to procure from him the repayment of his 8000*l.* and the payment of his interest, which was in arrear. In the beginning of May 1865 it was arranged that the whole subject of the plaintiff's securities should be submitted to a Mr. Rawlinson an equity barrister, and a friend of the plaintiff. Accordingly on the 25th of that month, the plaintiff and Chapman attended on Mr. Rawlinson, and Chapman then partially explained to him how he had dealt with the securities, and alleged that there was still property of the value of 16,000*l.* subject to the plaintiff's mortgages. Mr. Rawlinson suggested that a fresh

V.C. S.]

CHAPMAN v. CHAPMAN.

[V.C. S.]

valuation of the plaintiff's securities should be at once made on the plaintiff's behalf by one two or three valuers, that certain of the leases which had been granted under the said building agreements, should be at once assigned to the plaintiff, so as to give him the legal estate in the premises as mortgagee, and that until the leases had been so assigned no fresh ones should be granted to Thomas, or his nominees, without the express consent of the plaintiff. The defendant both on his own and on behalf of Thomas, agreed to these suggestions, and he also assured the plaintiff that he would carry them into effect at once. He did not, however, act on them, and the consequence was that many leases of the property comprised in the plaintiff's securities, were afterwards granted to nominees of Thomas, without the plaintiff's knowledge.*

It appeared that a Lady Hoghton was also a mortgagee of part of the property, viz., Nos. 1, 2, and 20 of Elgin-road, and it was represented by Chapman that if No. 1, Elgin-road, was given up to her she would give up Nos. 2 and 20 to the plaintiff thereby preventing possible litigation; and that, upon the footing of that arrangement, the then value of the securities held by the plaintiff would be 16,000*l.* This proposal having been acceded to, the defendants shortly afterwards submitted to Mr. Rawlinson to settle, on behalf of the plaintiff, a draft of a deed confirming No. 1, Elgin-road, to Lady Hoghton according to the proposed arrangement. In settling the draft Mr. Rawlinson appended the following observations:—

Not having any knowledge of the value of the property, which is not affected by the proposed deed, I am unable to say whether or not it is advisable that Mr. Chapman should part with any of his security. On this head, of course, he will be satisfied for himself. Mr. Chapman cannot be advised to execute the present deed until the question as to the other leases has been settled, and a legal assignment made to him.

Notwithstanding the above observations, the defendants induced the plaintiff, on the 9th Aug. 1865, to execute the deed without any valuation being made, and without informing the plaintiff of the observations. Subsequently Lady Hoghton sold No. 1, Elgin-road, for 5200*l.*, and the plaintiff, therefore, charged that, in any case, the defendants were liable to him for any deficiency in the value of his securities that may have been occasioned by the arrangement.

No interest had been paid to the plaintiff since 1865, and in the beginning of Nov. 1866 the plaintiff, finding it impossible to procure payment of either principal or interest, and being dissatisfied with the replies sent to him by the defendants in answer to his letters on the subject, and with the management of his business, placed the matter in the hands of his present solicitors, Messrs. Walters, Young, Walters and Deverell.

The bankruptcy of Thomas was annulled in March 1866, but he was again adjudicated bankrupt in Nov. 1867. His estate proved insufficient to pay the plaintiff any part of the moneys owing to him.

In April 1867 Charles Randell, a subsequent mortgagee to the plaintiff of part of the property instituted a suit of foreclosure against Thomas, making the plaintiff one of the defendants. The suit came on to be heard in Feb. 1868, when the usual foreclosure decree was made, and the plaintiff had to pay considerable costs. The principal moneys secured by other mortgagees of the property, with a large arrear of interest, were still unpaid, and the plaintiff complained that he was liable to be harassed by other foreclosure suits, and also by suits to which he might be a necessary party by reason of the negligent way in which the defendants had transacted his business, and in which he would have to pay costs.

The plaintiff alleged that the result of the above

dealings by the defendants or by Thomas, with their sanction, with the property was that he had no legal estate in it; that the vesting in him of the legal estate in such part of the property (if any) as still remained subject to his securities could only be procured at great expense, and with great difficulty, if at all; that as to any equitable interest which he might have in the same, the nature and extent of it was, having regard to the number of incumbrances which had been created, uncertain, of little value, and quite insufficient as a security for the moneys due thereon to the plaintiff. Further, the defendants had made very large profits in professional costs and otherwise out of the leases, underleases, mortgages, and sales before referred to, and also by preparing or approving documents for carrying the same into effect. It was therefore directly in the interest of the defendants that the plaintiff should have advanced his money as he did; and that Thomas should be able to deal freely with the property comprised in the securities. Under these circumstances the plaintiff charged that the defendants were liable, and ought to be decreed to pay the money due to him on the securities, and to take the securities off his hands and indemnify him against all claims and liabilities in respect of them.

The bill prayed that the defendants might be decreed to pay to the plaintiff the principal sum of 7000*l.* owing to him as aforesaid, together with interest thereon at the rate of 6*l.* per cent. per annum, from the day or respective upon which such interest fell into arrear. Or that in default thereof the defendants might be decreed to be liable to pay to the plaintiff in aid of any deficiency in his said securities, the sum of 5200*l.*, being the value of the premises No. 1, Elgin-road aforesaid, portion of the plaintiff's securities, which the plaintiff was improperly induced by the defendants to abandon; and that in the meantime, until the existence of any such deficiency should have been finally ascertained, the defendants might be decreed to secure to the plaintiff the payment of such sum of 5200*l.*; that the defendants might be decreed to indemnify the plaintiff against all claims and liabilities under or in respect of his said mortgage securities, or any of them, and particularly against the costs incurred by the plaintiff in the said suit of *Randell v. Thomas*, and any costs which might be incurred by the plaintiff as a party to other suits to which he might be properly made a party by reason of the negligence and improper way in which the defendants had transacted the aforesaid business of the plaintiff; and that the defendants might be ordered to pay the costs of the suit.

The original bill in the suit contained charges of fraud against the defendants, but these were omitted from the bill as amended.

The answers of the defendants contained the following statements:—The defendant Clarke had no personal knowledge of the transactions complained of. The letters set out in the bill were not addressed to him or to the firm, but to the defendant Chapman. He was not present at any of the interviews, neither was he consulted in any way upon the subject of the original security. The facts were really these: The plaintiff desired Chapman to look out for a mortgage which would pay him at least 6 per cent. for his money. Accordingly, after taking the advice of an experienced surveyor on the subject, he had suggested the property in question. At the same time he explained to the plaintiff, who was a good man of business, what the nature of the proposed mortgage would be, and expressly told him that the borrower had no legal interest in the land at the time, but only an agreement under which leases would be granted to him when he had erected certain buildings, and that he wished to borrow the plaintiff's money to enable him to erect such build-

V.C. S.]

CHAPMAN v. CHAPMAN.

[V.C. S.]

ings, and obtain such leases of them. That he was to be at liberty to withdraw finished houses from the security (sufficient being left to secure the plaintiff's advances), and to raise money by sale or mortgage for the purpose of enabling him to erect further buildings on the land remaining subject to the security. After the execution of the mortgage the defendants gave notice to the solicitors of the trustees of the land of the plaintiff's security, and desired them not to grant any leases to Thomas, or his nominees, without notice to them, as the plaintiff's solicitors. The plaintiff was from time to time kept informed as to the manner in which the property was being dealt with, but he never raised any question upon the subject. The plaintiff from the first knew perfectly well that it was contemplated that part of the property should be withdrawn from his security, but no part was ever so withdrawn without there being good reason to believe that the residue (from the forward state of the buildings, and the money which had been expended) was a sufficient security for the plaintiff's advances.

A draft memorial of the mortgage had been prepared for registration, but in order to avoid the necessity of making the plaintiff a party to every lease or deed affecting the property, the registration had been delayed.

At the time when plaintiff advanced his money the property (as the defendants believed) was a good and sufficient security, and any subsequent deterioration in its value had arisen from the general stagnation of business consequent on the crisis of 1866, and from other causes, over which the defendants had no control, but more especially by the conduct of the plaintiff himself. The plaintiff was duly informed of all the sub-lettings, and consented and approved of them; but as there was no reason why he should be informed of the leases granted, they were not brought under his notice. The defendants denied that they made large profits in professional costs, as alleged by the plaintiff. They also denied that there was any intention to deceive the plaintiff at the time when he executed the deed in reference to the property mortgaged to Lady Hoghton. It was done in order to avoid a dispute to a claim raised by Lady Hoghton's solicitors, and the plaintiff, acting under the advice of Mr. Rawlinson, agreed to give up his claim to the property. Before the execution of the deed the plaintiff received the following letter from Mr. Rawlinson, dated the 7th Aug. 1865:

I have just settled a draft of a deed on your behalf; and I write a line, at George Chapman's request, to say that although it makes you part with a portion of your security, you may with practical safety execute it. There is a very ample margin for you now the houses are built. There was a nasty question which arose as to three houses to which Lady Hoghton laid claim. If there had been a fight you must have come out well; but that was to be avoided, at all events, and I advised that the question should be settled, and that one house should be taken by Lady H., and that two should be given up to you. This has been agreed to. The deed, by which the two will be given up to you has not yet been completed, but I have made it a *sine qua non* that the deed you are now asked to execute should not be handed over until the other is completed. G. C. has been through the figures of the value of the security you hold. He puts them at 15,000l., which I think fair; but deducting one-fifth for overvalue, you would still have 12,000l. as security for 8000l.

A fresh valuation of the plaintiff's securities had been prepared on his behalf, as Mr. Rawlinson suggested.

Some of the leases assigned to Thomas had become directly subject to the plaintiff's security. The plaintiff, moreover, was in possession of the leases of two of the houses, and of certain coach-houses and stables, subject to his security; and the defendants expressed it as their belief, that if the property was judiciously and gradually realised, it would be the means of bringing back to the plaintiff all that he was entitled to claim. The course, how-

ever, which the plaintiff had latterly adopted had been very much opposed to his own interest. He had given notice to the solicitors of the trustees of the land not to grant any leases of the property comprised in his security, notwithstanding that it had been pointed out by those solicitors that such notice would be injurious to himself; and the defendants therefore submitted whether what might be objectionable in the present state of things might not be attributable to the advice the plaintiff had received since they ceased to act for him as solicitors. They further submitted that the suit was at least premature, and that the plaintiff's remedy (if any) was at law.

Dickinson, Q. C., and Caldecott, for the plaintiff, contended that the conduct of the defendants fully justified the relief prayed against them. They had induced the plaintiff, under an assurance that the securities in question were perfectly safe, to advance his money. The plaintiff himself knew nothing of the nature of the securities, but trusted implicitly to the representations of the defendants, relying on them, as his solicitors, for their protection and the management of his business. The result of this misplaced confidence was that he had lost considerable sums of money, and was liable to lose more. The motives which actuated the defendants in thus involving the plaintiff were obvious. They expected to make large profits out of the building scheme, and, while acting as solicitors for Thomas, they were serving their own interests as well as his. The original valuation, if taken at all, was made on behalf of Thomas; but the plaintiff was entitled to have it shown by an independent valuation that the security was, at least, worth double the amount advanced on it. With regard to Lady Hoghton's property, the evidence clearly showed the sacrifice which the plaintiff had made through the advice and mismanagement of the defendants. Under these circumstances the plaintiff was fully entitled to ask that the defendants might be compelled to take the securities off his hands and recoup him for the loss which he had sustained while holding them. They cited

Craig v. Watson, 8 Beav. 427;

Smith v. Pococke, 2 Drew. 197; and

Dixon v. Wilkinson, 4 De G. & J. 522

Wickens and W. Barber, for the defendants, submitted that the plaintiff's version of the transactions was altogether incorrect. The real facts were these: The plaintiff wished a high rate of interest for his money, and it was therefore necessary that the securities should be of a somewhat speculative character. The plaintiff was a thorough man of business, and was fully alive to the risk (if any) he was running. He knew that it would be necessary from time to time to withdraw a considerable portion of the property from his securities, and he was kept perfectly well informed, both by letters and documents, of those withdrawals as they took place. The investment of his money had not turned out so well as he apparently had anticipated, and he now turned round and attempted to make out that the defendants by their representations had guaranteed him against loss. Neither the ordinary course of business transactions nor the evidence would warrant such a contention. The remaining property was in fact more than a sufficient security for the money advanced by the plaintiff, but if it was not he had only himself to blame for the depreciation in its value, for by preventing the trustees from granting fresh leases he had almost rendered it unmarketable. As to Lady Hoghton's property the plaintiff had acted on the advice of his own counsel in the matter, and the defendants were freed from all responsibility. Even if the charges made by the bill could be established the plaintiff's case must fail. It was con-

V.C. S.]

CHAPMAN v. CHAPMAN.

[V.C. S.]

trary to the practice of the court to entertain an action for damages in the form of a suit. The bill prayed for a sum of money as for damages; but the court had no jurisdiction to grant such relief except in extreme cases, and even then it was exceedingly difficult to frame a proper decree. The case made by the bill, however, did not come within that category, and the allegations were by no means conclusive of the conduct of the defendants. The bill must, therefore, necessarily be dismissed with costs. They cited

Frankland v. Lucas, 4 Sim. 586.

Dickinson, Q.C. in reply.

Judgment reserved.

Jan. 20.—The VICE-CHANCELLOR.—In this suit the plaintiff asks the decree of the court against the defendants, who acted as his solicitors in a mortgage transaction, and he prays that they may be compelled to repay to him the mortgage money of 7000*l.*, with interest at the rate of 6*l.* per cent. per annum. This relief is sought on the ground of neglect of duty as to the securities on which the plaintiff advanced his money. There is an alternative relief prayed as to a sum of 5200*l.*, for which it is sought to make the defendants liable in aid of any deficiency resulting from the abandonment of certain property included in the plaintiff's mortgage, and said to be abandoned by him in consequence of the improper advice of defendants. The plaintiff asks to be indemnified generally in respect of the mortgage securities, and the costs of suits to which he may properly be made a party by reason of the alleged negligent and improper way in which the plaintiff's business was transacted. It is admitted at the bar that the plaintiff can only be entitled to relief on the footing of his assigning to the defendants the securities which he still holds. There seems to me to be no ground for disputing the jurisdiction of the court. Although an action at law may be sustained and damages recovered against a solicitor for loss occasioned by negligence in the discharge of his duty, this court in a proper case would give relief without sending the injured client to a court of law. Under its improved course of practice it would seem to be the duty of this court to extend its jurisdiction as far as possible in such cases, and to take cognizance of all well-grounded complaints against the conduct of its officers in the management of the business of their clients, either on bill filed or under its summary jurisdiction. Even before the statute of 1852 the authorities support the right to relief. It is to be observed that the judgment of the Vice-Chancellor in the case of *Frankland v. Lucas* (*sup.*), does not justify the statement in the marginal note of the reporter. In the present case the grounds of complaint are greatly overstated, and the nature of the security so peculiar and the present position and value of the existing securities so entirely uncertain as to any ultimate loss that, even if there were stronger evidence in support of the plaintiff's case, it would be difficult to support the bill. No actual loss has yet been incurred by the plaintiff, except the non-payment of interest for some time, and the uncertainty when it may be paid. The land is at present unproductive, and must remain so until building operations are resumed. But it was perfectly understood by the plaintiff that the value of the security depended on the building operations, and was, therefore, necessarily a precarious value. Upon the evidence it is impossible to say that it is certain that the plaintiff will ultimately sustain any loss at all, beyond the loss and inconvenience from delay as to the interest. There is no precedent, so far as I know, of a decree declaring generally that the plaintiff in such a case should be indemnified in respect of an apprehended loss which may never occur." And

there is a serious difficulty in forcing upon the defendants the assignment of a security of so peculiar a kind, which they never contracted to take. This is not like the case of *Craig v. Watson* (*sup.*), where the solicitor took the security in his own name, and the court was able to direct a sale so as to ascertain with certainty the amount of the loss. In that case gross negligence was proved, and there was nothing peculiar in the nature of the property. The defendants' conduct has been imprudent rather than negligent. The imprudence was as to a matter on which any man of sense could form an opinion for himself, and a matter which required no professional skill to guide the plaintiff's judgment. It is the peculiar nature of the security which has occasioned the complaint. A lease of land for building purposes is of no productive value until the expenditure for erecting the buildings is made, and the object of the borrower is to get the money to enable buildings to be erected. It is not attempted to put the plaintiff's case upon the ground that the defendants ought not to have lent his money on such a security. The amount lent by the plaintiff was inconsiderable, compared with the amount necessary for the contemplated buildings, and the nature of the security was such that from the beginning it was contemplated that houses as they were completed might, with the consent of the plaintiff, be withdrawn from the security. It is no part of the complaint against the defendants that they were negligent in not having a definite stipulation as to the number to be withdrawn. On the contrary, the plaintiff perfectly understood the nature of the contract, and knew that the number of houses which might be withdrawn was undefined, and was therefore for future arrangement. The plaintiff was fully informed and consulted, and had the same means of forming an opinion and of obtaining the information necessary for forming an opinion as the defendants. In a question between solicitor and client as to loss from negligence there must be negligence of a gross and palpable kind to give a right to relief. But where, as in this case, the conduct complained of is more properly to be described as imprudent or indiscreet, rather than negligent, and every transaction was referred to the judgment of the client himself, who concurred in it, there seems to me to be no right to equitable relief. The advice which the defendants gave was founded on the reports of surveyors communicated to the plaintiff, and whatever may be said of the prudence or imprudence of the course advised by the defendants, I can see no reason to doubt the honesty of the advice. It was upon a matter which did not require professional skill; and the grounds upon which the advice was given were submitted to the plaintiff's judgment, and approved by him. That is as to the general case of the plaintiff. But as to the transaction with Lady Houghton, the principal ground of complaint is that no valuation of the property was made as suggested by Mr. Rawlinson. But it is proved that a valuation was made, although not communicated to the plaintiff. The letter of Mr. Rawlinson to the plaintiff, dated 7th Aug. 1865, seems to me conclusive against the plaintiff as to the whole transaction with Lady Houghton. In his second affidavit the plaintiff is obliged to admit that the allegation in the bill is incorrect, and that at the meeting on the 25th May 1865, nothing passed as to any question between himself and Lady Houghton. There seems to me no just ground for the allegation that the execution by the plaintiff of the deed of 9th Aug. 1865, was improperly obtained. It is unfortunate for the plaintiff that he should have been induced to charge fraud against the defendants in the original bill. Even in the amended bill in which the charges of fraud are struck out, there remains the imputa-

V.C. M.]

Re CLARK'S TRUSTS.

[V.C. M.]

tion of improper motives as influencing the defendants in the advice which they gave to the plaintiff. There is nothing in the evidence to justify these charges, and as the plaintiff has failed to show any sufficient ground for the relief which he asks, the bill must be dismissed with costs.

Solicitors for the plaintiff, *Walters, Young, Walters, and Deverell*.

Solicitors for the defendants, *Chapman, Clarke, and Turner*.

V.C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.

Friday, Feb. 25.

Re CLARK'S TRUSTS.

Will—Construction—Gift to "each of my sons"—Survivorship.

A testator bequeathed the income of his residuary estate to his wife for life, and after her death bequeathed one-fifth of the residue to each of his two sons J. and C. absolutely, and to be paid to them respectively, or to such of them as should be living at the death of his said wife, or the children of such of them as might be then dead, the children of such as should be dead taking the share which their parent would have taken if living. C. died a bachelor in the lifetime of the tenant for life, but J. survived her.

Held, that J. was entitled to the one-fifth originally given to C.

This was a petition to ascertain the rights of parties in a fund which had been paid into court, under the Trustee Relief Act, by the trustees of the will of William Clark. The testator by his will, dated the 30th Dec. 1845, after bequeathing certain pecuniary legacies, bequeathed all the residue of his personal estate unto his trustees therein named, upon trust to collect and get in and invest the same as therein mentioned, and to pay the income of his said residuary estate to his wife Mary Bucknor Clark for her life, and the will then proceeded as follows:—

And from and after the decease of my said wife, I give, devise, and bequeath one-fifth part of all and every my said residuary estate, and the stocks, funds, or securities in or upon which the same may have been invested, unto each of my said two sons, James Clark and Charles Clark, absolutely, and to be paid and transferred to them respectively, or to such of them as shall be living at the time of the decease of my said wife, or the children of such of them as may be then dead, the children of such as shall be dead taking the part or share only which their parent would have taken if living, with benefit of survivorship as between my said sons in the event of either dying without issue in my lifetime.

The testator died on the 10th Feb. 1849; Charles Clark died a bachelor in June 1858 in the lifetime of the testator's widow. The widow died in Nov. 1868. The question was who, in the event that had happened, was entitled to the one-fifth bequeathed to Charles Clark.

C. Hall, for the petitioner James Clark, contended that, according to the true construction of the will, and in the events which had happened, the petitioner, as he survived his brother Charles, and was living at the death of the testator's widow, was absolutely entitled to the one-fifth to which Charles would have been entitled if he had survived the widow. When the issue of a deceased child are provided for, as in this case, there is no necessity for giving the parent a vested interest unless he actually survives the tenant for life. By the clause providing that the children of a son dying in the lifetime of the tenant-for-life should take their parent's share, the testator evidently contemplated

the possibility of a survivorship under the preceding clause. He cited

Sturges v. Pearson, 4 Madd. 411.

W. Pearson, for the legal personal representatives of Charles, contended that each of the sons took an absolute vested interest in one-fifth of the residue, subject only to be diverted in the event of his dying in his mother's lifetime leaving children. There is nothing in this will to cut down this absolute interest. The words "to be paid and transferred," merely refer to the time of payment. Suppose there is a gift of 1000*l.*, after the death of the tenant for life, to A. and B., or the survivor of them, and A. dies in the lifetime of the tenant for life, the survivor takes the whole; but suppose a gift, after the death of the tenant for life, of 500*l.* to each of A. and B., or the survivor of them, and A. dies in the lifetime of the tenant for life, B. does not take both sums. A gift of two-fifths to two persons is not the same as a gift of one-fifth to each.

Renshaw, for the testator's next of kin, contended that there was an intestacy. The gift was not of an entire fund, and there was no joint tenancy. There was only a survivorship in the event of either of the sons dying in the testator's lifetime, not of either dying in the lifetime of the tenant for life. He referred to

Browne v. Lord Kenyon, 3 Madd. 410.

C. Hall in reply—Here children are provided for, and when this is the case the court does not lean to a vesting. In *Emperor v. Rolfe*, 1 Ves. Sen. 208, and that class of cases, there was a vesting because there were no children. There is no distinction to be made between the gift and the direction to pay. He cited

Re Wilmott's Trusts, L. Rep. 7 Eq., 532;

Locke v. Lamb, L. Rep. 4 Eq. 372; 16 L. T. Rep. N. S. 616;

Merry v. Hill, L. Rep. 8 Eq. 619.

The VICE-CHANCELLOR—In all questions arising upon wills it is a cardinal rule of construction that you are to ascertain the intention of the testator. In this case it is not disputed that if the testator had given his sons two-fifths of his residuary estate as one gift, instead of one-fifth to each, the case of *Sturges v. Pearson* would have applied, and James Clark would have taken the whole. But the testator has given the two-fifths in this form. [The Vice-Chancellor then read the clause above stated, and continued:] Now the words "dying in my lifetime" do not apply to the case; they are merely a provision against lapse. The question is whether there is any distinction between a gift of two-fifths to the sons, and a gift of one-fifth to each of the sons; and I am of opinion that it would be a violation of the testator's intention to say that there is any such distinction. The testator gives one-fifth to each, to be paid to them respectively, or to such of them as shall be living at the death of his wife, so that he provides for the death of one only and not both of his sons in the lifetime of his wife. Now, what does the testator mean by the words "or to such of them?" Surely he does not intend them to refer to a part only of the property in question, for that would be in effect to say, "I give to Charles or to such of them as shall be living at the death of my wife," which would be nonsense. He clearly intends to make an indivisible gift to James and Charles in equal shares, or to such of them as shall be living at the death of his wife. It is precisely the case of *Sturges v. Pearson*; there the testator bequeathed certain dividends to his daughter for life, and then to be equally divided amongst her three children, "or such of them as shall be living at her decease." The children all died in the lifetime of the tenant

V.C. M.]

BULTEEL v. PLUMMER.

[V.C. M.]

for life, and it was held that they took vested interests. This intention of the testator, that the son who survived the tenant for life should take the one-fifth of the son dying in her lifetime, is still more strongly shown by the clause which directs that the children of such of the sons as should be dead at the time of the decease of the testator's wife should take the share which their parent would have taken if living. I am of opinion, therefore, that it was the intention of the testator, as it is the effect of his language, to give the two-fifths to his two sons, or such of them as should survive the tenant for life. Therefore, as James Clark alone survived the tenant for life, there will be a declaration that in the events which have happened, the petitioner, James Clark is entitled to the one-fifth originally given to Charles.

Solicitors: Waller and Scott.

July 26 and 27, 1869.

BULTEEL v. PLUMMER.

Settlement—Construction—Power of appointment—Defective exercise as to part.

Under a marriage settlement 4000l. Bank Stock was vested in trustees upon trust to assign the same unto and amongst all and every the children, and the issue of deceased children, in such parts, &c., at such times, and in such manner, &c., as the husband and wife should jointly by deed, or the survivor by will, appoint, and in default on certain trusts for the children equally with benefit of survivorship. The joint power was never exercised, but the wife, on the marriage of a daughter (her husband being then dead), covenanted that by any future will she would only appoint to her in a specific manner. The widow then made her will, whereby, reciting the power, she gave a house (part of the trust property) to a single daughter, appointed 2500l. to her married daughter, 500l. to a son, and 100l. to a daughter of a deceased son, he having left other children still surviving, and gave all other, the realty and personally, over which she had a disposing power, to the daughter to whom she had given the house:

Held, that the appointment was valid except as to the residue, which went as in default of appointment.

The question in this case was, whether the will of Louisa Plummer was a good and valid exercise of a power of appointment given to her by her marriage settlement. The settlement was dated the 2nd Sept. 1809, and thereby 4000l. Bank Stock was assigned to Frances Hearle Rodd and William Plummer, upon certain trusts for George Thomas Plummer and Louisa his wife, and after their decease a power of appointment was given to them in these terms:

Upon trust to transfer and assign the said sum of 4000l. unto and amongst all and every the son and sons, daughter and daughters of the said George Thomas Plummer and Louisa Plummer, lawfully to be begotten; and the children of such sons and daughters in case any of them should be then dead, leaving issue, in such parts and proportions, and at such time or times, and in such manner as the said George Thomas Plummer and Louisa Plummer should jointly by any deed or writing, or the survivor of them, by his or her last will and testament in writing duly executed, limit, direct, or appoint the same, and in default of such appointment, then unto and amongst all and every the son and sons, daughter and daughters of the said George Thomas Plummer and Louisa Plummer, and the children of such sons and daughters, in case any of them should be dead leaving issue, in equal shares and proportions, but so as the child or children of the sons or daughters as should then happen to be dead should be entitled only to the share which his, her, or their father or mother would have been entitled to if living, equally to be divided amongst such children if more than one, and if but one, then wholly to that one.

There was then a provision at the desire of the said George Thomas Plummer and Louisa, his wife,

or the survivor, to lay out the 4000l. in the purchase of freeholds to be held on the same trusts. George Thomas Plummer died in 1828, there being issue of the marriage five children, Louisa Marian, George Robert, Henry, Frances, and Charles, who died in 1837 an intestate, and a bachelor. The husband and wife never executed the joint power of appointment reserved to them by the settlement, and the 4000l. Bank Stock was invested in 7000l. Three per Cent. Reduced. In 1831 Louisa Marian, the eldest child, married Robert Westmacott, and on that occasion a settlement was executed, and Louisa Plummer, who was a party to the settlement, covenanted that she would not by any future will to be executed by her appoint to the said Louisa Marian Plummer, or her child or children, a less portion of the funds, the subject of the settlement of the 2nd Sept. 1809, than 2500l. Reduced Annuities, or property equal in amount thereto, and that if she should execute another will, and thereby appoint to the said Louisa Marian, or to her child or children, a less portion of the said trust funds than the said sum of 2500l., she in her lifetime, or her executors or administrators, within six calendar months after her decease would pay to the said trustees for the time being of such settlement such a sum of money as would be equivalent to the difference between the stock or property which should be so appointed, and the said sum of 2500l. Three per Cent. Annuities. George Robert Plummer, another child of the said Louisa Plummer, died in her lifetime leaving four children, who all attained twenty-one.

On the 25th Oct. 1867 Louisa Plummer made her will. By this instrument she recited that under her marriage settlement she had, in certain events which had happened, a disposing power over certain real and personal estate unto and amongst the sons and daughters of her marriage, and the children of such sons and daughters in case any of them should be dead. The testatrix then gave and devised a freehold house at Plymouth (which had been bought out of the 7000l. 3 per Cent. Reduced in 1829) to her daughter Frances Plummer, her heirs and assigns, to be conveyed to her immediately after her (the testatrix's) decease. And the testatrix directed and appointed that the sum of 2500l. Stock, part of the 7000l. 3 per Cent. Reduced, should be held upon trust for her daughter Louisa Marian Westmacott, her executors, administrators, and assigns. And she appointed, gave, and bequeathed the sum of 500l. Stock, further part of the said trust funds, to her son Henry, his executors, administrators, and assigns. And she appointed, gave, and bequeathed the sum of 100l. Stock, further part of the said trust funds, to her granddaughter Louisa, daughter of her late son George Robert Plummer, deceased, her executors, administrators, and assigns. And as to all other the real and personal estate over which she had a disposing power, and all her real and personal estates and effects after payment of her debts, funeral and testamentary expenses, she appointed, gave, devised, and bequeathed the same and every part thereof unto her daughter Frances Plummer, her heirs, executors, administrators, and assigns. Louisa Plummer died a month after executing her will; and at that time the trust property consisted of 7054l. 6s. New Three per Cents., and the freehold house at Plymouth. The trustees of the settlement of 1809 were both dead, and new ones had been appointed, the plaintiff, Thomas H. Bulteel, being one, and William Harris, jun., the other; but it was singular that on neither occasion—one new trustee being appointed in 1858 and the other in 1859—was the freehold house mentioned, and the legal estate in it was outstanding in the heir-at-law of William Plummer, who survived Francis Hearle Rodd, having made his will containing no devise of

V.C. M.]

BULTELL v. PLUMMER.

[V.C. M.]

trust estates, such heir being, as it was believed, the eldest son of the testatrix's deceased son George Robert Plummer. This suit was instituted by the trustees, who now submitted the question for the decision of the court, and asked that the trusts of the settlement might be executed under its direction.

Glasse, Q.C. and Waugh appeared for the plaintiffs, and submitted the question.

Cole, Q. C. and Key for the defendant, Frances Plummer, contended that the will of Louisa Plummer must be supported entirely. The court previously to the Wills Act would aid a defective execution; but since that statute, although no formal words were required to constitute it a good exercise of the power, yet there must be some instrument operating as a will. The residuary clause probably had no application to the trust fund:

Wilson v. Piggott, 2 Ves. jun. 351;
Ranking v. Barnes, 10 L. T. Rep. N. S. 124.
Wilkie v. Holme, 9 Mod. 486; 1 Dick. 165;
Ward v. Firmin, 11 Sim. 235;
Morse v. Martin, 34 Beav. 500;
Young v. Lord Waterpark, 13 Sim. 199.

Cotton, Q. C. and Bedwell, for the grandchildren of the testatrix, in whose favour no appointment was made, argued that the will was either a good appointment or entirely bad—it could not be bad in part. This was not a case in which the court would help the defective execution:

White v. Wilson, 1 Drew. 298;
Sugden on Powers, 8th edit. 560-1;
Wilkie v. Holme (sup.);
Hervey v. Hervey, 1 Atk. 560.

Pearson, Q. C. and Langley, for Mrs. Westmacott.—The gift of the residue was entirely void, and therefore had no effect as defeating the appointments made. No doubt the will was a defective execution of the power, but it was good as far as it went, and the court would carry it out:

Rowley v. Rowley, Kay, 242, 246;
Ranking v. Barnes (sup.); 10 Jur. N. S. 463;
Wilson v. Piggott (sup.);
Young v. Lord Waterpark (sup.);
Kemp v. Kemp, 5 Ves. 849;
Sugden on Powers, 8th edit., 520;
Topham v. Duke of Portland, 1 De J. & S. 517.

Cotton, Q. C. in reply.

The VICE-CHANCELLOR.—This is a case in which I do not feel much difficulty. [The Vice-Chancellor stated the facts.] It is agreed on all hands that this was not an exclusive power, that is, the appointor must either give or leave something to all the objects of the power. The settlement creating the power was dated in 1809; and twenty-two years after, namely, in 1831, one of the daughters of this lady, Louisa Marian, having married a Mr. Westmacott, and her mother joining in the settlement made upon her marriage, and that settlement reciting the power, there is a covenant by the mother that she would not by any future will to be executed by her appoint to Louisa Marian, her daughter, or her children, a less portion of the trust fund than two thirds of 2500*l.* Reduced Annuities, or property equal in amount thereto; and if she should execute another will, and thereby appoint to Louisa Marian or her children, a less portion of the said trust funds than 2500*l.*, then, she in her lifetime, or her executors or administrators, within six calendar months after her decease, should pay to the trustees for the time being of the settlement such a sum of money as would be equivalent to the difference between the stock or property which should be so appointed, and the sum of 2500*l.* Three per Cent Reduced Annuities. The mother

made her will, dated the 25th Oct. 1867, and upon that will the whole question turns. At the date of this will the state of the family was this: there was the daughter Louisa Marian, who had attained her majority of twenty-one years and married in 1831, that is, thirty years before the date of the will, although upon that fact no question arises. Then there was George Robert, who died before the testatrix, leaving four children, and Henry and Frances Hill living, and Charles, who died unmarried before the husband of the testatrix. There being therefore three surviving children of a deceased son, Mrs. Plummer makes her will (the Vice-Chancellor referred to the will); she was mistress of her property, and was to give it amongst her children, provided she did not exclude any. Now the objects were her children and the children of a deceased son, and these latter were not wholly excluded, because she gave 100*l.* to a granddaughter. But, up to that point she had left out the three children of the deceased son who were some of the objects of the power; and if the will had stopped there, it being admitted that the sums given did not exhaust the whole trust fund, it is not questioned, and indeed could not be, that this instrument might have been a valid exercise of the power, because the unappointed part of the fund would have gone in default of appointment, so as to preserve or retain some small portion for the remaining objects of the power. That is, the appointment did not exhaust the whole trust fund over which the power extended, and so far as there was no appointment that went in default of appointment. As Lord St. Leonards has said with great truth:—"Provided the objects against a power take something, even the smallest sum of money being given to each of the objects of the power would satisfy the exigency of the law." If, therefore, the will had stopped after the appointment of the 100*l.* to the granddaughter, there is no contest but that she would have left enough to go in default of appointment, and the execution of the power would have been valid. But she goes on to leave the residue in the following manner:—"As to all other the real and personal estate over which I have a disposing power, and all my real and personal estate and effects, after payment of my debts funeral and testamentary expenses, I give, devise, and bequeath the same and every part thereof unto my daughter Frances, her executors, administrators, or assigns." Whether the house which was given to her is valuable does not appear. Suppose it was of considerable value, and there being a gift to her of all the residue of the trust fund, Mr. Cotton argued that the clause must be taken as an appointment; and, consequently that, as the effect was to exclude some of the objects of the power, he submitted that it was wholly void. That is because she had not left something (even a shilling would have been sufficient) to the remaining objects of the power, the whole is vitiated. Now, the effect of allowing the whole gift would be to effectuate the intention of the testatrix if possible, if that be the proper construction. But it is said, because she has not left something, even a shilling would be sufficient to the remaining objects of the power, the whole is bad. If this is so, the whole intention of the testatrix would be defeated. I do not say anything about the covenant in the marriage settlement. I treat it as if there were none such. I must assume that she has fairly and properly exercised the powers, there being no improper object, and no undue influence. There is nothing to show that it was not properly exercised; she feels the exigency of the different members of her family, and clearly intended Frances to have the dwelling-house, and that Mrs. Westmacott should have 2500*l.*, and her other child Henry 500*l.* only; to her grand-

V.C. M.]

MOYE v. SPARROW.

[V.C. J.]

daughter 100*l.* The effect, therefore, of holding the appointments void would be that none of these objects would take under the will the sums intended for them, and the whole intention of the testatrix would be entirely frustrated, when by a reasonable construction I think I can carry into effect every part of the intention. If the will had stopped at the gift of 100*l.*, there would have been no difficulty; but subsequently by her will and codicil (having no power by deed), she gave all the residue under circumstances which would have fallen within the cases of *Wilson v. Piggott* (*sup.*) and *Rowley v. Rowley*, 9 L. T. Rep. N. S. 846, irrespective of what was the effect of the authorities sixty or seventy years since noticed in Lord St. Leonard's Treatise and the case of *Young v. Lord Waterpark* (*sup.*) under the same power as in *Rowley v. Rowley*, and we have nothing now to do with illusory appointments; such a thing can hardly be now. Provided it is good at law, it is good in equity, it having previously been valid at law; but as I understand it, such appointments are called illusory by Lord St. Leonards, merely because small or illusory shares were given. If there are several objects of a power, and you do not appoint all the fund, but appoint something short of the whole, the rest going by default to the objects of the power, that will be valid: (*Wilson v. Piggott*, 2 Ves. Jun. 355). The rule is that if the several appointments do not exhaust, or nearly exhaust, the whole fund, that which is left only vitiates the appointment so far. It is very true that in some of the cases the appointments were by different instruments; so it was in *Young v. Lord Waterpark* (*sup.*); but I cannot think that Vice-Chancellor Shadwell attached much importance to it, and he held that only the last appointment was void, and the effect was that George, the last appointee, took nothing under the appointment, but came in in default after a series of appointments to his brothers and sisters. In *Ranking v. Barnes* (*sup.*), and all the cases there mentioned, in which the appointment was held void, the appointment was under a power to appoint among children; and two shares were appointed to one daughter and her husband, and it was held good as to the daughter, and bad as against her husband, and by this setting free a portion of the trust fund, it was left to devolve as unappointed, and that removed all objection, since every object of the power was entitled to something. [The Vice-Chancellor read passages from the judgment.] It is true there the appointment was by different instruments, but I cannot help thinking that the question whether an appointment is partly bad and partly good does not depend upon that, but whether, by a reasonable construction, it can be made to amount to the same thing. Here it would have the effect of absolutely frustrating the whole intention, and the question is, whether it should be so absolutely frustrated or in part only; and, if I can carry the leading intention into effect, is it not better that I should hold that one part is good than that the whole is bad? It is no doubt good down to a particular part, and entirely good if it had stopped there. (The Vice-Chancellor referred to the will.) There is a residuary bequest, by which she evidently intended the objects to take not only what was left unappointed; but she meant to give to Frances her own residuary estate. The rational construction is to say that, so far as she has given what was her own, it is valid, but so far as she has appointed it is invalid. I do it on the broad ground of intention. I think that is the result of all the cases except *White v. Wilson* (*sup.*), in which there was not an exclusive power, but there was an obligation to give something to each of three children; but the will gave 500*l.* to one, 1*l.* to another (B.), and the residue to C., and there was, therefore, an inten-

tion to give something to every one, but a blank left for some reason, and the question was whether the whole was invalid. It may admit of considerable doubt, what was the intention of leaving the blank? The case is a peculiar one. There was a gift of 500*l.*; so far it was good; but then came the blank. On these grounds, therefore, I shall hold the appointment valid, except as to the residue; and there must be a declaration accordingly. All that is not appointed by the preceding part of the will goes in default of appointment; costs out of the appointed fund.

Solicitors for all parties, Messrs. W. and W. H. Rennolls.

V. C. JAMES'S COURT.

Reported by W. H. BENNET, Esq., and Hon. ROBERT BUTLER, Barristers-at-Law.

Wednesday, Jan. 26.

MOYE v. SPARROW.

Building society—Rules—Powers of borrowing—Promissory note made by committee—Composition-deed without cessio bonorum—Position of trustee.

The members of the committee of a building society borrowed money from their bankers for purposes not strictly within their borrowing powers, and gave a promissory note for the amount borrowed. Soon after the transaction the company suspended business. On bill filed by one of the members of the committee who signed the note, against the bankers and the other members of the society to ascertain his liability:

Held, that only the persons who signed the note, and the persons who authorised the signatures, were jointly and severally liable to make good the amount.

One of the parties liable on the note had, some time previous to the filing of this bill, executed a composition deed containing no cessio bonorum, and the trustee of this deed was made a defendant in this suit:

Held, that as the composition-deed contained no cessio bonorum, the trustee ought not to have been made a party to the suit; and that the debtor himself should have been made a defendant.

The plaintiff in this suit, William Moye, was a member of a society called the Halstead and North Essex Permanent Benefit Building and Endowment Association and Savings Institution, formed pursuant to the Act of 6 & 7 Will. 4, c. 32. The objects and method of management of this society were defined by certain rules, of which the following were the most important:

1. The intents and purposes for which this society is intended to be established are declared to be, to raise by monthly subscriptions from its members, in shares of the ultimate value of 50*l.* each, a stock or fund to enable each member of the society to receive out of the funds thereof, an advance of the amount or value of his share thereon, for the purpose of erecting a dwelling-house or purchasing a freehold, leasehold, or copyhold house, or either real or leasehold estate, to be secured by way of mortgage to the society until the amount or value of his share shall have been fully repaid to the society with interest or redemption money thereon, and also all fines and all other payments incurred in respect thereof.

2. The business and affairs of the society shall be conducted and carried on by and under the management and control of the following officers, namely, three trustees, a committee of not less than eight or more than fifteen members, a solicitor, two auditors, a banker and a treasurer, an actuary, a manager, and a secretary.

The defendant Sparrow, and two other gentlemen since deceased, were appointed trustees, and Messrs. Sparrow, Round, and Co., of which firm the defendant Sparrow was a partner, were appointed bankers and treasurers of the society. Rule 8 of the society provided that—

The trustees shall do no act in their official capacity but by the written order and authority of the committee, such

V.C. J.]

MOYE v. SPARROW.

[V.C. J.]

order to be signed by the chairman of the meeting at which such order is made, and one other of the members then present, and to be attested by the secretary.

4. For the transaction of the usual monthly and general business of the committee, three elected members shall be a quorum.

13. Any member desiring an advance before he is entitled to it by rotation, and before the funds in hand from subscriptions and repayments are sufficient for the purpose, may be accommodated therewith, "provided the society can obtain a loan for such purpose, and provided such a member agrees to pay additional interest for a stated period, or until such advance can be made from the funds of the society," and in such case preference shall be given to any member who shall procure a loan for the society to meet his required advance.

20. Any member not having received an advance who may be desirous of withdrawing from the society, must send a written notice to the manager of his intention so to do, at least seven days before the usual monthly meeting, and such withdrawal will be regulated as follows: No withdrawal to be permitted unless in case of death, lunacy, or insanity, under twelve months from the date of such member's admission; provided always that the payment of any debts due from the society shall, if required, be made before any share can be withdrawn, and under all circumstances the sums paid for withdrawals shall in no case exceed the income derived from the repayment of shares already advanced to members; and withdrawn shares (not wholly subscribed for) shall be paid out in rotation according to the date of application for their withdrawal. And in case the expenses of the society and any loss sustained by it exceed the moneys appropriated to the management and contingent fund all shares so to be withdrawn shall be chargeable with a due proportion of such excess according to the number of years such shares shall have been in force, and this rule shall equally apply to members cancelling their unadvanced shares previously to taking a loan from the society.

24. The expenses of management and any losses that may be incurred by the society shall be defrayed out of the management and contingent fund, but if such expenses and losses be greater than the amount of such management or contingent fund the excess shall be borne equally by the holders of all advanced shares, and also of all unadvanced shares at the time of such deficiency not wholly paid up for five, ten, or fifteen years respectively as the case may be, in proportion to the number and amount of such shares respectively held by each, and according to the number of years the same shall have been in force.

The plaintiff Moye was the holder of five fully paid-up unadvanced shares in this society. The defendants, Cheverton and Nokes, were the holders of unadvanced shares not fully paid-up, and Dunt and Arnold were members of the society in respect of advanced shares held by them, and in respect of which certain sums of money were due to the society.

On the 14th Dec. 1855, at a meeting of the committee of the society, at which the plaintiff and several of the defendants were present, the following resolution was passed:

Resolved—that the committee do, and they are hereby fully authorised and empowered to borrow and take up at interest, not exceeding 5l. per cent. per annum, from any person or persons willing to lend and advance the same, any sum or sums not exceeding in the whole the sum of 2000l., for the purposes of the society, and that the same when so borrowed be immediately paid by the committee to the treasurer of the society, to the credit of the society, and that the funds and assets of the society be at all times liable to and answerable for the money so borrowed and paid over in pursuance of this resolution, and that any five or more of the said committee be, and they are fully authorised hereby and empowered to join in the security on behalf of themselves and other the members of the committee, for the repayment of such advances, and be fully indemnified therefrom out of the funds and assets of the said society.

The society, being in want of money, borrowed 200l. from J. Stubbing, for which amount they gave a promissory note made by Moye, Hustler, Clark, Barnard, and Crisp, all of whom were members of the committee.

On the 14th Jan. 1867, Barnard executed a deed of composition in the manner required by the provisions of the Bankruptcy Act 1861, of which John Nicholls was the trustee. The committee also borrowed from Stubbing 800l. in addition to the 200l. secured to him by the note.

In August 1868 Stubbing commenced an action against the plaintiff in the Court of Queen's Bench to recover the 200l., with interest due on the note;

and the plaintiff, being advised that he had no defence to the action, paid Stubbing 229l. 13s. 4d. for principal, interest, and costs. Stubbing also required payment of the 800l., and accordingly a special committee meeting of the society was held on the 14th Feb. 1861, at which the plaintiff Moye and the defendant Morris and one Robert Sargeant were present, the following resolutions were passed:

That the committee do and they are hereby fully authorised to borrow and take up at the current rate of interest the sum of 800l. for the purposes of the society, and that the same, when so borrowed, be immediately paid by the committee to the treasurer of the society to the credit of the society, and that the funds and assets of the society be at all times liable to, and answerable for the sums so borrowed and paid over in pursuance of this resolution; and that any three or more of the said committee be and are hereby fully authorised and empowered to join in the security on behalf of themselves and other members of the committee for the repayment of such advances, and be fully indemnified therefrom out of the funds and assets of the society.

That the sum of 800l. be forthwith paid to Mr. John Stubbing in discharge of the note of hand due to him from this society for that amount.

That in the event of the bankers of the said society, Messrs. Sparrow and Co., advancing the said sum of 800l., the committee be and are authorised hereby to deposit their title-deeds and writings of the said society as a security for the repayment thereof, and for any other sums of money which may be now due to the said bankers.

The money was advanced by the bankers and paid to Stubbing, and the repayment thereof, together with the sum of 450l. previously advanced, was secured by a promissory note for the sum of 1250l. made by the plaintiff Moye, and by Portway, Hustler and Sargeant, all members of the committee, and given with the privity and authority of Morris. They also deposited with the bankers, by way of equitable mortgage, the title-deeds then in their possession of certain cottages and houses mortgaged to the society by its members to secure repayment of advances made to them, together with the following memorandum:—

We, the undersigned, William Moye, of Halstead, in the county of Essex, innkeeper, Charles Portway, of the same place, ironmonger, William Octavius Hustler, of the same place, gentleman, and Robert Sargeant, of the same place, baker, four of the members of the committee of the Halstead and North Essex Permanent Benefit Building Society, do hereby declare that we have previously to the signing hereof deposited in the hands of Messrs. Sparrow, Tuffnell, and Co., of Chelmsford, Braintree, and elsewhere, in the county of Essex, bankers, the several deeds and writings relating to the premises mentioned in the schedule hereunder written, as and by way of security for the sum of 1250l., in which we are now indebted to them upon a certain promissory note, bearing even date herewith, and borrowed by us of them as members of the said society, and for and on behalf of the said society, or upon the general banking account of the said society overdrawn, or which may at any time hereafter be due by the said society to them.

Some portions of the property comprised in the equitable mortgage were sold, and the proceeds were applied by the defendant Sparrow towards payment of the debt of 1250l. The bankers alleged that there was still a sum of 650l. due on the promissory note, for which they threatened to sue the plaintiff at law. The bankers also alleged that they had given up the memorandum of deposit to the secretary of the society, and that the deeds were locked up with other muniments of the society in a box which the bankers held, and of which they had not the key.

Sargeant became insolvent in 1867. The business of the society had been suspended since Sept. 1867, but as the members of the society were less than seven in number, it could not be wound-up upon a petition under the Companies Act 1862.

The defendants had threatened to sue the plaintiff at law, and the bill in this suit prayed that they might be restrained by injunction from proceeding at law against the plaintiff in respect of the promissory note for 1250l.; that the note should be corrected so as to express the true agreement and intention of the parties; that an account might be taken of all dealings between the society and the

V.C. J.]

MOYE v. SPARROW.

[V.C. J.]

defendant Sparrow as the trustee thereof, and the bankers as treasurers and bankers of the society; that the validity of the equitable mortgage might be determined; that provision might be made for payment of the note for 1250*l.*, and any other sums due to the bankers, and for the amounts due to the plaintiff and other creditors of the society out of the assets thereof, and by means of contributions from persons liable as contributories to the society; and that in the event of the assets and contributions proving inadequate for the satisfaction of the debts, the rights and liabilities of the plaintiff and the other makers of the note might be ascertained and declared, and that the bankers should assign to the plaintiff and his co-sureties all securities in their hands, and that the society might be wound-up.

Kay, Q. C., Fry, Q. C., and L. Field for the plaintiff.—The plaintiff was entitled to an assignment of all the securities which the bankers held, including the equitable mortgage. The plaintiff and his co-makers of the promissory notes signed them only as agents for the society. The bank had always dealt with the society so as to accept them as the principal debtors and in exoneration of the personal liability of the makers, and therefore the defendants should be restrained from suing the plaintiff at law on the note for 1250*l.*

Laing v. Reid, 21 L. T. Rep. N. S. 773; L. Rep. 5 Ch. 4.

Eddis, Q. C. and J. W. Chitty for the bankers and several other defendants.

Alfred Bailey for Stratton.

Horton Smith for Nicholls.—Nicholls ought not to be a party to the suit, he being merely a trustee of a composition-deed under the 197th section of the Bankruptcy Act 1861.

Re Carlisle Canal Company, 13 L. T. Rep. N. S. 70;

Ex parte Holland, 19 L. T. Rep. N. S. 430;

Smith v. Saunders, W. N. 1867, p. 154;

Ex parte Willmot, L. Rep. 2 Ch. 795;

Re Richmond Hill Hotel Company, 16 L. T. Rep.

N. S. 786; 17 L. T. Rep. N. S. 188; 38 L. J.,

N. S., 541, Ch.;

Ex parte Mendel, 1 De G. J. & S. 330;

Ex parte Halliday, 2 De G. J. & S. 312.

There was no *cessio bonorum*. Nicholls was not a trustee of the property of the *quasi* bankrupt; he was only a trustee of the covenant in the deed of composition.

Kay, Q. C. in reply.

The VICE-CHANCELLOR.—In this case several authorities have been cited; many of them, indeed, of great interest, and some of them of not a little difficulty. It is necessary to treat them seriatim. First of all the question arises (and it is the foundation of a great part of this case), What powers this society had to borrow money? The only power of borrowing which this society had is the one contained in the 13th clause, to which my attention has been called. [The Vice-Chancellor read the clause to the effect above stated, and continued:] Now I am of opinion that, under that section, no loan could be properly raised by the managing body of the society so as to bind the society, unless it was a loan made for the purpose of lending to a member who agreed to pay an additional interest for a stated period, or until such advance should be made out of the funds of the society. That is to say, it is quite clear, in point of law, that these societies have no unlimited power of borrowing. They have powers of borrowing for the special purposes indicated by their constitution, if those purposes do not violate any principle of law; but those powers of borrowing can only be for those special purposes,

and within those limits. I am of opinion, therefore, that no loan borrowed for the payment of debts, or otherwise than for the purpose of making an advance to a member desirous of obtaining a loan, is justifiable under this deed. Then the loans in question appear to me to be not justified according to the view I have taken of the powers of the society. There is no suggestion that the loans were made for any other purpose than that of paying some debts and expenses incurred in the management of the society. At all events, there is no suggestion in evidence which makes them otherwise than a general loan borrowed for the general purposes of the society. Indeed, some of them were borrowed for the purpose of paying off debts. That being so, it appears to me that, upon the mere transaction of loan itself, no liability could be attached by the committee to those special members of the society who remained liable under the particular clause to which I am now about to refer. The deed, after having provided for the mode in which several persons could withdraw and cease to have any connection with the society, either in respect of interest or liability, proceeds, by the 24th clause, to show how the expenses of management, and any losses that may be incurred by the society, shall be defrayed. [The Vice-Chancellor read the clause, to the effect above stated, and continued:] That clause seems to me to have made it the duty of the committee to have inquired and ascertained the loss whenever it occurred; and they could not, by borrowing money to pay off a creditor, and so postponing the inquiry from year to year, alter the class of persons upon whom the burden of payment would fall. Suppose, for instance, that a loss occurs in one year, and then, instead of ascertaining it and throwing it upon the persons who are liable in that year, moneys are borrowed from the bankers, or from some other sources; suppose that the debts are paid and discharged, that members change their positions, withdraw or cease to be advanced members, and get their property, it is suggested that ultimately, after going on in that course of dealing for years, the two or three persons who are found at last to be in the position of holders of unadvanced shares, not fully paid up, or to be the holders of advanced shares in respect of which sums of money are due, are to be the persons liable to make good all the losses incurred during the preceding years, and which have been, from time to time, defrayed by means of borrowing money from some source or other. That shows how necessary it is to adhere to the rule of borrowing, that no money is to be borrowed except for the purpose of making an advance to a member. If that had been done the thing would have kept itself right; there would have always been the receipts and payments, if there was no balance; and there would have been a deficiency immediately ascertained, if a deficiency had arisen by reason of any default of a member, or of the expenses of the society exceeding the net receipts. But if there is no power of borrowing money, of course the members would be called upon to provide ready money for the purpose of meeting the deficiency. That really should have been the course of management of this society, for the neglect of which no person seems to me to be more answerable than the plaintiff himself, who was one of the most active of the committeemen who had the management of the society. That being so, I am of opinion that the plaintiff has no remedy whatever upon the allegations and proofs of this case against the defendants Elizabeth Cheverton, Abraham Nokes, William Dunt, or William Arnold in respect of his liability upon the two promissory notes, or the promissory notes to which he has been made a party. Then I am also of opinion that there is no case made for relief

V.C. J.]

MOYE v. SPARROW.

[V.C. J.]

against the bankers. The bankers were the treasurers and bankers of the society, which really comes to the same thing. They kept a regular pass-book, which was passed to and fro between the bank and the committee meetings of the society, and was regularly seen by them; and there is no evidence of any inaccuracy in that account, or anything to prevent its being dealt with as an ordinary banker's account, settled by the pass-book passing to and fro. It seems to me that any creditor of any person might as well have called on the bankers of that person to have the account taken. That is with respect to the general account. Nothing turns, as it appears to me, upon the 1200*l.*; that is a matter which has really been disposed of. They have given credit for 650*l.* If there was any doubt in respect of that, it would have been a matter to have been tried at law. It seems that 650*l.* has been in the course of the discussion admitted to be due to the bankers at law, at all events in respect of their claim upon that instrument. That being so, and as there is no relief against the holders of the shares, and none against the bankers in respect of the account, we must consider what can be done with regard to what is called the equitable mortgage. Now the equitable mortgage stands thus: Certain members of the committee in 1861 deposited the title-deeds of the society with the bank by way of equitable mortgage. As I understand, the only title-deeds the society had were the title-deeds of their borrowers, which were deposited with them as mortgages for the purposes of the society, and according to the rules of the society; and every person who had made such a deposit was entitled to receive his deed back upon paying what was due as between him and the society in respect of his advances and other contributions. That was the nature of the security which was given to the bank. It was a security given by way of the holdings of those mortgages. I do not see, at present, the answer to the suggestion of Mr. Eddis, that the bankers should not have received the money, because the money, according to the very constitution, was to be paid by the borrower direct to the society by monthly payment. But, however that may be, I should say that I entertain more than a doubt whether it was competent to any officers, committee men, or others, of the society, to make any such deposit of the deeds. I see nothing whatever authorising it in the rules of the society; and I have doubts, and more than doubts, whether a meeting of a special committee, at which the plaintiff and John Morris and Robert Sargent were present, was sufficient to authorise the deposit of the deeds. It stands thus—I mean for the purposes of the hearing of this cause: By the bill in the suit it is simply alleged that the bankers have realised the security, to some extent, by receiving a certain sum of money; and credit is claimed for that sum of money. Then there comes a paragraph in the prayer of the bill, asking that the bankers may be ordered to give up all securities in their possession. The bankers answer that by saying "We have no securities in our possession whatever; it is very true we had those securities, but we have given up the written memorandum to the secretary of the society; and as to the deeds, they are now in a box of the society locked up, of which box we have not got the key; but which box and deeds we hold with the other muniments of the society." That is stated by the answer to the original bill; the bill was afterwards amended, and no case is made by the amended bill against the bankers that they have done anything wrong in so giving up the securities or the deeds to the society. Therefore, it appears to me that no relief can be given now in respect of the equitable mortgage. In truth it comes to be a matter of the smallest possible

moment. It appears there is nothing due except in respect of some one of those "advanced persons" (whatever that may mean) of the name of Dunt. That is the only sum that really is due in respect of any of the securities which were in the bankers' hands. That, I think, disposes of the question as to the bankers. But very different considerations arise with regard to the persons who are members of the committee, and the others who authorised the making of the securities themselves. First of all, I will take the security of the 14th Dec. 1855. There is no doubt that the intention of all these persons was that the funds and assets of the society should be the first funds to be resorted to; for they all expected that the society would be a flourishing society, and would have funds and assets to meet its liabilities. I have no doubt the bankers and everyone at that time thought the same thing. That is sufficient to dispose of the objection that the agreement between the plaintiff and his co-makers, and also of the bankers in taking the notes, was that the makers of the note should sign it only as agents for and on behalf of the society. There seems no doubt that they did sign it as agents on behalf of the society, and the bankers took it in that sense. I have held that they had no right to do so on behalf of the society. They not only did it as agents on behalf of the society, but there was also this—it was never intended that some members of the committee should make themselves more liable than the others. That was the act of the committee; and it was mere accident apparently, and mere matter of convenience, as to which members of the committee should sign the security. Then when the five members signed that note—or whatever it may be called—of the 18th April 1857, and signed it "on behalf of themselves and others the members of the said committee," they signed that which they were duly authorised by the resolution of the members who were present at the meeting of the 14th Feb. 1855, to sign. I hold, that as between the persons who signed, and the persons who authorised that signature, they are all jointly and severally liable to make good that amount, and, therefore, to indemnify the plaintiff to the extent to which he has been called upon to overpay that note. Then the case as to Mr. Barnard stands on peculiar grounds. It has been contended before me that Mr. Barnard was the man who ought to have been here; and that Mr. Nicholls is not a proper person, either in respect of the debt or in respect of his own character, to be drawn into this litigation. I am of opinion that that contention is right. Nicholls is not the person who ought to have been made a party to this suit. I think that the decisions in the Court of Bankruptcy to which I have been referred are, if I may say so, based on a very sound principle; and that you cannot apply the 197th section of the Bankruptcy Act to every case of composition-deed. When you talk of trustees and persons of that kind, you must have regard to what trustees they are, and for what purpose they are appointed, and that a deed in which there is no *cessio bonorum*, stands in a very different position to a deed in which there is a *cessio bonorum*. In this case Nicholls was never trustee of any property or effects whatsoever of the *quasi* bankrupt. He had no right to call upon him to assign a particle of his property; he had no right to interfere with him in the management of his business, or estate, or effects. That is to say, he was still further removed from the character of an assignee in bankruptcy than an ordinary inspector is, because, in all inspectorship-deeds which I have seen, there is a clause enabling the inspector to turn himself into a trustee if he should think fit, by calling on the debtor to assign the property to him. In this case, Nicholls was not a trustee of the deed, except in

V.C. J.]

GREENOCK ELECTION PETITION.

[ELECT. PET.]

this way, that he was a trustee of the covenant by which the debtor Barnard covenanted that he would, within fourteen days after the registration of the deed of composition, pay all his creditors; and he was merely a name, as it were, by which the man could be more conveniently sued, or by which the money could be more conveniently paid for distribution. Nicholls says that "up to that time I received everything and I discharged everything, and I settled with Barnard, with whom I completed the whole of the arrangement." Then, moreover, this is further contended—and I think with propriety—that this is not a debt within the meaning of the deed. He was not a creditor, although it was an absolute contract upon which Mr Barnard could have sued by the holders of the promissory note. There could be no demand, except after notice or demand, in writing for three months, and that could never have been a debt capable of being discharged or paid within fourteen days after the registration of the deed. Then, again, no liability to the present plaintiff could have arisen until the present plaintiff had paid the debt. I am of opinion that that clause in the Bankruptcy Act to which my attention has been called could by no possibility of construction be incorporated into the provisions of such a deed as this. You could not put it into the deed consistently with the general provision and intent of the deed. Therefore, I am of opinion that no relief can be given against Mr Nicholls. Then with regard to the larger note—the note for 1250*l.*—upon the same ground that I have already held with regard to the others, viz., that the persons who signed the note, and Morris, who admits that he was a member of the committee which authorised the making of the note—those persons are all liable to contribute equally to the payment of that note, and there must be a declaration of their liability accordingly. With regard to the costs of the suit, I am not disposed to give the bankers any, because they were mixed up a good deal with these transactions, which I have held to have been irregular. They were bankers and members of the society. They were mixed up with the irregularity of the loan transaction; and they are very lucky to get, as they have got, back the whole amount they lent. I shall not, therefore, give the bankers any costs. With respect to Cheverton, Nokes, Dunt, and the others, they have not incurred any very considerable costs. But they have joined to some extent with the bankers, and I will not give them any costs. With regard to the others whom I have held liable, their costs and the costs of the plaintiff will be added together, so as to form part of the money which is ultimately to be contributed between them. Then, with regard to Nicholls, he must be dismissed with costs, as I think he ought not to have been brought here. It will be necessary to make a special provision with regard to Barnard's share, because, although it is only a share of the 200*l.*, the plaintiff has dismissed the bill against him.

Solicitors for the plaintiff, *Sharpe, Parker, and Pritchard*, agents for *Cardinall*, of Halstead.

Solicitors for the defendants, *Aldridge and Thorn*, agents for *Harris and Morton*, Halstead.

Solicitor for Stratton, *Joseph Mote*.

Solicitors for other parties, *Mason, Sturt, and Mason*.

Scotch Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

GREENOCK ELECTION PETITION.

(Before Lord BARCAPLE.)

Saturday, Feb. 13, 1869.

Polling places—Irregularity—Miscarriage—Communication of polling booth with public house—Duties of town clerk.

The simple fact that a polling booth communicated with a public house :

Held to be no ground for objecting to the validity of the return.

It was alleged against the validity of the return that the sheriff had improperly apportioned the polling districts :

Held, that the statutory provisions as to polling places are difficult to read together, so as to declare what precisely are the duties of the sheriff, but that even had there been an illegality committed in this respect, it was not of sufficient weight to upset the election.

The town clerk having express duties to perform in connection with the election :

Held, that information and assistance and advice rendered by him to the sheriff could not affect the return.

The statutory provisions discussed, and

Semble, the sheriff has a latitude in fixing upon the polling places.

LORD BARCAPLE (after some introductory remarks) said:—The portion of the case which has been the subject of a supplementary argument at the end of the proceedings is so entirely separate from the rest of it, that I think I shall most conveniently deal with it by expressing my opinion upon that matter at first, before going into the other things which require a consideration of the evidence. The facts of the case upon that part of it are substantially not disputed; and the question is, in so far as I have to consider it, simply whether there was such a miscarriage at the last election in Greenock, in reference to the arrangements of polling places and of polling districts, as has vitiated and invalidated the election. Except for the purpose of determining that question, it is unnecessary that I should either direct my mind to the subject, or pronounce any opinion upon it. There were objections stated to the course taken by the sheriff in this matter, some of which have not been referred to in the argument, which I may just state, because it will be satisfactory to the parties, I think, that I should allude, in a single word, to the whole of them. There was first of all an objection taken in respect that it was alleged that one of the polling booths or rooms, in the first ward, I think it was, was connected with a public house; that is to say, that there was direct access from the one to the other. That, I think, has been disproved in point of fact. I believe, if I remember rightly, it was not stated in the original petition. I ruled, therefore, that it could not be gone into as a separate subject of investigation. But in the course of the investigation into other matters it did appear (and I think it is just as well that it should have appeared), that in point of fact there was not, in my judgment, at least, any ground whatever for having entertained that objection. Then it was objected that the sheriff, in the course of making those arrangements, had communicated with, and taken more or less the assistance and advice of, the town clerk; and that was said to have been objectionable, I suppose, the more especially

GREENOCK ELECTION PETITION.

from some idea that, as one of the candidates was, or had recently been, the provost of the burgh (and I believe he was still the provost of the burgh at the date of the election), there was a sort of impropriety in communicating with the town clerk upon that ground. I certainly cannot conceive that this is a matter, however, upon which I could base my judgment to the effect that there was an illegality committed. But I may say, that upon that point of the case I have no doubt whatever. The town clerk has express duties to perform in this matter of the providing of places in which to poll; and by the very last provision which we have upon the subject, that in the Reform Act of last year, new duties are imposed upon him, or new instructions are given to him, which imply that he is still a public officer responsibly charged with some duties in this matter, who is bound to discharge them aright, and who will be looked to as the party responsible to do so. I cannot conceive that the sheriff did anything that could be looked upon as illegal in communicating with that public officer. He was entitled to have his assistance. He was entitled to require from him all the assistance which he, as town clerk of the burgh, could give him in the matter; and I must assume, and no reason has been suggested why I should not assume, that he might have relied upon him, and probably did rely upon him, with entire and, for anything I know or believe, well-grounded confidence, that he would get nothing but such assistance in the matter as one responsible public officer ought to give to another. From the very outset of the present system of election, the town clerk has been a person who was charged with duties in the matter of providing polling places in burghs. Indeed, originally, by the Reform Act of 1832, he was the sole party who had any functions to perform in that respect, and he was to make the division. I do not know whether it was suggested at the Bar or not; but I do not understand, or think that the 27th section of the original Reform Act has been repealed. It has been modified and added to by supplementary provisions in subsequent Acts; but I think it remains there as the basis of the whole thing; showing that the town clerk is a person who, as he has duties to perform in the matter, might well be consulted and called upon to give advice by the sheriff. Then, the third ground of objection, and that which has been the subject of argument, is in regard to the arrangements which were made by the sheriff; and those, as I understand them, seem to have been of this kind: that taking the wards as they had been fixed last year, I mean in 1868, under the provisions of the Act for dividing burghs into wards, it being, in point of fact, identical, or nearly so, with the wards which have prevailed here ever since the time of the Municipal Reform Act in 1834, I think it was, the sheriff did not, while he increased the number of polling places or polling booths (call them which you will), increase the number of districts, but appointed a certain number of rooms or other places at which the poll was to be taken within each one of those districts. In the first district, which is the largest, he appointed four; and then it is said, and I understand it to be quite admitted in point of fact, that further, in appointing those polling places within that district he did not assign the persons being voters, living within particular portions of each district, to each new polling place, but he divided the entire list of voters in the district by taking them alphabetically, and transferring a portion of the alphabet to one polling place and another portion of the alphabet to a second, and so on. Now, it is said, and was argued with great ingenuity and with great force by Mr. Christie, that that is not acting upon

a sound construction of the statutory provisions upon which this matter proceeds. I do not think it is incumbent upon me at present to pronounce any judgment upon that point. Those are provisions which I rather think are not easily all read together; and if my memory does not deceive me, even so long ago as very soon after the passing of the Reform Act of 1832, it was found that upon that subject, in the 27th clause of it there were provisions which it was difficult to work out and difficult to read together, and especially difficult to apply in burghs as in counties. The truth of the matter is, that "polling places," with reference to counties, is an expression which has always had, and to some extent always must have, a somewhat different meaning from that which it has to burghs. A polling place in a county is very commonly a town—and within that town, no matter where the polling booth may be situated, it is still at the same polling place. But then there is nothing of that sort in ordinary burghs, unless you conceive that which has not, I believe, in Scotland been at all common, that you have in one of the central burghs a particular public place, which has by use or by misapprehension of the statute from 1832 downwards, been always used as the polling place of that burgh. But the much more ordinary thing, and that which the statutes, even in their more recent provisions, seem to point to is, that in burghs the place for taking the poll must necessarily be more or less fluctuating, because it is either to be a temporary booth erected where the public authorities may find a convenient space for doing so, which disappears whenever the election is over, or it is to be a room hired for the purpose from any person who has a room convenient to be hired for that purpose at that time, that is to say, it is very generally either a booth upon a piece of ground which may happen to be vacant at the time, or it is a shop or room or other building which at the time happens to be untenanted. That implies that necessarily there must be some degree of fluctuation; and, therefore, I do not know that I can say that I think that there is any very precise rule which can be adopted by the public officers who have the charge of carrying out those provisions. I rather think that he has a latitude. I have no doubt it has always been acted upon, and I rather think that that latitude is within the statutes themselves. But the real question which I have to decide is, whether anything has been done in this matter by the sheriff upon the present occasion which is to invalidate the election. Now that is a very serious question indeed. To invalidate an election—to put a town, and a large town, with a great population, and a vast number of voters like this, to the necessity of having a second election in consequence of a mere miscarriage, is no light thing; because I must, of course, look at this matter altogether apart from the rest of the case, and I must treat this exactly as if there were no other complaint at all except of this as an illegality committed. Now, in the first place, I am by no means satisfied that there was any illegality at all; but, in the next place, I am quite satisfied that if there was to any extent, a contravention of those statutory provisions, if they were not carried out precisely (for that is, as it appears to me, the utmost that can be said about it), they are provisions of such a kind that it would require that something much more should be made out than merely that they were transgressed in good faith, and without any serious consequence, in order to invalidate an election. Whether I look to any evidence which is before me, or to anything which is suggested by the nature of the question which arises upon this alleged miscarriage, it appears to me that there is not the slightest ground to believe

Q. B.]

REG. v. GARLAND.

[Q. B.]

that it did, to any extent, affect the fairness of the election which was held here in November. I cannot see how it should have done so. On the contrary, although I am not bound to judge of that, and do not judge of it, and certainly am not in a good position to judge of it, nevertheless I see nothing whatever to lead to the conclusion that the sheriff is not perfectly right, at least in this: that his arrangements were such as were best calculated for bringing about those ends—of a tranquil and quiet, and an easily managed election, which it was his duty, as sheriff of the county, so far as he interfered or had to interfere in the matter, to endeavour to accomplish. Upon these grounds, into which need not go more fully, I have no hesitation in holding that, in so far as any question arises before me here, there has not been a ground made out, in respect to this matter of the polling places, on which I could hold that the sitting member was not duly returned. If there is any question in regard to this matter beyond that, it is not a question for this place, but it is a matter which I presume the sheriffs of Scotland have had occasion to consider before, and in regard to which what has taken place at present may lead them to reconsider and to take the best and most authoritative advice, and, if necessary, to get some more clear statutory provisions, in order to put an end to all possible doubt upon the subject.

On the other evidence as to the allegations in the petition, the learned judge decided in favour of the respondent.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Friday, Jan. 28.

REG. v. GARLAND.

Copyholds—Administrator—Application by trustees who had not disclaimed for admittance of infant heir—Mandamus—Effect of devise of copyholds—Wills Act (7 Will. 4, & 1 Vict. c. 26), s. 3.

A copyholder devised his copyhold tenements and hereditaments to three persons, who were also his executors, upon certain trusts contained in the will. One of the three trustees by deed disclaimed the trusts, and the other two proved the will. Application was made to the lord of the manor to have the infant heir-at-law of the testator admitted on the court rolls of the manor, and this having been refused on the ground that the devisees were the proper parties to be admitted.

Application was made for a mandamus to compel the admittance of the heir. In discharging a rule nisi for a mandamus:

Held, that in the exercise of their discretion, the court would not lend its process in a case where the application was not made bona fide on the part of the heir, but only for the purpose of defeating the claim of the lord to a double fine, and where the effect of granting the application would be to enable the trustees to evade the performance of the trusts of the will.

Semble, per Cockburn, C. J. and Mellor, J.—Sect. 3 of the Wills Act (7 Will. 4 & 1 Vict. c. 26), which enables all property to be disposed of by will, including customary freeholds and copyholds without surrender and before admittance, has not the effect of making copyholds pass directly to the devisee; and the heir remains entitled until the devisee claims to be admitted.

Per Lush, J.—The section was intended to make copyholds pass directly to the devisee in the same manner as freeholds.

In this case a rule nisi had been obtained by *Philbrick* in Trinity Term 1869, calling on Edgar Walter Garland, lord of the manor of Wix Park Hall, and Wrabness in the county of Essex, and his steward of the said manor, to show cause why a writ of *mandamus* should not issue directed to them, commanding them to hold a court and admit William Gould Busk by his guardians as tenant to the copyholds holden of the said manors respectively by Edward Thomas Busk deceased, to whom the said William Gould Busk is customary heir.

From the affidavit filed in support of the motion the following facts appeared.

Edward Thomas Busk, deceased, was, on or about the 5th Dec. 1810, admitted as tenant by copy of court roll to certain tenements, containing eighty acres or thereabouts, copyhold of the manor of Wix Park Hall, in the county of Essex, to hold the same to the said Edward Thomas Busk and his heirs, according to the custom of the said manor.

On the 2nd May 1856 the said Edward Thomas Busk, deceased, was admitted tenant by copy of court roll to a certain tenement called Northey, containing fifty acres or thereabouts, also copyhold of the aforesaid manor of Wix Park Hall, to hold the same to him and his heirs according to the custom of the said manor; and on the same day he was also admitted to a tenement called Skipps, containing twenty-eight acres or thereabouts copyhold of the manor of Wrabness in the said county of Essex, to hold the same tenements to the same Edward Thomas Busk and his heirs according to the custom of the said last-mentioned manor. In each of these manors the customary descent is to the youngest son.

The said Edward Thomas Busk died on the 19th Jan. 1868 seised of all the aforesaid copyhold hereditaments and tenements, and leaving William Gould Busk his youngest son and heir to all the said copyhold tenements according to the respective customs of the aforesaid two manors, him surviving, and having by will appointed his widow, his brother, and his nephew guardians of his infant children.

The infant Wm. Gould Busk, by his guardian, claimed admittance to the aforesaid copyholds and hereditaments. General courts baron for both of the said manors, were held within the same according to custom on the 11th June 1869, and Edward Henry Busk, the nephew of Edward Thomas Busk, deceased, as guardian of the infant William Gould Busk, attended the same on his behalf and prayed the lord of the said manor, by his steward, to admit the said William Gould Busk as such customary heir to the said copyholds, tenements, and hereditaments according to the custom of the said manors respectively, and claimed such admittance. The lord by his steward acknowledged the fact of the heirship of the said William Gould Busk according to the custom of the said manors, but refused to admit him as claimed, or at all to any of the aforesaid hereditaments or tenements. The ground of the refusal alleged by the lord is that stated in the following extract from the minutes of the court rolls of what occurred at such courts, and was identical in the case of each of the aforesaid manors, such minutes being prepared prior to the said court so as to raise the question hereinafter stated. The extract is as follows:—

At this court, the homage present, an official extract from the will and codicils of the late Edward Thomas Busk, a copyhold tenant of this manor, whose death was presented at a court held on the 19th June 1868, whereby it appears that the said Edward Thomas Busk devised his copyhold hereditaments held of this manor, of which he died seised, to Henry William Busk, Hans Busk, and Edward Henry Busk. Also at this court the third proclamation is made on the death of the said Edward Thomas Busk and Edward Henry Busk, one of the guardians appointed by the will of the said Edward Thomas Busk on

Q. B.]

REG. v. GARLAND.

[Q. B.]

behalf of William Gould Busk, the youngest son and heir according to the custom of this manor, claims admittance to the said copyhold hereditaments, but the lord, by his steward, refuses to admit the said William Gould Busk on account of the devise contained in the said will of the said Edward Thomas Busk, and a precept to seize the said hereditaments for want of a tenant is awarded.

By his last will and testament bearing date the 22nd Nov. 1852, and by five several codicils thereto, the said Edward Thomas Busk, deceased, devised all the manors, messuages, lands, tenements, and real estate of every tenure of or to which he was or at the time of his death, should be seised, possessed, or entitled at law or in equity (except estates vested in him by way of trust or mortgage) unto and to the use of his brother Henry William Busk, and his nephew Edward Henry Busk, upon certain trusts, for the benefit of the testator's family.

The said Hans Busk, by deed-poll dated the 17th March 1868, disclaimed the devises, trusteeship, and guardianship to which by the said will and codicils he had been appointed; and the said Henry William Busk and Edward Henry Busk duly proved the will and codicils, but did not come in or claim admittance as such devisees in trust, but claimed to have the infant heir admitted. The object of taking that course was that the payment of a fine and a half, to which the lord of the manor would have been entitled, on the admission of the acting trustees might be avoided.

The refusal to admit the infant heir was based on the ground that a devise now operates under the Wills Act, as a direct transmission of estate in copyhold not less than in freehold, and that the heir's right of admission is, consequently, extinguished and barred, unless and until the devisees disclaimed.

Mellish, Q. C. and Herschell, now showed cause against the rule. The devisees in trust who had not disclaimed were the proper parties to claim admittance and to be admitted. The legal estate in the copyhold of the testator was vested in them by force of the will, and the heir took nothing. Sect. 3 of the Wills Act (7 Will. 4 & 1 Vict. c. 25) was intended to remove the inconveniences which previously existed in the mode of devising copyhold estates, when a surrender to the use of the will was necessary. It provides that the general power of devising property which that section gives in the case of other kinds of property "shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, and, notwithstanding that being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will, according to the power contained in this Act, if this Act had not been made." The intention of the Act was to pass the estate direct to the devisee or devisees under a will, and to enable the heir to be absolutely disinherited by a devise by making him a stranger to the estate. The Master of the Rolls, indeed, said in *Paterson v. Paterson*, L. Rep. 2 Eq. 86; 14 L. T. Rep. N. S. 320, "I am rather disposed to think that the view which Mr. Joshua Williams stated is the correct view, that in substance the copyhold descends to the heir subject to

the right of the devisee to be admitted, there being no beneficial interest whatever in the heir." But sect. 3 of the Wills Act does not seem to have been cited or considered in that case. *Steele v. Waller*, 28 Beav. 466, is not inconsistent with the contention that the devisees are the proper parties to claim admittance. "Here," said the Master of the Rolls, "is a specific devise of the property in question, and therefore the legal estate in it passed to the devisees in trust named in the will. I do not understand that these trustees have disclaimed the devise or the trusts reposed in them, and, if so, the customary heir took nothing in the estate by descent. It is true that if the devisees did not present themselves when the proclamation was made by the lords for tenants to present themselves for admission, the heir had a right to be admitted, because if devisees do not choose to accept the devise, the heir, according to the custom, takes, and therefore the admittance of the heir was good, and that admittance conferred on him the legal estate." There has been no disclaimer in the present case by the devisees as there was in the case of *Rex v. Wilson*, 10 B. & Cres. 80, where the devisees having disclaimed, it was held that on the death of the testator the estate descended to his heir, and that as the devisees would not come in and be admitted he was entitled to admittance. The devisees in the present case were the proper persons to claim admittance, and this court should not lend its assistance to an attempt to deprive the lord of the double fine to which he is legally entitled. The Wills Act was not intended to interfere in any way with his right. Sect. 4 provides that the lord shall not lose the fines to which he would otherwise have been entitled in respect of the surrendering to the use of the will.

Joshua Williams, Q. C., and H. Tindal Atkinson, in support of the rule, contended that sect. 3 of the Wills Act was intended only to do away with the necessity of a surrender to the use of the will, but that the customary heir was still entitled, as having the legal estate, until the devisees under the will claimed to be admitted. In *Rex v. The Masters of the Brewers Company*, 3 B. & Cres. 172, it was held that the court would grant a *mandamus* to admit a copyholder who claims by descent. "The prosecutor," said the court, "as heir at law, is entitled to the writ; because, although he has a good title as against everyone but the lord, still he has a right to insist upon admittance, to make him a complete copyholder." In *R. v. The Lord of the Manor of Hexham*, 5 Ad. & El. 559, it was held that where two adverse parties claim title as devisees to the same copyhold, the steward may admit both, and, proper grounds being shown, this court will require him by *mandamus* to do so. In *Doe v. Harrison*, 6 Q. B. 631, the heir of copyhold lands not appearing on production, the lord seized *quousque*; afterwards the heir claimed, and the lord declining to admit him on the supposition that another party had title, the heir obtained a rule *nisi* for a *mandamus* to admit, and this rule was ultimately made absolute. "The lord is not," said Lord Denman, C. J., p. 636, "to seize and hold the land against the heir without showing that some person has claimed adversely. This was taken for granted in *Doe v. Bellamy*, 2 M. & S. 87. It is clear, on principle, that if proclamation is made, and the land seized till the heir comes in, and the heir afterwards does come, the lord cannot answer his claim by saying that parties who have not appeared are entitled. He is entitled to a *mandamus* because he is the heir, and there is no adverse title to prevent his admittance." [COCKBURN, C. J.—Is the lord though bound to admit the devisee, bound also to admit the heir?] The heir gets no beneficial interest by being admitted. The Master

Q. B.]

REG. v. GARLAND.

[Q. B.]

of the Rolls, in *Paterson v. Paterson* (*ubi sup.*) states the correct view to be "that in substance the copyhold descends to the heir, subject to the right of the devisee to be admitted, there being no beneficial interest whatever in the heir." Sect. 3 of the Wills Act was not intended to vest the legal estate in the devisees before they are admitted. Sect. 4, in providing that "where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, shall not have been admitted thereto, no person entitled, or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fines, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator, &c., implies the necessity of the devisees being admitted. In *Wellesley v. Withers*, 4 El. & Bl. 750, a copyhold was devised to three persons in fee, who were also appointed executors of the will, and the three proved the will, but two of them by deed released their interest to the third in order that she might be admitted alone. The lord of the manor claimed a treble fine and refused to admit, but this court held that he was entitled to a single fine only, and that the fact that all three devisees had proved the will did not prevent any of them from disclaiming the devise under it. "The cases," said Wightman, J. in delivering the judgment of the court, "as to trustees being liable to the trusts of a will by accepting the trusts as to some of the property, do not seem at all to affect the question of whether they may not renounce the legal estate, taking upon themselves any risk of a breach of trust, more particularly where, as in this case, there was no legal estate *prima facie* vested in them, but where they had a mere right to admittance which, according to a well known and proper practice, they give up in favour of one of their number for the purposes of the estate and to effect a saving." If the heir has a legal right to be admitted this court will not enter into a consideration of the trusts of the will, but will assist him to enforce his legal right by *mandamus*, where, as in the present case there is no fraud or suspicion of fraud, and the trustees are acting as they think best for the benefit of the estate. [LUSH, J. referred to *Bence v. Gilpin*, L. Rep. 3 Exch. 76; 17 L. T. Rep. N. S. 655, where it was held that a disclaimer by two out of three joint tenants, surrenderees of copyhold lands belonging to a manor, executed before the admittance of the remaining joint tenant, but after the exercise by all the three of various acts of ownership over the estate, is void, and that the lord is entitled to a fine as upon the admittance of the three; and the case of *Wellesley v. Villiers* was distinguished on the ground that the trustees had there effectually disclaimed. "There," said the Chief Baron, "four persons were entitled to real and personal property under a will, as devisees and executors. Three out of the four took out probate and assumed the character of executors. But as to the copyhold estate comprised in the will, two of these three, from the time of the testator's death, rejected and renounced it. They did no act whatever whence it might be inferred that they had taken the estate on themselves, and in due time they executed a disclaimer. That was, however a disclaimer in its true and proper sense. No man is bound to take an estate against his will, and they never had taken it."]

COCKBURN, C. J.—I am of opinion that this rule must be discharged. I do not ground that opinion upon any construction which I am prepared to put upon the 3rd section of the Wills Act. At present, I am disposed to agree with Mr. Williams, in the

construction which he has put upon it, and to think that the intention of the Legislature was merely to dispense with the necessity of a surrender to the use of the will which was previously necessary, and not to vest the legal estate in the devisee before admission. If it were necessary to decide that question, in the present state of my mind upon it I should have thought the case a fit one for the *mandamus* to go, in order that on the return to it this nice question might be more fully considered, and if necessary the matter might be taken to a court of error. It is not, therefore, because I entertain a view adverse to Mr. Williams's contention as to this that I am prepared to refuse this *mandamus*. I rest my refusal entirely on the special circumstances of this case, and refuse it in the exercise of that discretion which I think it is competent to the court to exercise, and which I think it ought to exercise where the parties are not of right entitled to the process they seek for without the intervention of the court. The ground of my refusal is this, that this is not, in my opinion, an application made *bonâ fide* on behalf of the infant heir. I am satisfied that it is not; and the effect of granting it would be to enable the trustees to evade the performance of what it was the testator's desire they should perform. Their intention is quite plain: nay it is admitted and even contended, that it is lawful and deserving of approval on the part of the trustees that they should wish to have the heir-at-law admitted in order to defeat the lord of the manor of the additional fine to which he would otherwise be entitled. I say nothing as to whether that is a legitimate thing on the part of the trustees to endeavour to accomplish; but this case differs from all those which hitherto have called forth the exercise of the discretionary power of this court in this: that the application for a *mandamus* is made not in order to enforce a right of the heir-at-law, but simply to enable the trustees to defeat the legal claim of the lord of the manor; and it is quite plain that the heir-at-law, in whose name the trustees are now coming forward, is no more interested in the matter than any one person in court at the present moment. But it is not in that respect only that this case seems to me to differ from the cases referred to by Mr. Williams; for I look also at what would be the effect of granting the application, and in that respect, too, I think it will be found to differ most essentially from the cases cited. The effect of granting the application would be that the trustees would be enabled to evade the discharge of the obligations which the will of the testator casts upon them, and which a court of equity would enforce against them. By the will they are to take the copyhold estate of the deceased for the purpose of executing certain trusts. They can only acquire it, as I assume, on the construction of the 3rd section of the Wills Act, by going and getting themselves admitted on the court rolls of the manor. Now, by what they are doing they are virtually disclaiming their office of trustees, and they do not put the Court of Chancery in a position to substitute other trustees for them. Now, that is directly contrary to the intention of the testator. If he had thought it worth while to appoint them trustees for the purpose of merely doing what they are now seeking to do, he could easily have done it; but he has not done that. He has intended that they should be devisees under his will for the purpose of carrying out the trusts of the will. I say therefore that if we granted the present application we should be lending our process to bring about the effect—whether it is intended by the trustees or not—of enabling them to evade the performance of their trusts, and leaving the trusts to be performed by the infant heir, who, for aught we know, may be unable to exercise any dis-

Q. B.] MORIARTY AND WIFE v. THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY. [Q. B.]

cretion in the matter. I do not think we should lend our process for any such purpose as that. In the cases of *Reg. v. Wilson* and *Lord Wellesley v. Withers* (*ubi sup.*) the circumstances were altogether different. In the former case there were no trusts at all to be performed; the devisees under the will had disclaimed, and there was no person who had a right to say that they should not disclaim; therefore the heir-at-law was fully entitled to be admitted. The case is quite different where the parties cannot disclaim, and in the next place have not disclaimed. In such a case we should not assist them to divest themselves of their obligations. As to the case of *Lord Wellesley v. Withers*, the facts of that case were altogether different from those of the present. There was a devise in that case to three persons upon certain trusts, and, two having disclaimed, the third person was held entitled to be admitted on payment of a single fine. I do not think that case applies to the present case, in which the application is really not made at all on behalf of the heir of the testator. If two of the trustees in the present case had got rid of their trusts by disclaimer, and the third sought to be admitted, and the question was whether the lord of the manor was entitled to more than a single fine, that case would be in point; but as the circumstances are it has no application. Here we have trustees who have not disclaimed, and who, if they asked to be admitted, must of necessity have obtained admittance. I come back, then, to my first proposition, that where we see the application for admittance is made not *bona fide* on behalf of the person named, and that the effect of granting it would be to enable the trustees to abandon the duties which they ought to perform, we ought not to lend our process for such a purpose. It is quite a different thing to say that in this court no regard is to be paid to any equitable rights of the parties where the process of the court is obtainable *ex debito justitiæ*. This is not such a case, and for the reasons I have already stated, I think the rule must be discharged.

MELLOR, J.—I am of the same opinion. If this case had depended on the construction to be put upon the 3rd section of the Wills Act, I certainly should not have consented to the rule being discharged, because I think the matter raises a very important question, and one of considerable difficulty. As at present advised, though in that respect I differ in opinion from my brother Lush, I agree with my Lord in the construction which he has put upon that section, and confess that Mr. Williams has by his argument induced me to alter the opinion which at first I entertained as to the more enlarged construction to be put upon the section. On the other point, I confess, though I am not prepared to dissent from anything which has been said by my Lord, that I do not see my way very clearly to the distinction between the present case and the case of *R. v. Wilson*, 10 Barn. & Cres. 80. But I feel myself at liberty to decline to make this rule absolute, on the ground that the application for a *mandamus* to have the heir admitted is not made *bona fide*, and might, if granted, be attended with the consequences mentioned by my Lord.

LUSH, J.—I am of opinion that this rule should be discharged; and on the grounds stated by the Lord Chief Justice. By discharging the rule, it must be remembered that we are not depriving any party of his rights, but only refusing to lend the prerogative process of this court to enable trustees to do an act which I regard as inequitable and improper. This is not an application on the part of the heir; but the trustees, who are behind him, are endeavouring to effect a twofold object—(1) to

deprive the lord of the manor of a double fine, and (2) if not to repudiate, at all events, to avoid the performance of, the obligations imposed on them by the will of the testator. Looking, therefore, at the matter as an application made, not on behalf of the heir, but on the part of the trustees, to put this, for all I know, mere child, on the roll of the court, the effect of it would be to clothe him with the duties of a constructive trustee, and to enable them to avoid taking upon themselves what the testator intended they should do. This is, to my mind, a sufficient reason for refusing to grant the *mandamus* which they seek to obtain. If at any future time there should exist no similar reasons for refusing their application, our decision in the present case will not prevent their coming again to the court. As to the other point argued in this case, were it not for the opinion of the Lord Chief Justice and my brother Mellor, I should have a strong opinion that the intention of the 3rd section of the Wills Act was to do away with the distinctions which formerly existed in the case of different kinds of property, and to make the will act as a direct conveyance of every species of property, copyhold as well as freehold; and thus to carry out the objects of the Act by facilitating the devolution of property. I think that the whole property was passed by the will itself, and that by the disposition of the will the heir was deprived of every particle of title. But if the case had rested on that ground alone, of course I should have held that the matter was sufficiently important to have the point put upon the record. But what I have stated would have been my strong opinion but for the different opinion of my lord and my brother Mellor. As, however, the first ground is, to my mind, entirely satisfactory, I concur on that ground with the rest of the court that this rule should be discharged.

Rule discharged with costs.

Attorneys for the prosecutors, Cookson, Wainwright, and Co.

Attorneys for defendants, Winter, Williams, and Co.

Monday, Jan. 31.

MORIARTY AND WIFE v. THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

Evidence—Subornation of testimony—Admission by conduct of a party to an action that his case is bad.

On the trial of an action against a railway company by a husband and wife for injuries sustained by the wife owing to the negligence of the defendants, the defendants tendered the evidence of one W. that he had been asked by the male plaintiff and a clerk of the plaintiffs' attorney to give evidence in support of the plaintiffs' case, although they knew that he had not witnessed the accident, and also the evidence of two other witnesses, that they had been asked to do the same thing by the clerk of the plaintiffs' attorney; and the evidence was received by the judge who presided at the trial, though neither the male plaintiff nor the attorney's clerk had been called as a witness:

Held, that the evidence of the three witnesses was admissible, as an admission by conduct on the part of the plaintiffs that they had a bad case, to be left to the jury with a caution from the judge. The evidence of the two latter witnesses relating to the act of the attorneys' clerk only was admissible evidence against the plaintiffs, as the clerk had been shown by the evidence of W. to have acted in concert with the male plaintiff to suborn testimony, and the subsequent acts of himself alone directed towards the same object might be regarded as a part of a concerted scheme.

This was an action against the defendants as carriers of passengers upon a railway from Far-

Q. B.] MORIARTY AND WIFE v. THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY. [Q. B.]

ringdon-street in the City of London to the Elephant and Castle, for so negligently and unskilfully conducting themselves in carrying the female plaintiff, and managing the said railway and the carriage and train in which the female plaintiff was a passenger that she was thereby wounded and injured, and the male plaintiff sued the defendants also for the loss of comfort and services of his wife.

The defendants pleaded that they were not guilty as alleged.

At the trial, which took place before Lush, J. and a special jury at Westminster, on the 6th Feb. 1869, the female plaintiff, Mrs. Moriarty, deposed that in Dec. 1867 she lived at the Manor Arms, Walworth; that on Saturday, the 28th Dec. 1867 she went to the Elephant and Castle station, and took a third class return ticket to Chapel-street, and in returning arrived at the Elephant and Castle station about 11 p.m., where she was to get out; the train stopped for about a minute; when the train stopped she stood up to leave the carriage, being at the further end of it; when she got about midway two men were let into the same compartment of the carriage; as soon as she passed she tried to alight; the guard still held the door of the carriage in his hand; witness was thrown down with great violence as she was attempting to put her foot on the platform, and the train went off; witness was severely injured. On cross-examination she said she knew persons named Wymark, Allen, and Pitt; had a parcel containing clothes in her hand when she got out of the train; and did not know the two men who got into the carriage as she was going out.

Robert Dowle was examined on behalf of the plaintiff, and swore that he was in the train on the night of the 28th Dec., going from Ludgate-hill to Camberwell-gate, Walworth-road; at the Elephant and Castle saw two gentlemen get into the carriage in which Mrs. Moriarty was standing and waiting to get out; she got on the step; the train then went off, and she was thrown out upon the platform; never saw Mrs. Moriarty but once before that night.

Similar evidence was given by other witnesses named George Haynes, Hampden Park, and William Henry Morgan; and the character of the injuries sustained by the female plaintiff was deposed to by Dr. Lees and Mr. Legros Clarke, member of the College of Surgeons.

For the defence, the guard of the train which arrived at the Elephant and Castle about 11 p.m. on the night in question was called, and deposed that after the passengers got out he closed all the doors of the carriages and got into his break van; then looked out, and as the train began to move saw a woman step from the train; the doors were all closed when the train started, and the woman must have opened the door and jumped from the train after it started.

Edwin Chapman, the underguard of the same train, gave similar evidence—as to all the doors being shut before the train started, and did not see the female plaintiff at all. The porters on duty at the Elephant and Castle station were also called, and deposed that they had not held the door of the carriage in which Mrs. Moriarty was, as stated by her.

Henry James Wymark, a witness, called on behalf of the defendants gave the following testimony (the admissibility of the chief portion of which was objected to on the part of the plaintiff):—that he was a composer of songs and music; knew the plaintiff Mr. Moriarty, and frequented his public house; knew Cox (the clerk of Mr. Rose, the plaintiffs' attorney), and saw him there with Moriarty; Moriarty said that if witness would come forward and say that he had been in the train and witnessed the accident, he (Moriarty) would

willingly give one-third of the compensation that he received to Cox, witness, and Dowle; that he (Moriarty) had spoken to Dowle, and that if witness agreed to the offer, he was to go up and make a statement with him at Mr. Rose's office; that witness did go to Mr. Rose's office, and stated that he was in the train at the time of the accident; about three or four months after the accident, and about a month after he went to Mr. Rose's office, he put himself in communication with the company concerning it; witness had been in Moriarty's house the whole of the evening that the accident occurred, and Dowle part of the evening; witness had told Cox that he had not been at the scene of the accident, and knew nothing about it, to which Cox replied, "We can make a nice case about it. We have a good medical man Dr.—, and if you and I and Dowle keep it together, we shall be able to make a nice little bit between the two;" witness acted with Cox and the others merely with the intention to circumvent and expose them; Cox gave him instructions in writing as to what he should say; told Mr. Rose's managing clerk that he saw the female plaintiff knocked down by the train as she was getting out.

Frederick Allen, another witness called on behalf of the defendants, deposed that Cox did not speak to him on the subject of the action in presence of Moriarty, but in his absence told witness that Mr. Rose was conducting an action for Mr. Moriarty against the London, Chatham, and Dover Railway Company, and that if he (witness) liked to be a witness in it he could, and would be well paid for what he should do; that Cox knew well that witness was not present at the accident; Cox did not dictate the evidence, but witness was to meet him on the following Monday, and then have an interview with Moriarty, when a consultation was to take place; saw Cox on the Monday, who told him that if he wanted to become a witness in the action on the part of Moriarty, he should write to Mr. Rose saying that he could give evidence; witness refused to write the letter to Mr. Rose, and heard nothing more about the matter; informed Wymark about three days after this interview.

Charles Benjamin Pitt, another witness, deposed that he had been asked by Cox if he should like to make a few pounds; replied "Yes, if he (Cox) could tell him how to do it." Cox said, "I have a little affair coming off. I expect shortly an action for damages for a railway accident. Will you be a witness, Charley?" Witness replied, "What! commit perjury!" Cox said "Yes," whereupon witness replied, "Certainly not;" and had no communication with Cox since that night.

The evidence of the two preceding witnesses was received under objection.

On the part of the plaintiff, William Cox deposed That he had been a shorthand writing clerk of Mr. Rose for about eighteen months; never suggested to Wymark to be a witness, knowing that he was not present at the accident; Wymark and Dodd went to see Moriarty, who introduced them to witness, and witness referred them to his master, Mr. Rose; Moriarty told witness that they were present at the accident; Wymark and Dowle called at Mr. Rose's office on the 28th Jan., and witness then took down their statement in shorthand in the presence of Mr. Rose's managing clerk; never suggested to Allen to be a witness, and never asked Pitt to become a witness.

Mr. Moriarty, the male plaintiff, was also called, and denied having asked Wymark to be a witness, knowing that he had not been present at the accident.

The learned judge having summed up the case to the jury, the jury returned a verdict for the defendants.

Q. B.] MORIARTY AND WIFE v. THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY. [Q. B.]

Giffard, Q. C. having, on the part of the plaintiff, obtained a rule nisi calling on the defendants to show cause why the verdict should not be set aside, and a new trial had between the parties, on the ground of the misreception of the evidence of the defendants' witnesses, Wymark, Allen, and Pitt, and also on the ground of surprise, and that the evidence of the said witnesses, Wymark, Allen, and Pitt, was unworthy of belief, as set out in certain affidavits sworn on behalf of the plaintiff.

Huddleston, Q. C. and *J. C. Carter* now showed cause against the rule. The evidence of Wymark was clearly admissible to show the existence of a conspiracy on the part of the plaintiffs with others to defraud the railway company. [BLACKBURN, J. —You may certainly call witnesses to show the existence of a conspiracy, and thereby impeach the credit of persons who have been called. You seek to go further than that here, and to impeach the credit of persons who have not been called as witnesses.] On the trial of *Lord Stafford* (7 Howell's St. Trials, 1400) evidence was offered on the part of the accused, and was received, to show that the chief witness against him had endeavoured to persuade people to swear against him falsely, and had offered them money for doing so. This is an authority in favour of the admissibility of Wymark's evidence; and if his evidence was admissible, that of Allen and Pitt was also admissible, as strengthening his. [BLACKBURN, J. referred to *Annesley v. The Earl of Anglesea*, 17 Howell's St. Trials, 1139.] Even if Wymark's evidence and that of Allen and Pitt was inadmissible, there was enough without it to sustain the verdict, and under such circumstances a new trial will not be granted. In *Doe v. Tyler*, 6 Bing. 561, it was held that the court will not grant a new trial on the ground that evidence has been admitted which ought to have been rejected, if, exclusive of such evidence, there be enough to warrant the finding of the jury. "I will assume," said *Tindal*, C. J., "for the purpose of this discussion, though I give no opinion on the point, as we have not heard the other side, that the evidence in question ought not to have been received. But the court will not close their eyes to the rest of the evidence; and if they see that there is enough, not merely to make the scales hang even, but greatly to preponderate in favour of the defendant, they will not send the cause to a jury again. It has been contended that we are to analyse the evidence by a difficult process, and to discriminate the precise effect produced on the mind of the jury by each portion of the proof; but we have a much plainer course, and that is to hear the report of the trial, and to sustain the verdict if we are satisfied that there is enough to warrant the finding of the jury, independently of the evidence objected to." In *Horford v. Wilson*, 1 Taunt. 12, *Mansfield*, C. J., said, "The court will not set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorise the finding of the jury." As to the other point, i.e., of surprise, neither *Cox* nor *Moriarty* affirms by affidavit that either was taken by surprise.

Giffard, Q. C., and *Hodgson*, in support of the rule. —The evidence of Wymark, Allen, and Pitt, was improperly admitted. In the *Queen's case*, 2 Brod. & Bing. 302, the judges were of opinion that if on the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that A. B. (not examined as a witness) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine

C. D. as a witness to prove that A. B. offered a bribe to E. F. in order to induce him to give testimony touching the matter in the indictment, E. F., not being a witness examined in support of the indictment, nor examined before it was so proposed to examine C. D. They were also of opinion that if on the trial of an indictment for any crime, evidence has been given upon the cross examination of witnesses examined in chief in support of the indictment from which it appears that A. B. (not examined as a witness) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine G. H. as a witness to prove that A. B. offered him a bribe to induce him to bring to A. B., papers belonging to the party indicted; G. H. not having been examined as a witness in support of the indictment. The first of these two rulings is strictly applicable to the present case. The "question," said *Abbott*, C. J., "must, as it appears to me, be considered in the same mode, and must receive the same answer, as if the parties were reversed; as if, instead of proof offered on the behalf of the defendant, respecting the act of an agent employed by the prosecutor, it were proof offered in reply on the part of the prosecutor respecting the conduct of an agent, employed by the accused to procure and examine evidence and witnesses in support of his defence. If such proof can be received on the part of a defendant, it must be received on the ground that it may lead to a legitimate inference and conclusion that the witnesses examined against him, although not appearing to have been called before the court by any undue means, are, nevertheless, on this ground extraneous and foreign to them, not to be considered as witnesses of truth. And, if such an inference and conclusion can be reasonably and legitimately drawn in favour of a defendant, in the case proposed by your Lordships, I am unable to discover any principle upon which I may say that the like conclusion may not be with equal reason drawn against him in the analogous case that I have taken the liberty to suggest; so that proof of this nature, if admissible, must be expected to lead as frequently to the condemnation of an innocent man by casting discredit upon his defence, as to the acquittal of such a person by disgracing the prosecutor." Even supposing the evidence of Wymark, Allen, and Pitt to be true, the evidence of the female plaintiff and the other witnesses examined on her behalf does not on that account lose its force. The further remarks of *Abbot*, C. J. bear out strongly this view. Speaking of the witnesses examined, he says, p. 307, "the proposed proof does not directly affect them; it regards an act to which, according to the hypothesis, they may be entire strangers; and, being an unlawful act, they are not to be presumed to have been parties to it, or to any other act of the like nature without proof against them; they may be persons of honour and probity deposing to facts really and truly occurring within their own personal knowledge, and taking place within their own sight or hearing, as they have averred upon their oath. It may have been intended that the person to whom the bribe was offered should speak to other facts occurring at another time, and in another place wholly unconnected with them or with the matters to which they have deposed. Can it, then, be reasonably concluded that the facts deposed by them are untrue; that, however respectable or numerous they may be, they must be all wicked and perjured men because some other man has, from overweening zeal or a corrupt heart, wickedly endeavoured to induce by money another person to give evidence touching the matter of the indictment, on which they have appeared? I must say, my Lords, that

Q. B.] MORIARTY AND WIFE v. THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY. [Q. B.]

I am of opinion that such conclusion cannot reasonably be drawn. . . . The utmost effect, in my opinion, of the proposed proof (and in many cases, even this would not be a fair or reasonable effect) would be to excite suspicion; but suspicion is not a legitimate ground for the verdict of a jury which ought only to be founded upon reasonable and probable proof." [COCKBURN, C. J.—Still can it be said that, from the conduct of a party in relation to a particular case for the purpose of obtaining a decision in his favour, there may not be a legitimate inference that he considered that if the case were justly determined it would be determined against him.] Moriarty was only technically and theoretically plaintiff in the present case; he himself had no personal knowledge of the merits of the case. [BLACKBURN, J.—But no person can have better means of knowing the merits of his wife's case than her husband.] In the *Attorney-General v. Hitchcock*, 1 Ex. 91, in an information under the revenue laws a witness who had given material evidence as to the fact in issue, was asked on cross-examination whether he had not said that the officers of the Crown had offered him a bribe to give that evidence, and he having denied that he had ever said so, it was held that evidence to show that he had made such a statement was inadmissible. The reasons given by Rolfe, B. in support of this ruling are strictly applicable to the present case. "If we lived for 1000 years instead of sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded or what portion if it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that would be; in fact mankind find it to be impossible. Therefore some line must be drawn, and I take it the established rule is that you may contradict any portion of the testimony that is given in support or contradiction of the issue between the parties. That is clear. Then undoubtedly mankind have felt that, as facts are frequently to be proved by the testimony of men of suspicious character, you may inquire into the genuineness and truthfulness of the party who gives such testimony." But it is nowhere said that evidence may be given to contradict testimony which has not been given.

COCKBURN, C. J.—I think this rule ought to be discharged, in so far as relates to the ground taken that the evidence was improperly admitted. I think it was rightly admitted. The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defence taken, if he is defendant, is an honest and just one; just as the giving evidence to convict a prisoner that he has said one thing at one time and another at another time, for the purpose of showing that the recourse to falsehood leads fairly to an inference of guilt; or, as you may generally show, that a man who is alleged to have stolen an article was seen throwing it away. All those things which are cogent, anything from which an inference is to be drawn, is valuable and important evidence with a view to the issue. Here, if you can show that a man has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong to show that he knew perfectly well that his cause was an unrighteous one; I do not say it is conclusive evidence; but I fully agree that it should be put to the jury. Because, a man, not sure that he will be able to succeed by righteous means, has recourse to means of a different character to accomplish the object which he desires, namely, the

gaining the victory when he believes that in justice he is entitled to it, it does not necessarily follow that he has not a good cause of action, any more than it does from a prisoner's making a false statement for the purpose of increasing his appearance of innocence, that he is necessarily guilty. But it is always evidence which ought to be submitted to the tribunal which has to judge of the fact; and therefore I think that, inasmuch as here the evidence went to show that the plaintiff, who is not only the nominal but also in some sense the substantial plaintiff (seeing that the damages would have gone into his pocket), was present when Cox, who was acting in a certain sense as a clerk to the plaintiff's attorney, was endeavouring to suborn witnesses, and must be taken to be a party to the subornation, the evidence was admissible. And it being shown that after that the same Cox goes and solicits witnesses to commit perjury, although the plaintiff Moriarty was not present at those subsequent interviews, I think there was evidence to go to the jury that what Cox did was done in furtherance of an object which was common to him and the plaintiff, and that he was acting under the authority of the plaintiff; it being also shown—a fact about which I think there was no dispute at the trial—that one of the witnesses, Allen, was directed by Cox to go to Moriarty's house for the purpose of being told by Moriarty what he was to say at the trial. It appears also that this witness did go, but Moriarty being from home, Cox supplied his place, and told the man what he was to say at the trial. That being so, I think there was a conspiracy between Moriarty and Cox to suborn testimony, and either to set up a false case, or by false testimony to bolster up what might be a fair one. At all events that was all matter which was very properly left to the jury. On the ground, therefore, that the evidence was improperly received, I think that this rule must be discharged. I have some doubt whether a case of surprise has been made out. I am of opinion, certainly, that this is one of those cases in which one desires that evidence of this kind should be sifted to the uttermost. Anything which can be shown to impugn the veracity of witnesses who come forward at the last moment to set up a case of conspiracy to suborn false testimony should be investigated to the utmost. I think, therefore, that on that ground—the ground of surprise—this evidence should be further investigated and sifted, and that we should make the rule absolute on that ground. But then, as no blame can be imputed to the defendants, who got the verdict fairly, the rule for a new trial must be made absolute only on payment of the costs of the last trial. On payment of those costs the plaintiff may have a new trial.

BLACKBURN, J.—I am of the same opinion. On the first question, that of the admissibility of the evidence, I quite agree that the evidence of both Allen and Pitt was admissible. What the plaintiff on the record has said is always evidence against him, its weight being more or less according to circumstances. Even if the plaintiff is merely a nominal plaintiff, a bare trustee for another, the evidence, though slight in such a case as that, would still be admissible. In the present case he is not only the plaintiff on the record, but he is also the person who would have the benefit of the whole cause. It is quite true that he was not present at the time the accident took place; and what he knows about the nature of the accident, and whether or no his wife was injured in the way she says, or whether or no the story of the defendants is untrue, he would only know by way of information and belief. But I think it cannot be disputed that if the defendants got hold of a letter written by Mr. Moriarty, in which he had said, "I am carrying on this action

Q. B.] MORIARTY AND WIFE v. THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY. [Q. B.]

for my wife ; but, though I was not present at the accident, yet from information and belief, we shall, I am convinced, fail utterly in the action, and therefore we must get false evidence to support the case"—I think, under such circumstances, no one could contend—and it was acknowledged by Mr. Giffard that he could not contend—that that would not be evidence to go to the jury as an admission on the part of Moriarty, though by no means conclusive, because he might have been making a mistake, but still evidence to go to the jury with its proper weight, care being taken to caution the jury not to give it too much weight. Now comes the question whether or no, where there is evidence that the plaintiff tried to suborn false witnesses to swear what was false within his knowledge, the jury can draw a conclusion from that exactly the same as if a letter such as I have referred to had been put in evidence (it seems to me that in common sense the inference from such conduct would be very strong); but the plaintiff did not do that because he was doubtful about his case being a true one, but because he doubted as to the jury drawing an inference from it that it was not a good one. As to the authorities on the subject, the cases, so far as I can ascertain them from the text books, one and all say more or less that evidence as to conduct is admissible evidence; but I do not think there is any case on this subject in which it was really so ruled, except the celebrated case of *Annesley v. The Earl of Anglesea* (*ubi sup.*), in which I think it was distinctly determined. In that case after the evidence was tendered on the first day, there was a difference of opinion between the judges as to whether the evidence should be admitted, and the Chief Baron thought it should not, because in substance the objection was that it would lead to a long collateral inquiry as to whether or no the prosecution was instituted with reasonable and probable cause. Mountenay, B. was very strong the other way, and Dawson, B. said, "I am very glad that there is no necessity for giving our opinions immediately on this point. I shall, therefore, decline giving any positive opinion as we have this night to consider of it, and in the mean time the gentlemen on both sides might look into the cases to clear it up to the court. The prosecution here is agreed to be a lawful act, and is not immediately relative to the matter in issue. The difficulty with me is that, if this be given in evidence, a jury may from a lawful act not immediately relative to the issue draw an unwarrantable consequence. If the act were unlawful it would undoubtedly be good evidence; there could be no other way of accounting for the party's subjecting himself to legal punishment; but where it is not unlawful it may be dangerous to leave the intent to the jury. We will consider this matter, and give our opinions on it to-morrow." On the morrow, a great deal of matter was produced, which went into the question whether a witness's professional evidence could not be admitted. Then Dawson, B. in giving judgment about reserving the point, said, "I think it proper at this time to mention that I have considered the point of evidence that was proposed yesterday; and if it was now to be determined I should be of opinion to allow the evidence; and if the counsel for the defendant should so please, they may take a bill of exceptions." After that the evidence comes in, and in the course of the argument the strong way in which Mountenay B. puts it in charging the jury, whether an admission of this, the prosecution for murder of an innocent man, would not discredit the witnesses, would have great weight in principle. Now that point applies to the witness Wymark in the present case, who swears that Moriarty was present when there was this effort to procure him to give false evidence. But his evidence goes further

than that. He says that at that time Cox went on to say that he had two witnesses who were to swear falsely, and if he would come and join it would be a good case, and if he would not he would get another; all of which, as I understand it, is said to have taken place in Moriarty's presence. That may have been all false or not, but it was for the jury to decide upon; and if it were believed, there was, I think, sufficient to show concert between Moriarty and Cox to get such false evidence as might be necessary with what had been done by the express authority of Moriarty. If they were tried for conspiracy, the evidence of Wymark as to what Cox did, would be evidence of facts done in furtherance of the design for the jury, but yet the jury might reject it on the ground that Cox was not acting with authority. I do not wish to express any opinion one way or the other as to what would have been the case if a person who had the sole conduct of the cause had suborned witnesses, whether, as showing an unlawful act, that would be admissible or no. I doubt very much whether the witness speaks the truth about Moriarty and Cox telling him that they wanted him for the purpose of committing perjury. Still, if two witnesses give evidence to that effect, and are unshaken in their testimony, which is consistent with truth, it might very well influence the jury. But the point before us at present is, is the evidence admissible? I think it is, and I have no doubt that it went to the jury with a proper direction to them. I quite agree that the jury should be cautioned against giving too much weight to such evidence; which they might possibly do in error, and against the danger of punishing a man by denying him a right of action on account of the falseness of some of his testimony, and that they should see carefully whether it shook their belief in his own evidence. That, I am sure, was properly done by my learned brother, and no motion has been made on the ground of misdirection. Then as to the affidavits of surprise. I hardly think they make out a case of surprise; but I quite agree with my Lord that the matter is such that if the plaintiff pays the costs of the former trial, it ought to be discussed again, and therefore that there ought to be a new trial on those terms.

LUSH, J.—I also think, on further consideration, that the evidence was receivable. I had formed no definite opinion on the subject at the trial itself. It is a new point, and I adopted what I considered to be the usual course, and the safer course where evidence is pressed on one part and objected to on the other part, viz., not to form a strong opinion one way or the other, but to receive the evidence at the risk and peril of the party tendering it. The argument which the matter has undergone has led me to consider the question more fully, and I am now quite satisfied, along with my brothers, that this species of evidence is receivable, and is receivable as an admission by the party that the case he was putting forward was not a true one. It was an admission by conduct and was receivable on that ground. The effect of it is entirely for the jury! No doubt there are cases—perhaps it frequently happens—in which a person has endeavoured to bolster up a good case by fictitious evidence. That goes to its weight merely, and should be so pointed out to the jury. It is a matter entirely for them. I also think that no distinction can be made as to the character of the party suing—whether the party is suing in a representative character merely, or to enforce some right of his own. Either way, the inference which the evidence tends to raise is that the case is not a true one, and on that ground the evidence is receivable. Looking at the whole matter I entirely agree that it is fit, having regard to the character and conduct of the parties, that the matter

C. P.]

STEWART v. YOUNG.

[C. P.]

should undergo further examination, and, therefore, that the rule for a new trial should be made absolute on the terms already mentioned.

Rule absolute on payment by plaintiff of costs of first trial.

Attorney for plaintiff, J. A. Rose.

Attorney for defendants, Cleather.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING,
Esqrs., Barristers-at-Law.

Wednesday, Jan. 26.

STEWART v. YOUNG.

Slander of title—Privileged statement—Evidence of malice.

S. died intestate and indebted to A. in about 80l. His widow, who remained in possession of his house and furniture, executed a bill of sale over the latter, in favour of A., and died without ever having taken out letters of administration. On her death the plaintiff took out letters of administration as brother to R. S., and directed the property to be sold by auction. The defendant then, as agent for A., put himself in communication with the auctioneers with a view to preventing the sale; but the auctioneers by letter clearly informed him of the invalidity of the bill of sale under which A. claimed. Notwithstanding this notice, the defendant at the sale, said, "I forbid the sale, for I hold a bill of sale over everything in the house in favour of A." Evidence was given that, in consequence of the defendant's conduct, the property did not realise at the sale so much as it would otherwise have done:

Held, on an action for slander of title, that there was no evidence of malice to go to the jury.

Action for slander of title.

The declaration stated that the plaintiff was the administrator of the goods, &c., of Robert Stewart, deceased, and as such administrator caused certain goods of which he was possessed as such administrator, to be put up for sale by public auction; and that the defendant at the said auction, &c., spoke, &c., in relation to the plaintiff's title as such administrator to sell, &c., the words following:—"I forbid the sale, for I hold a bill of sale over everything in the house in favour of Mr. Alexander. I shall not allow a single lot to leave the house." Whereby the said goods were sold for less prices, &c.

Plea, not guilty.

The cause was tried before KEATING, J., at the Middlesex sittings in last Hilary Term. It appeared that the late Robert Stewart had kept a public-house, and had died in Feb. 1865, indebted in about 80l. to Messrs. Alexander, his landlords. On his death, his widow remained in possession of his house, goods, and effects; and, to secure the debt owing to Messrs. Alexander, gave them a bill of sale on the latter. She, however, never took out letters of administration to her husband. On her death, in March 1869, the plaintiff, who was brother to the deceased Robert Stewart, took out letters of administration, and gave instructions to a firm of auctioneers to proceed to sell the goods of his deceased brother, and also to arrange with Messrs. Alexander for a surrender of the lease of the house. The defendant, who was agent to Messrs. Alexander, then informed the auctioneers of the bill of sale held by his principals, and refused to assent to the sale taking place. The sale nevertheless took place on the 22nd July last. On the day before the sale the auctioneers wrote the following letter to the defendants:—

[Stewart deceased].

To Mr. Young.

July 21st, 1869.

DEAR SIR,—In the hurried letter we last wrote you, wherein we stated we had been informed that the bill of sale held by the brewers had been fully satisfied, &c., it appears that midst press of business we somewhat misunderstood our instructions, which are that 40l. has been paid on account of the bill of sale, but that the brewers in reality have no legal right or title whatever to the security they claim, inasmuch as the deceased had no title thereto; a portion of the furniture, moreover, being the property of the heirs-at-law of her late husband. It appears there are very few debts owing, and we shall use our utmost endeavours to realise the effects to best advantage, in order that they may be discharged. We cannot, however, but feel that the course which the brewers have deemed it most to their interest to pursue has been calculated rather to defeat than to assist our endeavours on this head.—Yours, &c.,

H. & Co.

P.S.—Since writing the above, our Mr. H. has perused your letter of this day's date. For the reasons already given, the business can only be wound-up in the way we propose, and either on or off the premises, the furniture will be sold to-morrow, and however pleased Mr. H. would have been to meet your clients at the proper time, you must see that at the eleventh hour such a meeting could be productive of no good. The only matter in which we can now assist you is in arranging for a speedy surrender of the premises, and this all parties will still be happy to do.—H. & Co.

Notwithstanding this letter, the defendant attended the sale and spoke the words attributed to him in the declaration. Evidence was given that in consequence of the language of the defendant, the goods sold for much less than they would otherwise have fetched.

On these facts the learned Judge nonsuited the plaintiff, on the ground that the occasion of the defendant's interference was privileged, and there was no evidence of express malice.

Montagu Chambers, Q.C. now moved to set the nonsuit aside and for a new trial, on the ground that there was evidence to sustain the action. To support an action for slander of title, "the words must be uttered maliciously, and the damage must have arisen from the words so uttered:" (*Brook v. Rawl*, 4 Ex. 521.) If the defendant, being interested and not a mere stranger, makes the statement, though untrue, *bona fide* and on reasonable grounds, he is not liable: (*Pitt v. Donovan*, 1 M. & S. 639; *Roscoe on Ev.* 527.) The question then ought to have been left to the jury whether, although the defendant was not a mere stranger, he did not act contrary to good faith, and whether he could possibly have thought, after the warning he had received, that he had any reasonable ground for acting as he did. In *Pitt v. Donovan*, 1 M. & S., 643, Lord Ellenborough, C.J. said:—"I think there is no necessity for troubling the other side on this occasion, for in this matter I cannot help thinking that the point which was peculiarly for the consideration of the jury, and on the event of which this case ought to depend, was not left to them correctly, and that it ought, therefore, to be presented to the consideration of another jury; and that point is whether the defendant made that statement *bona fide*, and under an honest impression of its being the truth, or whether he made it maliciously and for the purpose of slandering the title of the person that was about to convey his estate." The defendant having acted as he did after the caution he had received, the jury would have been quite justified in concluding that he acted without *bona fides* and without reasonable grounds.

BOVILL, C. J.—Assuming that there was a bill of sale executed by the widow to secure the debt of 80l. to Messrs. Alexander, I think that the occasion on which the defendant interfered in the sale was privileged. It was known to the auctioneers that Messrs. Alexander held a bill of sale, which had been executed by the person at the time in possession of the goods, who was acting as executor *de son tort*, and that Messrs. Alexander meant to assert their rights under it. Messrs. Alexander

C. P.]

ALLEN (app.) v. TOWN CLERK OF WARRINGTON (resp.)

[C. P.]

employed the defendant to protect their interests. The defendant accordingly went to the sale and gave notice of the bill of sale to intending purchasers. Under such circumstances, I think that the defendant not only had a right to give notice of the bill of sale, but he was bound to give it. As was said by Bayley, J. in *Pitt v. Donovan*, 1 M. & S. 649, "I think that if the defendant really believed this contract to be void for the want of sanity in Y., it was not only his right but his duty to make the communication." Under these circumstances the *prima facie* presumption of malice is rebutted; and the question then arises, whether there was any evidence of express malice. "The jury must arrive at their conclusion in this case through the medium of malice or no malice in the defendant"—per Lord Ellenborough, C. J. in *Pitt v. Donovan*, 1 M. & S. 645. As to that point it is sufficient to say that, if the learned judge had left the question to the jury, and they had found that there was express malice, the verdict could never have been sustained. The rule must be refused.

BYLES, J.—I also think that my brother Keating did right in refusing to allow the case to go to the jury. Two things are essential to the maintenance of this action, first, that the words used should be false; secondly, that they should be malicious. Now the words were true. The defendant did hold a bill of sale in favour of Messrs. Alexander. The first essential, then, does not exist; moreover there was no evidence of malice.

M. SMITH, J.—I am of the same opinion. The widow, acting as executor *de son tort*, gave Messrs. Alexander what they conceived to be a good security. The plaintiff subsequently administered, and then gave instructions to have the goods sold by auction. It was only natural and proper that the Messrs. Alexander should give notice of their claim to intending purchasers. It is admitted by Mr. Chambers, that in these actions it is not sufficient to show that the claim set up was invalid, but it must be shown that it was maliciously made. As was said by Maule, J. in *Pater v. Baker*, 3 C. B., 868, "not . . . malicious in the worst sense; but with intent to injure the plaintiff." Was there such evidence in this case? The plaintiff's case was, that the auctioneer had sent a letter which amounted to this—that there was a dispute between the auctioneer and the defendant whether Messrs. Alexander had a good or a bad title. This is not sufficient evidence of malice. It was settled clearly enough in *Ryder v. Wombwell*, 17 L. T. Rep. N. S. 609, Ex. Ch.; 19 L. T. Rep. N. S. 491, that a mere scintilla of evidence is not sufficient, and that no case should be laid before a jury unless there is evidence on which (to use the language of Willes, J. in delivering the judgment of the Court of Exchequer Chamber in *Ryder v. Wombwell*) "the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant." That is a reasonable and proper rule. It would be absurd for us to send the case down again for trial, when we are satisfied that no jury could, on such evidence, properly find for the plaintiff.

BRETT, J.—I think that the nonsuit was right on both grounds. There was in the first place no evidence that the defendant's expressions were untrue in fact. But, supposing them to have been so, they were used by him as agent for Messrs. Alexander, and were consequently privileged, unless actual malice was shown. The plaintiff would have given

some evidence of actual malice if he had shown that the statements were made without any belief in their truth, and irrespectively of the interests of Messrs. Alexander. But the only evidence adduced by the plaintiff is, that the defendant was told that the bill of sale was invalid, and that he did not agree with that opinion and said it was valid. There is no further evidence. This is no proof of *mala fides*. The law has been settled for some time by the case of *Smith v. Spooner* (3 Taunt. 246), where the facts were similar to those of the present case, and in other cases from *Watson v. Reynolds* (Moo. & M. 1), down to *Wren v. Weild*, 20 L. T. Rep. N. S., 1007; L. Rep. 4, Q. B. 730; 38 L. J. N. S., 327, Q. B. The rule therefore must be refused.

Rule refused.

Attorney for plaintiff, W. Bristow.

Attorneys for defendants, White, Broughton, and White.

REGISTRATION APPEAL.

Friday, Jan. 21.

ALLEN (app.) v. TOWN CLERK OF WARRINGTON (resp.)

Registration—Notice of objection—Sufficiency of description—6 & 7 Vict. c. 18, s. 17.

A notice of objection to a borough voter was signed "S. D. on the list of voters for Golborne-street, in the borough of W." The borough of W. consisted of three townships, each having a separate overseer, who made out a list of voters for his own township.

Held, that the objector must give such a description of the list on which his name was to be found as would be commonly understood by the people resident in the locality to designate the particular list, and that it was for the revising barrister to decide whether, as a matter of fact, the description given would be so understood.

Case stated by the revising barrister for the borough of Warrington.

At a court held before me, &c., S. Dunbobbin objected to the name of John Allen, and of the other persons whose names appeared in the schedule hereunder written, being retained in the list of voters for the borough. The notice of the objection which had been served upon the said parties was in the following form:

To John Allen, 12, Rolleston-street, Warrington.
I hereby give you notice that I object to your name being retained on the list of persons entitled to vote in the election of a member for the borough of Warrington.
Dated this 24th day of August 1869.

(Signed) SAMUEL DUNBOBBIN,
on the list of voters for Golborne-street,
in the borough of Warrington.

It was objected on behalf of the said John Allen, and of the other persons, &c., that such notices of objection were bad, as they did not specify the list upon which the name of the objector was to be found, and that they were not called upon to prove that they were entitled to have their names retained on the register.

The borough of Warrington consists of three townships, each having a separate overseer, each of whom has only one list of voters to make out; and the register of voters for the borough of Warrington is composed of the said three several lists.

It was contended in support of the objection to the said notices that they did not comply with the form and directions given in Sched. B., No. 11, of 6 Vict. c. 18, not stating upon which of the said three lists the name of the objector appeared.

I held the notices of objection good, and granted this case for the decision of the Court of Common Pleas as to whether it was necessary that the objector should state in the notice of objection upon

C. P.]

FRIEND v. BUCKLEY.

[Ex. Ch.]

which particular list of voters his name was to be found.

If the court think the notices of objection bad, the several names hereunder written are to be inserted in the list of voters.

Holker, Q. C. (*Barstow* with him) for the appellant. (The respondent did not appear.)—The question here is as to the validity of the notice of objection. The appellant's case is, that the objector did not specify on which list his name was to be found. The Act 6 & 7 Viet. c. 18, s. 17, says that the person making the objection shall give to the overseers a notice according to a particular form. That form is given in number 10 in Schedule B of the Act. He must give to the person objected to a notice according to Form 11 in the same schedule. If we look at those forms they are signed "A. B. on the list of voters for the parish of —." In a note to the forms given in the schedule, it is distinctly provided that "if there is more than one list of voters, the notice should specify the list to which the objection refers." This form does not say in what parish Golborne-street is. Thus the person objected to cannot discover whether the person objecting has a right to object, without taking more trouble than the Act requires. There was no list of voters for Golborne-street, and for aught that appears that street may be partly in one township and partly in another. [BRETT, J.—Supposing the revising barrister had found as a fact that there was only one Golborne-street, and that the whole of it was in one township.] Still the directions of the Act of Parliament were not followed. In *Crowther v. Bradney*, Hopw. & Philb. 63; 33 L. J. 70, C. P.; 9 L. T. Rep. N. S. 414, where the objector described himself as "on the list of persons entitled to vote for a member for Kidderminster, in respect of property occupied within the parish of Kidderminster," which parish consisted of "the borough of Kidderminster," "the foreign of Kidderminster," and "the hamlet of Lower Milton," for each of which separate overseers and churchwardens were appointed, and separate lists made, the notice was held insufficient. ERLE, C. J., in giving judgment in that case, said:—"I do not think the description given by the objector is sufficiently precise to enable the person objected to to find his name in the proper list, without being subjected to the undue burden of having to search several lists in several places." In *Eidsforth v. Farrer* (4 C. B. 9; 1 Lutw. 517), a notice describing the objector, who was on the list of freemen, as "on the list of voters for the borough of L.," was held insufficient. In *Moon v. Andrew* (19 L. T. Rep. N. S. 452; L. Rep. 4 C. P. 461) the objector described himself as "on the list of voters for the borough of Penryn," and the description was held sufficient; but there, although there were six lists for the Parliamentary borough of Penryn, it clearly appeared from the context that the old borough of Penryn, for which only one list was made, was meant. [WILLES, J.—Does not the provision in the 101st section of the 6 & 7 Viet. c. 18 apply, that no misnomer is to vitiate a notice, provided that the place "be so denominated in such . . . notice, as to be commonly understood?"] BOVILL, C. J.—Supposing that the lists for the different parishes in a borough were numbered respectively 1, 2, and 3, and the objector had specified the number of the list, would not that have been sufficient? The cases cited point the other way.

BOVILL, C. J.—Those cases were decided on the ground that the objector stated nothing to indicate which of several lists he referred to. The case may be different here. Supposing that there were at Warrington, a township called Golbourne-street,

everyone would understand which list the objector meant; also if the lists were numbered, and the number of the list had been given, unless we are to say that each word in the Act is to be followed. The 101st section of the Act forbids such strictness. We must then take it that the revising barrister thought that the description was such as to be sufficiently understood. The only question, however, left to us is whether it is necessary that the objector should state on what list his name is to be found. Our answer to that is that he must give such a description of the list as would be commonly understood by anyone in the locality to designate which list he refers to. Whether or no the objector has done so here is a question of fact which we are unable to decide. The case then must be sent back to the revising barrister for him to decide as a matter of fact, whether the description "on the list of voters for Golbourne-street" was one that would be commonly understood by the persons objected to. If there were two streets of the same name in different parishes, the description would be vague; but if there is only one Golbourne-street, and that street is well known at Warrington, the description might well be sufficient.

WILLES and BRETT, JJ. concurred.

Case to be amended accordingly.

Attorney for the claimant, *Farington*.

EXCHEQUER CHAMBER.

Reported by J. SHORTT, Esq., Barrister-at-Law.

Nov. 27, 1869, and Feb. 4, 1870.

(Before KELLY, C. B., WILLES AND KEATING, JJ., CHANNELL, PIGOTT, AND CLEASBY, BB.)

FRIEND v. BUCKLEY.

Vendor and purchaser—Leasehold property—Abstract of title—Obligation to produce original lease where more than sixty years old.

The vendor of leasehold property is bound on an unconditional sale of the property to produce the original lease, or give evidence of its contents, equally where the original lease is more than sixty years as where it is less.

On a contract for the sale of leasehold property by A. to B., the abstract of title set forth an indenture of the 13th Sept. 1800, reciting an indenture dated the 20th Jan. 1606, by which certain lands, &c. (of which a part was the subject of the contract) were demised for a term of 1000 years from Michaelmas 1599, at the yearly rent of one penny payable at Michaelmas only if demanded. To a requisition for the production of an attested copy of the lease of 20th Jan. 1606, and for a covenant for its production by the legal possessor, the vendor replied that the production of a deed more than sixty years old could not be insisted upon, whereupon the purchaser rescinded the contract, and brought an action for the recovery of the amount paid to the vendor as a deposit.

Held (affirming the judgment of the Queen's Bench), that the purchaser was entitled to rescind the contract, and to recover by action the amount of the deposit.

This was an appeal from the judgment of the Court of Queen's Bench, refusing a rule to the defendant to enter a nonsuit pursuant to leave reserved at the trial of the cause.

The action was brought to recover the sum of 400*l.*, being the deposit paid by the plaintiff upon the purchase by him from the defendant of certain freehold and leasehold premises, and also the sum of 59*l.* 16*s.* 4*d.*, the expenses of investigating the

Ex. Ch.]

FRIEND v BUCKLEY.

[Ex. Ch.]

defendant's title to the said premises; the declaration alleging that the defendant did not, within the time agreed upon, nor at any time, deliver and make a good and marketable title to the premises. The declaration contained also the ordinary money counts.

The defendant pleaded:—1. That he did not agree as alleged. 2. For a defence on equitable grounds, that he did deduce and make a good title to the premises, according to the true intent and meaning of the agreement, and within a reasonable time. 3. That the plaintiff waived the stipulation as to the defendant's making a good and marketable title within the time specified, and that the defendant did within a reasonable time afterwards make a good and marketable title. 4. That the plaintiff did not within twenty-one days after the delivery to him of the abstract of title deliver all requisitions to the said title, and thereby accepted the defendant's title according to the true intent and meaning of the agreement. 5. To the rest of the declaration, never indebted.

The case was tried before Hannen, J. on the 5th June 1868, when a verdict was entered for the plaintiff for 459*l.* 16*s.* 4*d.*, subject to leave reserved to the defendant to move to set aside the verdict and to enter a nonsuit. A motion was accordingly made on behalf of the defendant in Michaelmas Term of that year, when the Court of Queen's Bench refused to grant a rule.

The facts proved at the trial on the part of the plaintiff were as follow: On the 8th Jan., 1868, the plaintiff, who is an architect and surveyor, carrying on business at No. 44, Bedford-row, Holborn, entered into an agreement with the defendant for the purchase of two farms, consisting the one of freehold, the other of leasehold property.

By this agreement the vendor agreed to sell, and the purchaser to purchase (subject to a mortgage of 5000*l.* at interest at 4*l.* per cent. per annum to R. T. Fisher and others) all those farms and lands belonging to the vendor, situate at Ifield, Crawley, in the county of Essex, and known as Lyons Farm and Gossips Green Farm, whereof, Gossips Green Farm, containing about 58 acres and 16 perches, or thereabouts, is freehold, and Lyons Farm, containing 94*a.* 3*r.* 12*p.*, or thereabouts, is leasehold, for the residue of a term of 1000 years, from Michaelmas, 1599, at the rent of one penny, at or for the price or sum of 3575*l.*, 400*l.*, part thereof, to be paid by the purchaser as a deposit and in part payment of the purchase-money, the vendor to deduce a good and marketable title to the said farms and lands, and to deliver an abstract of his title to the purchaser within seven days from the date of the agreement, and the purchaser, within twenty-one days after delivery of the same, to deliver all requisitions to the title, and in default thereof to be deemed to have absolutely accepted the title; the purchase to be completed, and the balance of the purchase-money paid to the vendor on or before the 25th of March following; when the purchaser should have possession. If, from any cause whatever, the purchase should not be completed on that day, the purchaser to pay interest at the rate of 5 per cent. on the balance of the purchase-money, and interest at the rate of 5 per cent. on the mortgage debt of 5000*l.* The purchase to include all growing crops, ploughings, dressings, hay, straw, fodder, manure, &c., in and about the said farms and lands, except the two houses and the oxen belonging to the vendor, and except the furniture and agricultural implements (if any) belonging to the then tenant of part of the premises. If the purchaser should fail to complete his purchase by the time mentioned, the deposit to be forfeited, and the vendor to be at liberty to resell the property by public auction, and any deficiency to

be made good by the purchaser to the vendor. The vendor to pay all outgoing to the 25th March, and to continue until that time all needful and expedient farming and other operations upon and about the premises.

An abstract of the defendant's title to the property sold was received by the plaintiff from the defendant on the 16th Jan. 1868.

That part which related to the leasehold premises began with an indenture of 13th Sept. 1800, made between Henry Blunt, of Chelsea, in the county of Middlesex, esquire, the executor named in the last will and testament of Samuel Blunt, then late of Horsham, in the county of Sussex, esquire, deceased, of the one part, and George Hutchinson, of Westheathly, in the county of Sussex, esquire, of the other part, reciting that by indenture, dated 20th Jan. 1606, and made between Sir Anthony Mayne, knight, George Blencoe, esquire, and Henry Halt, of the one part, and John Middleton of the other part, for the considerations therein mentioned, the said Sir Anthony Mayne, G. Blencoe, and Henry Halt, did demise, grant, and to farm let unto the said John Middleton, his executors, administrators, and assigns, all those messuages, mills, cottages, farms, orchards, gardens, lands, tenths, and hereditaments, with all and singular their appurtenances, commonly called or known by the name or names of Ifield Forge, Ifield Furnace, and all other the mills, messuages, lands and tenths theretofore demised by the said Sir Anthony Mayne, by the name of A. Mayne, Esq., and Arthur Middleton, and unto the said John Middleton or either of them, and also all those the lands and tenths then or theretofore called or known by the name or names of Poyningham, Fletchers, or Bowling Spitts, Chaulktons, Rowswood, Blackhurst, and by what other name or names soever they or either of them were called or known by, situate, lying, and being in the parishes of Ifield, Crawley, and Beeding *alias* Seale, or either of them in the said county of Essex; and also all other the messuages, lands, tenths, and other hereditaments of them the said Sir Anthony Mayne, George Blencoe, and Henry Halt, or either of them in the said parishes of Ifield, Crawley, and Beeding, *alias* Seale, or either of them, theretofore demised or to farm let to the said John Middleton, William Heaver of Ifield, or John Woodman, or either of them in the said parishes of Ifield, Crawley, and Beeding *alias* Seale, or either of them in the said county of Sussex; and also all other the messuages, lands and tenths in the said parishes of Ifield, Crawley, and Beeding *alias* Seale, or either of them, all which said messuages, mills, lands, and tenths contained in the whole by estimation 574 acres, to hold unto the said John Middleton, his executors, administrators, and assigns, from the feast of St. Michael the Archangel 1599, unto the full end and term of 1000 years, under the yearly rent of 1*d.*, payable on the said feast day only (if demanded), and the said Sir Anthony Mayne, George Blencoe, and Henry Halt, by the now reciting indenture for the consideration therein mentioned, did bargain and sell unto the said John Middleton all the woods and underwoods standing, growing, and being on the said demised premises, and every part thereof. And reciting that by divers assignments, conveyances, wills, bequests, and other acts in the law, the said messuages, mills, lands, tenths, hereditaments, and premises by the said thereinbefore recited indenture demised with their appurtenances, became legally vested in John Middleton, Esq., deceased, for all the residue now to come and unexpired of the said term of 1000 years, in and by the said recited indenture granted, &c. The abstract then set out a number of other assignments.

Ex. Ch.]

FRIEND v. BUCKLEY.

[Ex. Ch.]

On the 3rd Feb., requisitions on the title of the defendant, as set forth in the abstract, were sent to the defendant through his attorney, and replies were returned thereto on or about the first March following. The first requisition was as follows :

Where and when will the several deeds, wills, &c., which are abstracted in chief and the lease of the 20th Jan. 1606, be produced for examination with the abstract? Of course all expenses attending the examination of documents elsewhere than at the office of the vendor's solicitor will be paid by the vendor.

Part of the second requisition was as follows :

The purchaser requires an attested copy of the lease of the 20th Jan. 1606, and a covenant for its production by its legal possessor.

The second requisition also required the delivery of attested copies of a number of other indentures. To these two the replies were :

The production of a deed more than sixty years of age cannot be insisted upon : (See *Prosser v. Watts*, 6 Mad. 59.) As to the mere inheritance term mentioned in No. 2, it is now annihilated by the Act to render the assignment of satisfied terms unnecessary.

No further replies to the requisitions made on behalf of the plaintiff being furnished in the meanwhile, the following notice rescinding the agreement to purchase was given by the plaintiff to the defendant :

Lyons and Gossips Green Farms.

Sir,—In consequence of your having, by your replies to the requisitions on the title, declined to produce the lease dated the 20th Jan. 1606 (to the production of which I am entitled), and of your having by the said replies stated that it is out of your power to provide me with covenants to which I am entitled for the production of such lease, and of divers other deeds and documents which are material to the title of the above farms, or one of them, and which will not be delivered on my paying off the mortgage for 5000*l.* thereon, and of your having failed to prove the representation you made to me respecting the freedom of the estates from the great or rectorial tithes (no grant by the Crown thereof to any lay person having been abstracted or produced, and the same, if in fact a lay inheritance, not having been effectually merged); and in consequence likewise of your having insufficiently replied to divers of the said requisitions, especially those respectively numbered 15, 16, 26, and 28, and of your not having replied at all to others of them, especially those respectively numbered 18, 19, 20, 21, 22, 23, and 24, I do hereby give you notice that I reject the title to the above farms, and rescind my agreement for the purchase thereof, dated in or about the month of Jan. 1868, and expressed to be made between you of the one part and myself of the other part. And I hereby require you forthwith to repay to me, or to pay to my solicitors, Messrs. Palmer, Palmer, and Bull, of No. 24, Bedford-row, Holborn, the deposit or sum of 400*l.* paid by me to you, together with all expenses incurred by me in investigating the title to the said farms, and in relation thereto.

Dated this 12th March, 1868.

A. B. FRIEND.

To Joseph Buckley, Esq.

After the above notice was given, that is to say on the 6th May 1868, it was discovered by the attorneys for the plaintiff that there was a mortgage upon the defendant's property comprised in the agreement of the 8th Jan. 1868, for a further sum, the date of which did not appear at the trial, and which was not mentioned to the plaintiff by the abstract of title or otherwise.

Supplementary answers to the requisitions were delivered on the 14th May, 1868. None of them, however, related to the requisition of the production of the lease of the 20th Jan. 1606 for examination.

On the 6th May the plaintiff's attorneys wrote to the defendant's attorney as follows :

London, 9th May, 1868.

Friend v. Buckley.

Dear Sir,—In reply to your inquiry, we think it likely that we may be able to induce our client to complete, if the vendor will reduce the purchase-money so that it does not exceed £5800. in the whole, that is, including the sum owing on the mortgage and the amount paid on deposit, all the stock and growing crops included. The above is, of course, without prejudice.—Yours faithfully,

PALMER, PALMER, and BULL.

The defendant having refused to repay to the plaintiff the amount of deposit and the costs of investigating the title, this action was brought on the 10th April 1868.

No evidence was given on behalf of the defendant at the trial.

The question for the opinion of the court of appeal was whether the plaintiff was entitled to retain the verdict entered for him at the trial?

Mellish, Q.C. (with him *Morgan Lloyd*), for the appellant (the defendant).—The requisitions sent to the vendor were thirty-seven in all, but four only have been relied on, and the argument in the case turns chiefly upon one of them and the sufficiency of the answer to it, viz., the requisition of the production for examination of the lease of 1606, and the answer that the production of a deed more than sixty years old cannot be insisted on. The non-production of the indenture of 1606 did not, it is submitted, entitle the plaintiff to rescind the contract. There could be no sound practical objection to completing the contract on the ground of the non-production of a deed more than 250 years old under the circumstances of this case. The abstract of title furnished by the defendant begins more than sixty years back, viz., from the 13th Sept. 1800, and there is a complete series of assignments from that time, coupled with the possession of the demised premises, which removes every practical ground of objection. If a deed more than sixty years old recites another older deed, it is not necessary to produce that older deed. In *Prosser v. Watts*, 6 Mad. 59, a conveyance dated in 1753, under which there had ever since been an undisputed possession, recited certain prior deeds as matters of title, which the vendor was unable to produce or give any evidence of, and the purchaser for that reason objected to the performance of his contract, alleging that the recital affected him with constructive notice of the contents of the deeds, and that he could not safely complete his purchase without seeing that the deeds confirmed the title; but the Court overruled his objection. "There is no dispute," said the Vice-Chancellor, "that the recital of a deed is constructive notice of its contents; but to say that a purchaser is not to complete his contract unless he has the actual inspection of every deed of which he has constructive notice by recital would lead to a practical inconvenience which would be manifestly absurd. . . . There must of necessity be some practical limit to the operation of this objection; and the true inquiry seems to be in every case whether the absence of the deed throws any reasonable doubt upon the title of the vendor. *Prima facie* it is to be presumed that the purchaser in the ancient conveyance had actual inspection of every deed recited, and was satisfied with their contents; and further, it is to be observed that it is not probable that a vendor would recite deeds which afforded evidence against his title. When there is no evidence to repel the effect of these general presumptions, and when the title under the conveyance which contains the recital is fortified by sixty years undisputed possession, I think it is a good practical rule to hold that the loss of a deed recited throws no reasonable doubt upon the title of the vendor, and that the purchaser must complete his contract." This would clearly be the rule in the case of an ordinary sale of freehold property. Looking at the very peculiar nature of the present case, can it be said that there is any "reasonable doubt" thrown upon the title of the vendor, by the non-production of the original lease of 1606? The reason for requiring in general the production of the original lease is, that the lessor may possibly have reserved to himself certain rights which may be burthensome to the tenant; but such a reason cannot exist in the case of land held in undisputed possession for such a long period at a rent of only one penny, and that only "if demanded." [CLEASBY, B. referred to *Alexander v. Crosbie*, 1

Ex. Ch.]

FRIEND v. BUCKLEY.

[Ex. Ch.]

Jones and Lat. 666, in which neither the non-production of a will recited in a deed, nor the non-production of articles between the father, tenant for life, and his son, tenant in tail, authorising the revocation of certain uses declared, was held to constitute a valid objection to the title.] And in the present case, besides the recital, there is an undisputed actual enjoyment of more than sixty years. There is no decided authority as to leaseholds; but the practical rule laid down by the Vice-Chancellor in *Prosser v. Watts* (*ubi sup.*), may with the greatest safety be applied to such a case as the present. The court should not look minutely to see whether there is any objection which to a lawyer may seem theoretically possible, but whether there is any practically possible ground of infirmity in the title. [Some other points were taken, but they did not relate to the ground on which the decision of the court was given; and it was ultimately agreed to refer all points in dispute, except that as to the necessity of producing the original lease, to the determination of a conveyancer.]

Joshua Williams, Q. C. (with whom was *J. C. Mathew*) for the plaintiff. The indenture of Sept. 13, 1800, reciting that of Jan. 20, 1606, shows the demise to be of a large quantity of leasehold property, including mills, and forges. Leasehold property is generally made determinable upon certain conditions; and it is as probable as not that in the lease of 1606 there were covenants as to the working of the mills and forges of which the purchaser in the present case can know nothing unless by examination of the original lease. It is because there may always exist covenants of this sort, on breach of which the leasehold property is made determinable, that the courts have held it necessary for the vendor of leasehold property to produce the original lease, or an attested copy. The indenture of Sept. 13, 1800, does not even purport to recite the whole of the original lease; and if there were no covenants or conditions of a character onerous to the lessee and beneficial to the lessor, what was the utility of the reservation of a rent of one penny? a rent which could only be useful as keeping up the title of the lessor. "If the purchaser of a lease," says Lord St. Leonards (*Vendors and Purchasers*, 14th edit. p. 370), "is not entitled to the lessor's title, he of course can only acquire a regular title to the leasehold interest from the time the lease was granted. If the lease be an ancient one, it is not necessary to do more than make it the root of title, and then commence the derivative title with an assignment on a sale or mortgage within a reasonable period, *e.g.*, fifty years"; and at p. 410 he says, "The creation of terms of years assigned to attend the inheritance should be shown by the abstract, but the intermediate assignments may be abstracted very shortly." The necessity of showing the lessor's title is also stated in *Dart's Vendors and Purchasers* (3rd edit.), p. 191: "Upon a sale of leaseholds the abstract must (except in the case of a bishop's lease) show the lessor's title as well as the subsequent title to the term," where the reason of the exception is also stated. "The decision as to the non-production of the bishop's title was on the ground of the lease having been granted in a mode prescribed by an Act of Parliament, and upon the presumed notoriety arising from the use of the episcopal seal; and it would seem to apply to leases granted by a dean and chapter, and possibly to other cases; and the general rule does not apply when the purchaser enters into the contract with notice that the freehold title cannot be produced; nor does it appear clear that the rule applies when, on the sale of a lease of great antiquity, the vendor shows the creation of the term, and deduces the leasehold title for the last sixty years." So that even in the case of

a lease of great antiquity the deed creating the term must be proved. Preston, indeed, in his *Abstracts of Title*, pp. 11, 12, seems to think that in some cases the creation of the term need not be proved. He says, "though it be true that the deed creating a term is material to the title, and is the evidence on which a purchaser can best rely, yet a title under a very long term of years, which has been created for sixty years at least, appears to be marketable without evidence of the creation of the term, since, against all persons except the lessor or those who claim the reversion or remainder under him, the recitals are evidence of the title; and the lessor, or those who claim under him, cannot by any means, after sixty years, recover the lands without proof of an actual seisin within that period. To show the seisin they must adduce evidence of the tenancy, and in adducing such evidence, unless in very particular circumstances (as where a rent is reserved), they must support the title under the term; and in several instances titles have been approved by gentlemen of distinguished eminence, although there was not any evidence of the creation of the term except by recital." These observations, however, apply only to the case of the original deed being lost, and this view has been doubted by other conveyancers of eminence. In *Bythewood and Jarman's Precedents* (3rd edit.) title "Abstracts," p. 69, the law is thus stated: "Where an estate is held under a lease of great antiquity a vendor, it is conceived, could only be required to show the creation of the term, and to deduce the title for the last sixty years, and it would not be incumbent on him to trace its history uninterruptedly from the origin of the lease down to the immediate transaction. Even the absence of the deed creating the term will not, in the opinion of some gentleman at least, render the title unmarketable: (see 1 *Prec. Abst.* 11);" and there may no doubt be cases where the non-production of the deed creating the term would not practically weaken the title, *e.g.*, where there has been a demise to a mortgagee to secure the repayment of the money advanced; but there is nothing in the present case to show the existence of such a state of facts. The case of *Prosser v. Watts*, cited on behalf of the defendant, was a case of freehold property, and as such is quite distinguishable from the present case. Finally, there is nothing in the present case to show that it is not in the vendor's power to produce the lease of 1606.

Mellish, Q. C. in reply.—There is no authority in any way conclusive on the point as to the question involved in this case; and the text writers only state that ordinarily the original deed creating the term must be produced. The authority of Mr Preston is in favour of the defendant's contention. It is admitted that if this had been the case of a mortgage, it would not be necessary to produce the original deed; and if we examine the circumstances of the present case, the lease amounts, practically, to a conveyance of the fee. The term of 1000 years goes back to 1599, though the lease was executed in 1606, *i. e.*, it goes back nearly to the time of the creation of those long terms of years, and the long lease practically amounts to a sale of the freehold. After a series of assignments, and a continued possession under them for over sixty years, it is almost inconceivable that there should be any risk in taking the property with the title offered. [WILLES, J.—There is a recital of the sale of the messuages, cottages, farms, orchards, gardens, &c., but not of the sale of the minerals. Suppose the lease contained a proviso which is found in many old leases, that the lessor should be at liberty to enter to search for mines, and that a counterpart of the lease should now be found containing that

Ex. Ch.]

FRIEND v. BUCKLEY.

[Ex. Ch.]

condition, would not that be a defect in the title?] The defendant only proposes to sell a leasehold interest, without saying anything about mines or minerals. [WILLES, J.—Suppose the existence of such a proviso in the original deed could be shown, would not that be an objection to the vendor's suing the purchaser for not completing the purchase?] It probably would. [WILLES, J.—The question then is—does this recital reasonably exclude that?] It is submitted that it does. A conveyance of freehold property might contain in it such a reservation of minerals as has been suggested, and yet after sixty years the production of the original conveyance cannot be insisted on. [WILLES, J.—That, however, does not apply to the case of a right of re-entry.] *Cur. adv. vult.*

Feb. 4, 1870.—The judgment of the court was now delivered as follows by

KELLY, C.B.—This is a case in which the plaintiff and defendant had entered into a contract for the sale and purchase of certain freehold and leasehold estates. The contract contained no special stipulation of any kind whatever, but merely provided in the ordinary form of words, for the delivery of an abstract of title by the vendor and the making out of a title to the property to be conveyed. A portion of the property was leasehold, and, looking at the statement of the case and the abstract, it appears that amongst this property was a quantity of land held under a lease of the date, Jan. 20, 1606. It appeared on the abstract, that is, a statement appeared on it, that this lease had been assigned from party to party, and at one period, more than a century ago, the larger portion of it had passed by assignment into the hands of one person, the remaining quantity passing into the hands of another person. The estate in question in the present case consisted of a portion of from 90 to 100 acres, and as to this it appeared by the abstract that the title was alleged to be deduced from this ancient lease of 1606. At last, by various assignments during more than sixty years, from about the year 1800 or a later date, this came into the possession of the vendor, and no doubt, supposing the assignments correctly to recite the original lease, and supposing it had been produced and the root of title made out, the successive assignments for more than sixty years would have made out a marketable title. But it appears that upon the abstract being delivered the objection was made on the part of the intending purchaser to which I am now about to advert. Various objections appear upon the requisitions, but the objection to the non-production of the original lease is stated in the compass of about three lines at the head of the requisitions, and it is in this form: "The purchaser requires an attested copy of the lease of Jan. 20, 1606, and a covenant for its production of its legal possessor." Now the only answer to this requisition is in these words: "The production of a deed more than sixty years of age cannot be insisted upon." That raises the question which we are called on to determine. The case was argued indeed upon various points and grounds, but it is unnecessary to refer to the arguments further than, with regard to what was insisted on at the bar—viz., that if the result of the requisition and answer was such as I have stated, the vendor was not bound to produce the original lease; that after such a lapse of time it might have been lost, and therefore secondary evidence of its contents might constitute a sufficient root of title, and that the recital of the lease which appeared in several assignments should be deemed sufficient—to say that the recital itself does not purport to set forth the whole of the lease, but only the substance, and it still left open the question

whether there might not be something more in the original lease than appeared; something which might have constituted a defect of title. Now we must not be supposed to determine that if the answer had been "the lease is lost and therefore we cannot produce it; there is no authentic copy of the whole of the lease, and therefore we have no means of showing the entire contents of it except by means of the several assignments and the recitals contained in them"—if such appeared to be the answer made to the requisition—and what I am now stating I state for myself only, though we all agree in the general judgment to be delivered—we must not be supposed to decide that that would not have been a sufficient answer, and that reference might not have been had to the recital of the original lease in one or more of the assignments. For myself I give no opinion on that point; it might or might not be a sufficient answer to the requisition, but at present I do not pronounce any opinion on the matter. We are relieved from all difficulty as to the judgment we should pronounce by the consideration that nothing would have been easier on the part of the vendor than to have introduced into the contract of sale a stipulation to the effect that, as the original lease could not be produced, the recital of it in the assignments of more than sixty years old must be deemed sufficient proof of it. Such a stipulation would have dispensed with the necessity of producing it, and every difficulty would be obviated. But that was not done, and when the objection was made as to its non-production the only answer made was "the production of a deed more than sixty years of age cannot be insisted on;" and we are of opinion that on that a sufficient title is not made out by the vendor. Taking the requisition and the answer to it together, the contention of the vendor must be that in the case of an absolute, unconditional contract for the sale of property of this kind, where the lease is alleged to be more than sixty years old, it is enough for the vendor to show an assignment, or a series of assignments of the property, reciting the parcels demised and the reddendum of the lease only, but not purporting to recite the original lease itself, accompanied by sixty years possession consistent with such assignments; and that the original lease itself need not be produced, or a copy of it, or any further evidence of its contents, and that the purchaser is bound to accept such proof of title to the term, taking his chance of the undisclosed contents of the lease, and that he is not entitled to satisfy himself, either by examination of the lease or otherwise, that it gives what he has bargained for, namely, a clear title to the term without onerous covenants or conditions constituting substantial infirmity in the title such as would justify its rejection. In determining the question thus raised it ought to be dealt with as a general one, affecting all leaseholds more than sixty years old, and it was so treated in the answer to the requisition. Upon the argument indeed reliance was placed upon the special circumstances of this case, upon the alleged great antiquity of the particular lease, the small amount of the rent, the peculiar language of the reservation; the probable object of the creation of the term being to raise money, in support of which speculation the history of leases of long terms of years might be referred to (see Lord Hardwicke's judgment in *Willoughby v. Willoughby*, 1 T. R. 761), and of which the sale of the timber in this case was also said to be some evidence. As a counterpoise to this sort of argument may be adduced the uncertainty and consequent litigation that will follow if each case is to be decided according to the special circumstances, making it more or less likely or unlikely that the lease, if its whole contents were disclosed, would show a good title, more or less likely that the reversioner could or

Ex. Ch.]

THE FREEDOM.

[ADM.]

would take advantage of any defect, more or less likely that there was any reversioner, or that the owner had become entitled in default, and so forth. In some cases such considerations might seem frivolous, in others weighty. They are more proper for the discretion of the purchaser and his advisers before he makes his bargain and incurs expense and it is competent to the vendor to exclude all subsequent reference to them by a simple condition that the purchaser shall be satisfied with the recital of the lease in the assignment or assignments (specifying it or them), without requiring production of the lease, or proof that it is lost, or a copy or proof of its contents further than such recital affords, a precaution which in this case was not adopted. Upon the sale of a lease less than sixty years old, without condition, the purchaser would be entitled to, and it would be part of the duty of his solicitor to require, amongst other things, proof of the contents of the lease; and the vendor could not fulfil his obligation to show a good title without affording such proof. No authority was cited for making the distinction now contended for in favour of the vendor of a lease more than sixty years old. Nor is there any sound reason for doing so, considering that the limitation to sixty years, or, as has been suggested by great authority, forty years, in the case of sales of fee-simple estates, is founded upon the effect of the Statute of Limitations. But it must be remembered that that statute does not begin to run against the reversioner after a term of years, before the expiration of the term or a forfeiture of which the reversioner elects to take advantage. This consideration distinguishes the present case from that of *Prosser v. Watts*, 6 Maddocks, 59, where the purchaser of a fee simple estate required the inspection of deeds recited in conveyances included in an abstract which, without such recitals, would have shown a good and sufficient title upon the ground that the recitals were constructive notice of the deeds and their contents, and that these might perhaps show something to prejudice the title, which, without them, was complete. In the present case the lease partially recited is the root of the title, and without the recital there would have been nothing to show that the thing contracted to be sold, viz., a subsisting term (not a mere chance of not being ejected) had any existence. It would be extravagant to hold that upon an absolute unconditional sale in 1869 of a lease for 100 years made in 1806, the purchaser was bound to accept a title founded upon a recital of part of that lease in an assignment to the vendor in 1810 or 1808, though accompanied by a provision consistent with the lease, but also consistent with its containing provisions making it in effect something different from what was contracted to be sold. To bind the purchaser to accept such ambiguous proof of title there ought in justice to be a condition apprising him that he must be content not only without the lease, but without knowing all its contents; and it is more reasonable to require that where circumstances of such a character exist, the difficulty should be anticipated by such a condition, which it is in the power of the vendor, in the first instance, to impose, and the like of which are constantly used to meet similar contingencies, than that it should be open to a vendor upon every sale of a lease more than sixty years old to litigate the question whether it was reasonable that he should be prepared to produce it or, accounting for its absence, to prove its contents. The vendor, not having in this case imposed such a condition, and not having, by production, or proof, however slight, of loss, and that no complete copy exists, or otherwise shown the purchaser a title to that which he proposed to sell; but having insisted only that was

not bound to produce a lease more than sixty years old, the purchaser is entitled to retain the judgment given in his favour in the Court of Queen's Bench, which ought, therefore, to be affirmed.

Judgment affirmed.

Attorneys for the plaintiff, *Palmer, Palmer, and Bull.*

Attorneys for the defendant, *Smith and Co.*

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister at-Law.

Jan. 28 and March 4.

THE FREEDOM.

Damage to cargo—Perils of the seas—Right to sue.

In a suit for damage to cargo and for improper delivery thereof by the consignees, who were also assignees of the bills of lading, it was

Held, that the plaintiff had a persona standi both as to negligence and breach of contract.

The Figlia Maggiore and the Nepoter followed.

This was a suit instituted under the 6th section of the Admiralty Court Act 1861, on behalf of Messrs. Simmons and Hunt, of Mark-lane, in the City of London, against the vessel *Freedom*. It appeared that on the 3rd Sept. 1868, Messrs. Campbell and Thayer, of New York, caused to be shipped on board the *Freedom*, then lying in the port of New York, six parcels, consisting each of 500 bags of linseed cake marked "C. and T.," and that the master of the vessel received the same to be carried on board the vessel to London upon the terms of six several bills of lading.

These bills of lading were in form exactly similar, and were so far as material in the words following:

Shipped in good order, and well conditioned by Campbell and Thayer, on board the ship called the *Freedom*, whereof is master now lying in the port of New York and bound for London to say (500) five hundred bags linseed cake, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the port of London (the dangers of the seas only excepted) unto order or to assigns, he or they paying freight for the said merchandise 17s. 6d. sterling per ton, with 5 per cent. prime and average accustomed of 2240lb. gross. In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading all of this tenor and date, one of which being accomplished, the others to stand void. Dated in New York, the 3rd Sept. 1868. Weight unknown.

The ship sailed on her voyage, and arrived in London on the 10th Oct. 1868. For a reason which will presently appear, a small portion of the cake only was put into lighters on the 13th or 14th, and the rest was landed in the London Docks. The landing on the quay begun on the 23rd Oct., and was completed on the 4th Nov. Out of the 3000 bags it appears that only 317 arrived in a perfectly sound state, and some 134 of these were externally damaged by sea water. The plaintiffs claimed as consignees of the goods, and assignees of the bills of lading, and it appeared that bills of exchange to the amount of 2980*l.* were drawn upon the plaintiffs against the bills of lading, and were accepted and paid by them.

The plaintiffs claimed both for the damage and for loss sustained by an improper mode of delivery.

Milward, Q. C. and Cohen for plaintiffs.

Butt, Q. C. and E. C. Clarkson for defendants.

March 4.—Sir R. PHILLIMORE.—One of the defences raised by the defendants is that in this case the plaintiffs have no title to sue at all, even for negligence, and, secondly, that they have no right to sue as consignees in contract. It is admitted

ADM.]

THE FREEDOM.

[ADM.]

that I decided adversely to both these contentions in the *Figlia Maggiore*, L. Rep. 2 Adm. 106; 18 L. T. Rep. N. S. 532, and in *The Nepoter*, Ibid, 375, and *infra*. I have reconsidered these cases, and I see no reason to alter the opinion which I then formed. The consignees, therefore, having according to my former decisions a *persona standi* both as to negligence and as to breach of contract, put in their claim for this damage to the cargo, which has been proved, and also for a loss sustained by them in consequence of an improper mode of delivery. The charges under the first head are these: "The said six parcels of 500 bags were not delivered to the plaintiffs according to the terms of the said bills of lading, in as good order and condition as when they were shipped on board the said vessel at New York as aforesaid, but, on the contrary, the same were delivered to the plaintiffs much damaged and in much worse order and condition. Such nondelivery as aforesaid to the plaintiffs of the said six parcels of 500 bags, in as good order and condition as when they were shipped, was not occasioned by the dangers of the seas in the said bills of lading excepted." And on the second head, these: "The said six parcels of 500 bags each were not delivered to the plaintiffs in London separately, but the said 3000 bags were by the said master improperly and negligently delivered to the plaintiffs, all mixed up together. By reason of the premises and of the master of the said vessel refusing to deliver to the plaintiffs the bags which were damaged separately from those which were not damaged, the plaintiffs not only lost a great part of the value of the said bags, but were put to great expense in and about repacking the said goods, and sorting the same, according to marks and numbers, and in and about separating the damaged from the non-damaged portion, and in and about keeping, warehousing, and improving the condition of the said bags. To the charges on the first head the defendants have replied as follows: They deny the truth of the allegations contained in the sixth article of the said petition. The damage (if any) to the oil cake in the said petition mentioned was occasioned by the dangers of the seas or by the natural qualities of the said oil cake, and not by any breach of contract contained in the bills of lading in the said petition mentioned, or by any negligence or breach of duty on the part of the master or crew of the *Freedom*. With respect to the first defence, the fact of the damage has been proved. With regard to the charges contained under the second head, which are of minor importance, the defendants deny the fact in their answer, and by their evidence seek to establish two points, the first, that they were not bound to sort and weigh the goods on the ship before delivery; the second, that they were delivered according to marks and numbers. I have considered the evidence of Simmons, and Hopwood, and Ford, and Bradley, and I am of opinion that it is proved that the delivery according to marks and numbers was demanded by the consignees and refused by the master. With respect to the master's right to refuse to allow the goods to be sorted and weighed on deck, I think it is proved that this sorting and weighing had been invariably required by Simmons and conceded to him. I have considered the case of *Coulthurst v. Sweet*, L. Rep. 1 C. P. 654, which appears to me, though not conclusive, in favour of Simmons's claim. But this is really not material, because the plaintiffs were clearly entitled under the bills of lading to the delivery according to marks and numbers, and that was refused to them. I think therefore they are entitled to have compensation for any loss which they sustained by reason of this refusal. But the really important question in the case relates to the liability of the owners of the ship for the state of deterioration

in which the cake is proved to have arrived. The fact of damage being established, I have already decided in a previous stage of this very case (3 Mar. Law Cas. 219, 261), that the burden of proving affirmatively that such damage was in consequence of the excepted peril lies upon the defendants. And the same observation applies to the other branch of the defence, namely, that the damage was incurred by the intrinsic properties of the cake. It is to be inferred from what I have stated, that there is no real controversy as to the good order of these cakes when they were put on board, a fact which is amply proved by the evidence adduced on behalf of the plaintiffs; and it therefore only remains for me to consider whether the defendants have sustained either of the defences which they have alleged. I think it would be convenient to take the latter defence first. I am satisfied upon the evidence as I was in the case of the *Figlia Maggiore*, that with respect to oil cake shipped in proper order and condition as this was, the amount of deterioration proved in this case cannot be ascribed to any inherent vice or intrinsic property of the cake. Now with respect to the other defence, have the defendants proved that this injury was caused by peril of the sea? And this question resolves itself into another, What is peril of the sea? It is admitted that neither defective stowage, nor bad ventilation, nor the neighbourhood of a heating cargo, nor a distant heating cargo of such a kind as would throw off heat to affect the whole cargo, would fall within the category of peril of the sea. But it is alleged that the evidence disproves that any of these causes produced the damage in question. This is the negative contention. The affirmative contention is, that sea water combined with heat of weather, and the warmth of the water in the Gulf stream, and a state of weather which rendered it necessary to keep the hatches closed during a portion of the voyage, and the condensation of steam consequent thereupon, were the causes of the damage, and that these causes fall within the category of the excepted sea peril. Here it is right to observe that the master in his evidence being asked what he thought caused the damage, said the oil cake itself—the heat of the oil cake—the intrinsic heat. It is true that afterwards, when the suggestion is made to him that the necessary closing of hatches may have partly caused the damage, he adopts the suggestion. With respect to defective stowage generally and apart from the question of the bones I think the evidence is in favour of the defendants, both according to the plan which has been put in and the testimony of the witnesses; and no injury occurred to the oil cake in this case, as it did in the former cases, from the tobacco which formed a part of the cargo. Nor is there any evidence that the clover seed, which formed part of the cargo, had an injurious effect on the cake. The subject of ventilation must be considered in connection with the allegation, that the state of the weather during the voyage and the constant necessity for keeping the hatches closed, caused the damage to the cake. In the first place the evidence as to the weather is not what could be desired; the log-book has not been produced here; it was said to have been left at New York but to that place a commission issued from this court to examine witnesses. It does not appear that any protest was made against the damage to the cargo caused by bad weather. With respect to the ventilation, it appears by the captain's evidence, that there was a large ventilator by the mainmast, another at the after end of the ship by the wheel, and an "air-streak" under the topgallant fore-castle. It is quite possible that these ventilators might have been adequate though several of the witnesses are of a contrary opinion if the hatches were properly and sufficiently opened; the captain swears that the weather pre-

ADM.]

THE NEPOTER.

[ADM.]

vented them from being opened; I have said that I do not think the evidence satisfactory upon this point. That there was a great rush of steam and heat, when the hatches were taken off, and for some time afterwards is undisputed. The hatches were taken off on the 12th Oct. and Kinnipie, who went on board to survey the damaged cargo, says that on the 19th Oct. he could scarcely see down the fore hatchway on account of the steam, and that there was a great stink. The hold was said to be like an oven by one witness, and Burstall, an experienced broker, says that on the 20th Oct. the steam in the fore hold dimmed his spectacles. I now come to the question as to whether the extensive damage to the cakes can be ascribed to other portions of the cargo which were of such a character as to generate the heat and steam whereby the cakes were damaged. This brings me to the consideration of the bones, which formed a part of the cargo. [His Lordship then commented at great length upon the evidence, and said.] Looking, therefore, to the facts proved with respect to the condition of these bones, and to the opinion of experts on the inferences of science applicable to such a state of things, I have arrived at the conclusion that the damage to the oil-cake was caused, in great measure at least, by the presence of these bones on board the ship. But this conclusion does not appear to me necessary for my judgment in favour of the plaintiffs. In my opinion it was incumbent upon the defendants to show that the extensive damage done to their cargo, was caused by "dangers of the sea," which is the only exception contained in the bill of lading. I think that upon the evidence before me, they have failed to do so, and on both grounds, therefore, I pronounce for the prayer of the plaintiffs, and make the usual reference to the registrar and merchants.

June 14, July 13, 16, and 27, 1869.

THE NEPOTER.

Damage to cargo—Bill of lading—Consignee—Right to sue—18 & 19 Vict. c. 111—24 Vict. c. 10.

C. and M. had been in the habit of receiving consignments of goods from N. and accepting his bills, and there was an account current between them. A cargo of sugar so consigned at a time N. was debtor in the account between them having suffered damage, C. and M. brought a suit in this court:

Held, that a sufficient property vested in C. and M. to satisfy the Bills of Lading Act.

Semle, a mere consignee to whom the property in the goods does not pass, has a right to sue in the Court of Admiralty:

Held, also, that sugar injured by drainage from other sugar improperly stowed was not damaged by "leakage" as named in the excepted perils.

This was a suit under the 6th section of the Admiralty Court Act 1861, against the Norwegian barque *Nepoter*, and her owners, and was instituted by Messrs. Cottam, Morten, and Co., as consignees of various parcels of sugar which formed part of the cargo.

The consignor had been in the habit of consigning goods for sale to the plaintiffs, who from time to time had accepted the consignor's bills, and credited him with the proceeds. On the account between them, the consignor was a debtor to the plaintiffs.

The bills of lading were not indorsed to the consignees, but they were named therein as the persons to whom the goods were to be delivered.

The bills of lading were in the following form:

Shipped in good order and well conditioned, by James Harvey, in and upon the good ship called the *Nepoter*,

whereof is master for the present voyage Nielsen, and now in the port of Salt River, Jamaica, and bound for London, twenty hogsheads, forty-one tierces, forty-four barrels of sugar, fourteen puncheons of rum, seventy-eight tons of logwood, all on board being marked and numbered as E. M., and are to be delivered in the like good order, and well conditioned at the aforesaid port of London (the act of God, the Queen's enemies, fire and, all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted), unto Cottam, Morton, and Co., or to their assigns. Freight for the said goods, to be paid, 3s. 3d. per cwt. for sugar, 5d. per gallon for rum, and 20s. per ton for wood, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, the one of which bills being accomplished, the other to stand void. Weight and contents unknown. Not liable for leakage. G. NIELSON.

Dated in Salt River, Jamaica, 17th April 1868.

The petition alleged that the goods were not delivered "in good order and well conditioned;" that such nondelivery was "caused by the negligence or misconduct of the master and crew, or was otherwise a breach of contract or duty on the part of the master and of the defendants." And the answer alleged, first, that the plaintiffs were not consignees of the goods to whom the property in them had passed; secondly, that the goods were delivered in a proper state and condition to the plaintiffs; thirdly, that the nondelivery of the goods was not occasioned by negligence, breach of contract, or breach of duty on the part of the master or of the defendants; and, fourthly, that the damage was occasioned by leakage, for which the defendants were not liable.

Butt, Q. C. and Cohen for the plaintiff.

Keene, Q. C. and R. G. Williams for the defendants.

July 27—Sir R. J. PHILLIMORE.—With respect to the first defence, which is one of law, the validity of it must depend upon the true construction of sect. 6 of the Admiralty Court Act 1861, and of the practice of this court independently of that Act. Upon both grounds I am of opinion that this defence fails. I adhere to the construction of the statute which I expressed in the *Figlia Maggiore*, L. Rep. 2 A. & E. 106; 18 L. T. Rep. N. S. 532; and I think that these plaintiffs have a right under sect. 6 of 24 Vict. c. 10, to sue the defendants both for negligence and for breach of contract as "consignees of goods named in the bills of lading," even though the property did not pass; in other words, that it is not necessary to import into the Admiralty Court Act from the Bills of Lading Act (18 & 19 Vict. c. 111) the words "to whom the property in the goods shall pass." I am aware that this construction differs from that which Dr. Lushington put upon the statute in his judgment in the *St. Cloud*, Br. & L. 4; 8 L. T. Rep. N. S. 54, and that I am taking a step beyond that which I took in the *Figlia Maggiore*; but after much reflection I have come to the conclusion that the Admiralty Court Act intended to give every consignee or assignee of a bill of lading a capacity to sue in this court for damage done to the goods mentioned in the bill. I think this, which is certainly the obvious construction of the plain words of the statute, is consistent with the intention of the Legislature to protect the absent owners; it must often happen, as in the present case, that an immediate proceeding, and one which would allow no time for communication with the owner, must be necessary for his protection. The evidence of damage caused by fermentation or the like process might, and not unfrequently would, be lost, in consequence of the delay which the necessity of such a communication would create; and I agree with Dr. Lushington in his general view of the objects of this statute in the *St. Cloud*: "The general intention of the Legislature cannot be doubtful. The statute is remedial. The short delivery of goods brought to

ADM.]

THE NEPOTER.

[ADM.]

this country in foreign ships, or their delivery in a damaged state, was frequently a grievous injury for which there was no practical remedy; for the owners of such vessels being resident abroad, no action could be successfully brought against them in a British tribunal. To send the merchant who had sustained a loss to commence a suit in a foreign tribunal, and probably in a distant country, could not be deemed a practical or effectual remedy. With a view to obviate a grievance so oppressive to British merchants, the enactment contained in the 6th section was passed. It was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the absence of the shipowner in foreign parts, the common law tribunals could not afford effectual redress." By the 7th section of the same statute (24 Vict. c. 10), it has been enacted that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." This court, confirmed by the Judicial Committee of the Privy Council, has, in the case of the *Beta*, L. Rep. 2 P. C. 447; 20 L. T. Rep. N. S. 988, put the largest construction on the words "any claim"—a fact which must be considered in weighing the reasons assigned by Dr. Lushington in his judgment in the *St. Cloud*. The reasons which appear most to have weighed with my learned predecessor for transferring the words of the Bills of Lading Act into the Admiralty Court Act, which he said "at first sight is rather a strong proposition," were as follows: A nude assignee would, if the owners of the ship were out of the country, have a right of action in the Admiralty Court, and in that alone; but if the owners of the ship were in this country, such nude assignee would have no right of action, either in the Admiralty Court or in one of the courts of common law. Such a consequence is so inconsistent with reason that I cannot believe it was the intention of the Legislature." But it appears to me, as perhaps it would to the learned judge if it had been brought a second time to his consideration, that this consequence is really not unreasonable; because, if the owners of the ship were in this country, the owner of the goods would know where and how to bring his action against them; whereas in the case of the owners being abroad, unless his agent could at once arrest the ship, no action could be brought at all, either *in rem* or *in personam*, in this country, although the cargo was discharged here; and all the evidence of the damage must necessarily be in this country. Another reason for putting this construction upon this statute is, that it would be in harmony with the usual practice of this court, which has always put aside technical objections, as to the parties who may institute or defend a suit, and allowed any person who has an interest to appear for the purpose of defending that interest—as in the common case of a bottomry bondholder defending a suit for wages. But if the construction of the statute in the *St. Cloud* be right, and my present construction wrong, I adhere to my opinion expressed in the *Figlia Maggiore*, that the assignee would have a *persona standi* on the ground of negligence or breach of duty, if not on the ground of the breach of contract; for I think that I must assign a distinct force to each of these grounds. I think it right also to add that, after careful perusal of the judgment in the case of *Short v. Simpson*, I incline to the opinion that a property did pass sufficient to entitle the consignee to sue in this court under these bills of lading in the particular circumstances of this case. It is true that bills were not drawn upon the cargo, but there was an arrangement between the consignor and the consignee according to which the consignee accepted bills drawn upon his firm by the consignor, and credited him with the proceeds of the goods

sold from time to time. There was an account current between them; and at the time of the institution of this suit the consignor was considerably in debt to the consignee; and the mention of this fact leads me to notice another criterion of a species of property having passed to the plaintiffs in this case. An indorsee of a bill of lading, to whom a general balance is due, and a consignee of goods, who is intrusted to sell them and has a general balance against the consignor, have an insurable interest in such goods. This is the position of the plaintiffs in this case; and, therefore, I think a sufficient property vested in the plaintiffs to satisfy the Bills of Lading Act; and, moreover, they would have such an interest in the goods as would, according to all analogy derived from the practice of this court, entitle them to sue. Now, with respect to the defence on the facts of the case. The cargo in this case was the usual, if not the invariable, cargo from Jamaica namely, a cargo of sugar; and it is proved to my satisfaction, after due consideration of the evidence on the one side and the other, that the portion of the cargo which belonged to the plaintiffs—and it is to be observed that it was only a small portion of the cargo—was shipped in proper order, and after proper precautions, in the port of Salt River, Jamaica; and the condition in which the cargo generally was discharged at the port of London appears to have been as follows:—The upper portion was in a very good condition, as was also the lower portion, with the exception of the casks on the ground tier, which was consigned to the plaintiffs. On this tier there was an accumulation of drainage in the nature of molasses, part liquid, part encrusted, to the extent of two feet or rather more, up the hogsheads; some of the casks were full, some about half full, some about one-third, and some entirely empty. Not any casks on the bottom tier were absolutely uninjured, according to the evidence of Mr. Jack, who superintended the discharge of the cargo, and who appears to me a perfectly creditable witness. The fact, therefore, that the goods were not discharged in the like good order and condition in which they were laden appears to me to be proved. The next defence is, that this damage was not occasioned by negligence or breach of duty on the part of the master. This defence involves two considerations: first, whether, any precautions ought to have been taken to prevent the accumulation of drainage; secondly, if so, whether such precautions were taken. It appears from the evidence that all sugar cargoes drain, and that this sugar cargo drained, I think, rather less than the average. It appears that the drainage came out, for the most part, if not entirely, from the head of the cask. It is admitted that this drainage should find its way out through the ceiling in some way or other into the hold, and also that the drainage of this cargo did not so find its way. If this drainage does not escape, the lowest tier of casks must, as in the present case, receive injury. I have already adverted to the fact that these casks were embedded more than half way up in molasses; and to this fact there can be no doubt, in my opinion, that the damage done to this cargo was owing. The master frankly admitted that this was the first cargo of sugar which he had ever carried; that there were four holes, about 1½ in. in diameter, bored close to the after part of the pumps, for the purpose only of draining the water when the hold was washed. Other witnesses also speak to these holes. The result of the evidence appears to me to be that they were quite insufficient to afford the necessary means of egress for the liquid stuff to reach the pumps; and that other means ought to have been provided, whether by a greater number, and a larger size of holes, or by keeping the timber boards open by means of wedges, a precaution which

BANK.]

Ex parte —, Re H. B.—Ex parte THE ASSIGNEES, &C., Re VINING.

[BANK.]

appears to be generally taken before the vessel sails. It is clear that the skin of the ceiling of the *Nepoter* was too tight to allow the stuff to escape without some such precautions. I am therefore of opinion that precautions ought to have been taken by the master, and were not taken, which would have prevented the damage in this case. The last defence remains to be considered, namely, that this damage falls within the excepted perils mentioned in the bills of lading, that is, "not liable for leakage." But this defence appears to me also untenable. For it is not the leakage, properly speaking, which has done this injury to the cargo; but the accumulation of drainage upon the floor to such an extent that the casks were half-way immersed in it; and it was this mischief, which, by keeping out the air, caused the sugar to heat, and thereby, as a natural consequence, produced the emptiness of the casks. The circumstances, therefore, of this case render the judgment of the Privy Council in the *Helene, B. & L. 429*, inapplicable. Upon the whole, I am satisfied that the plaintiffs have established their case; and I must make the usual order of reference to the registrar to ascertain the amount of the damage; and I must accompany this sentence with costs.

Proctors for plaintiffs, *Clarkson, Son, and Greenwell.*

Proctors for the defendants, *Deacon, Son, and Rogers.*

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

Tuesday, Feb. 1.

Ex parte —, Re H. B.

Petition for adjudication—Non-attendance of petitioner at hearing—Dismissal of petition with costs.

If, upon the day appointed for the hearing of a petition for adjudication, neither the petitioning creditor, nor his solicitor, nor anyone on his behalf, attends to support the petition, the court will, upon the application of the alleged debtor, dismiss the petition with costs, pursuant to the discretion vested in the court by the 8th section of the Bankruptcy Act 1869.

On the 7th Jan. 1870 E. A. Murton, who claimed to be a creditor of H. B., filed a petition for adjudication against him, and on the following day obtained an order for substituted service, and it was directed that service should be effected by inserting a notice in the *Gazette*, pursuant to 61st General Order of Jan. 1, 1870, requiring him to appear at the hearing of the petition on the day named, which was Feb. 1. A copy of the petition and order for substituted service were also left at the residence of H. B., who was then absent from home.

On the 1st Feb. H. B. attended with his solicitor at the hour appointed, and after waiting some time the learned registrar directed the solicitors for the petitioning creditor to be sent for, and in reply they stated that it was not their intention to attend. Upon this message being reported to the court,

Treherne (solicitor), on behalf of H. B., asked that the petition might be dismissed with costs.

Mr. Registrar ROCHE consented to the application, and dismissed the petition accordingly.

Petition dismissed with costs.

Solicitors for H. B., *Treherne and Wolferstan.*

Solicitors for petitioning creditor *Harcourt and McArthur.*

Wednesday, Feb. 9.

(Before the CHIEF JUDGE.)

Ex parte THE ASSIGNEES, &C., Re VINING.

Bill of sale—Description of grantor in — Apparent ownership.

The description of the maker of a bill of sale as an "esquire," he being at the time an actor or theatrical manager, is an insufficient description under the Bills of Sale Act (17 & 18 Vict. c. 36.)

Where the registration of a bill of sale is insufficient, as improperly describing the maker of the instrument, the furniture and effects comprised in it will pass to the assignees under the subsequent bankruptcy of the maker, notwithstanding that the holder of the bill of sale had, prior to and at the date of the bankruptcy, taken personal possession of the property, by placing his man in possession, with a copy of the bill of sale.

This case came before the court as a special case or the opinion of the Chief Judge. The facts were not in dispute.

In October 1869, the bankrupt gave a bill of sale of certain goods and furniture in his house to his father, in consideration of and as a security for a sum of 400*l.*, advanced by the father to the bankrupt in the month of October, 1869. The bill of sale was registered on the 20th Oct., and on the 23rd Oct. a man was put in possession under the bill of sale; the property, however, was not removed, but was left in the house, and the bankrupt continued to use it as before. The adjudication was made upon the bankrupt's own petition on the 8th Nov. 1869. The assignee now claimed the property comprised in the bill of sale, and which was upon the bankrupt's premises at the date of the adjudication, as being in the apparent possession of the bankrupt within the meaning of sect. 1 of the Bills of Sale Act (17 & 18 Vict. c. 36), and thus within the reputed ownership of the bankrupt at the date of his bankruptcy, with the consent of the true owner, under the 125th section of the Bankrupt Law Consolidation Act 1849. It was also contended that the bill of sale was insufficient, the grantor, the bankrupt, being therein described as "Esq.", and all mention being omitted of his being at that time the lessee and manager of a theatre.

Finlay Knight appeared for the assignees, in support of their claim.

Bridge appeared in support of the claim of Mr. Vining, Sen., under the bill of sale.—The facts were stated at some length, and will be found in the judgment. The following cases were cited:

Gough v. Everard, 32 L. J. 210, Ex.;

Vicarino v. Hollingsworth, 22 L. T. Rep. N. S. 362.

The CHIEF JUDGE delivered judgment as follows:—The question in this case is whether the assignees in bankruptcy of George James Vining are entitled to certain furniture and effects, which, at the date of the adjudication, were in a dwelling-house occupied by the bankrupt, or whether the same effects belong to James Vining, to whom they had been assigned by the bankrupt by a bill of sale dated the 7th, and registered on the 20th Oct. in the last year. And the parties have agreed to submit the whole case, and all questions between them, to the decision of this court. The claims of the assignees have been argued upon two grounds: First, that the description of the assignor, the bankrupt in the deed, does not comply with the requisitions of the Bills of Sale Act (17 & 18 Vict. c. 36), which prescribe that there shall be "a description of the residence and occu-

BANK.]

Ex parte THE ASSIGNEES, &C., *Re* VINING.

[BANK.]

pation of the person making or giving the same." The bankrupt is the lessee and manager of a theatre in London. He says that at the time of giving the bill of sale he was not under any acting engagement, although he did occasionally appear upon the stage; and it has therefore been argued that his description in the bill of sale as an "esquire" is sufficient. If this were the only point in the case, I should be of opinion, without any hesitation, that the description he has adopted is insufficient, and that the statute has not been complied with. The gentleman is by profession an actor, and although it is said that he was not at the particular time referred to under any engagement to act, yet he was undoubtedly a manager of actors. He had the conduct of a theatre, in which he must of necessity have had abundance of employment in preparing plays for representation, in engaging and directing such performers as were there employed, and in entering into a variety of personal contracts incident to his business and occupation as a manager, as well within the terms of the statute as within that which must be taken to be its meaning and object, viz., the giving, by means of the registration, the information to the persons who had dealings with him. I am of opinion that the bill of sale, notwithstanding its registration, is defective for want of an accurate description of the occupation in which the bankrupt was engaged. Upon this point, if authority were needed, it is furnished by the cases of *Allen v. Thompson*, 1 H. & N. 15; 25 L. J. 249, Ex.; and *Adams v. Graham*, 33 L. J. 71, Q. B. The assignees insist further, that, inasmuch as the furniture and effects in his house were at the date of the bankruptcy in his apparent possession the bill of sale, the requirements of the statute not having been fulfilled, is invalid as against their statutory title, and they rely upon the interpretation clause of the Act of Parliament which defines the apparent possession to be that of the person making the bill of sale "as long as the chattels shall remain in any house occupied by him, or shall be used and enjoyed by him in any place whatever, notwithstanding that formal possession has been taken by or given to any other person." The facts which it now becomes most important to consider, for the question is really one of fact, appear to be these. The bankrupt being in want of an advance of money applied to his father, the respondent, who agreed to lend and did lend him 400*l.* upon the security of the chattels assigned by the bill of sale; and I may add that there is no reason to doubt the perfect good faith of the transaction in this or any other respect. The money not being repaid, the respondent determined to enforce his security; and on the 25th Oct. last, by his agent William Backhouse, he took possession of the whole of the furniture and effects assigned by the bill of sale, and which then were, and still remain, in the house occupied by the bankrupt. Backhouse says that he was furnished with a copy of the bill of sale, and was desired by the respondent's solicitor to show it to any person claiming the furniture or interfering with his possession thereof; that he retained possession until the 16th Nov. last when he gave up possession to Vivian, another agent of the respondent. And Vivian says that on the 13th Nov. last he relieved Backhouse, and has ever since continued, and is still, in the like possession. Upon the day last-mentioned, the messenger in bankruptcy claimed to take possession of the goods, which Vivian refused to give him, or to relinquish his possession in favour of the assignees. Vivian, however, being unable to prevent him from remaining in the house the messenger is still there. The respondent's counsel insists that the description of the bankrupt in the bill of sale is sufficient; but even if it should be held not to be so, the point is immaterial, for that

the Bills of Sale Act gives a preferable or paramount title to assignees in bankruptcy only where the apparent possession of the chattels is in the bankrupt at the time of the bankruptcy. And it is argued that in this case, and upon the facts which I have stated, there was no possession in the bankrupt, apparent or otherwise; and that the interpretation clause does not help the claim of the assignees, for that the possession taken and kept by the respondent was not that formal possession which is there mentioned, but was a real and actual possession taken and kept by him; that it was not in any sense a symbolical possession—a taking of a part to represent the whole, but that from the time when Backhouse went into the house the possession was, and has been, that of the respondent in his own right, and of his own property. Several cases have been referred to, and one of them, strange to say, is most strongly relied upon by each of the counsel as supporting his view. That is the case of *Gough v. Everard*, 32 L. J. 210, Ex. The question in that case was between a person who claimed as vendee of the property in dispute, under an instrument which, if it could be properly called a bill of sale, at least had not been registered under the statute, and a judgment-creditor of the vendor who had levied his execution against what he alleged were the goods of the vendor. The point therefore was, and could only be, whether, assuming the instrument to be a bill of sale and not registered, the vendee had such full and perfect possession as to exclude the operation of the statute upon the ground of some apparent possession remaining in the vendor, and so to negative the fact upon the presumption that this possession of the vendee had been formal only; or whether the chattels in question had been so sold to and possessed by the vendee as to make it immaterial to consider whether there was a bill of sale within the meaning of the statute, or whether it was registered or not. The property was of three kinds, first, timber lying upon a wharf belonging to another person deposited there until a purchaser could be found for it, and in the mean time unquestionably the property of the vendor until it had been assigned to such purchaser; secondly, timber and other moveable chattels the property of the vendor, and lying upon premises of which the vendor was the owner and occupier; and thirdly, the furniture and effects in a dwelling-house and counting-house which had also belonged to the vendor. These three several kinds of property the vendor sold to the vendee for the prices and upon the terms agreed upon between them. The fairness of the transaction appears to have been open to no suspicion. It was proved that, with respect to the first, the vendee after his purchase had taken persons to see the timber with a view to their buying it, and had in that respect acted as the owner. That as to the second, he had the key of the place in which the chattels were deposited delivered to him, and that he had sold, or offered to sell, some of these articles to purchasers. As to the third, it was proved that he had used and occupied the house and counting-house in which the furniture was placed, and had paid, as under the terms of his contract he had undertaken to pay, the wages of the servant who was in charge of the premises. These facts being proved, Bramwell, B., before whom the case was tried, left it to the jury to say whether the transactions between the vendor and vendee were *bona fide*. The jury found a verdict in the affirmative, and in favour of the vendee, and the case came before the full court upon a motion to enter the verdict for the defendant, when the question argued was whether the property was, at the time of the seizure, in the possession or apparent possession of the vendor within the meaning of the Bills of Sale Act; and

BANK.]

Ex parte THE ASSIGNEES, &C, *Re* VINING.

[BANK.]

whether it was subject to the execution of a judgment-creditor? The judges of the Court of Exchequer held that, upon the facts stated, there was no possession, or apparent possession, by the vendor within the Bills of Sale Act or otherwise so as to render the effects liable to seizure by an execution-creditor of the vendor. It seems to me impossible to doubt the correctness of this judgment, even if it were competent to me, or I were disposed, as I am not, to dissent from it. The facts proved before the jury, and commented upon by the judges, show most conclusively that the property which had once been that of the vendor had become the property of the vendee, and that the vendor had no right in it or any possession apparent or otherwise, and that much more than formal possession had been given to and taken by the vendee. Having given to this case the fullest attention, I must say I do not perceive that it has any direct bearing upon that which is before the court. The decision turns upon mere facts, and they being ascertained, there was no ground for saying that there was any distinction to be drawn between the actual possession and the apparent possession, both of which were united in the same person. *Vicarino v. Hollingsworth*, a case decided in the Queen's Bench, 20 L. T. Rep. N. S. 362, was also relied upon by the respondent, but I think that upon examination it will be found not to lay down any rule which can be applied to the present case. There a bill of sale had been executed by a trader to secure an advance of money. The lender, on the day of the execution of the bill, of sale sent a person who took and retained possession of the chattels comprised in the bill of sale, and it would appear that they had been actually removed and sold, but whether before or soon after the execution of the bankruptcy, which happened within a week of the bill of sale, does not distinctly appear, nor is it material. So that no question did or could arise respecting its registration. The assignees in bankruptcy brought an action against the lender for money had and received for their use. The only ground upon which they claimed was that, within the terms of the statute in bankruptcy, the goods were, at the time of the bankruptcy, by the consent and permission of the true owner in the possession, order, and disposition of the bankrupt. This raised a mere question of fact, "order and disposition" being in all cases only a question of fact. It was proved that the agent who had taken possession was a young woman who lived in the house with the bankrupt and his family, that she took her meals with them, sate in the same rooms, and lived as one of the family. On the part of the plaintiff it was contended that the possession by her was not real and substantial, but colourable only, and that the goods, notwithstanding her presence in the house, remained in the ostensible possession of the bankrupt, and, with the consent of the true owner, were within his order and disposition. The learned judge who tried the cause directed the jury "if they came to the conclusion that the young woman was *bona fide* in possession of the furniture, so that she would not have allowed the bankrupt or anyone else to deal with it contrary to her instructions, to return a verdict for the defendant, which they did. Upon a motion for a new trial on the ground of misdirection, the court was unanimously of opinion that there had been no misdirection; that the parties had intended an actual possession, and that the young woman had been put into possession for the purpose of preventing any attempt on the part of the bankrupt to dispose of the furniture. It was said by the Lord Chief Justice upon that occasion that the current of recent decisions had been less in favour of the title of assignees than formerly. And this may well be in cases of order and disposition, but cannot, I think, in any way influence the matter

now before the court. The fact of the possession, the nature of it, the circumstances under which it was taken, the consent of the true owner, are all matters to be inquired into and determined by a jury. The question before me, although depending greatly upon facts, is simply whether the goods in question were or not at the time of the bankruptcy in the possession, or apparent possession—not ownership, as was remarked by Bramwell, B. in *Gough v. Everett*—of the bankrupt. The scope and object of the Bills of Sale Act is obvious. It was passed to prevent the mischief arising from a practice too commonly resorted to by debtors of making an assignment of their property to certain creditors who, when the insolvency of the debtor becomes apparent, enjoy a preference over other creditors. The mode of preventing this injustice and injury to the creditors which the statute has established is first to require a public registration, in the manner and form prescribed, accessible to all whom it may concern, of transactions by which a debtor, or a person about to contract debts, deprives himself of portions of his property. If this regulation be complied with, the persons who trust the debtor cannot be heard to say that they had not the means of satisfying themselves, so far as the visible possession of property is concerned, whether or not he was to be trusted. If it be not complied with, as for the reasons I have mentioned, I am of opinion that in this case it was not, it is declared to be null and void in certain cases as against, among other persons, assignees in bankruptcy. Then arises the question whether the goods in question were, or not, in the apparent possession of the debtor. Of course if, as in the case of *Gough v. Everard*, the actual possession was in the owner of the bill of sale, and there was not, and could not be, any apparent or other possession, it would be indifferent whether the bill of sale were registered or not. A bargain and sale or even a mortgage or pledge completed by delivery made and possession taken, would preclude any claim by assignees or any other persons. The goods were at one time the sole property of the bankrupt; they were, and have remained, and still are, in the house he dwells in. Agents have been put in possession of them for the purpose of protecting the title of the respondent under the bill of sale; but nothing has been done to change, in the view of the outer world, that appearance of ownership which the bankrupt was, and, for anything that appears, is still invested with. He says, in his affidavit, that, notwithstanding the entry by the agents of the respondent, he has had, and still has, the use of the goods. Now, having to discharge to some extent the function of a jury, I cannot hesitate a moment in saying, upon the facts in evidence, that, in the words of the interpretation clause in the statute, these goods, being in the bankrupt's house, used and possessed by him, are and were at the time of the bankruptcy, in his apparent ownership as defined by the statute. But then it is urged in argument that the words at the end of the interpretation clause, "notwithstanding that formal possession only have been given or taken" have the effect of qualifying the generality of the preceding enactment, and that where any other than merely formal possession has been taken, as is said to be the case here, although I am by no means convinced of that as a fact, the preceding definition of apparent ownership becomes of no effect. And in support of this argument reference has been made to an expression in Bramwell, B.'s judgment, in which he says, "the interpretation applies to cases where formal possession alone has been given." I do not, however, think that the context of the learned baron's judgment bears the construction which it has been attempted to put upon these words, nor can I read the statute in the manner

PROB.]

In the Goods of DUGGINS—STONE v. STONE.

[CHAN.]

suggested by the respondent. The plain enactment is in substance that if the owner of the bill of sale do not comply with the provisions of the statute his security shall be void as against assignees in bankruptcy with respect to chattels left in the apparent ownership of one who becomes bankrupt. The creditor is at liberty under his bill of sale, whether registered or not, to take possession of that which has been assigned to him, and to remove or deal with it as the owner. If instead of exercising his right he thinks fit to leave the goods which have been assigned to him, and which have thereby become his, in the house of his debtor, the bill of sale not having been duly registered, he leaves them in that debtor's apparent ownership, and he cannot be relieved from the consequences by proving only that it was not a merely formal possession which was taken by him. To decide otherwise would, in my opinion, be not only to impair the Bills of Sale Act in a very mischievous degree, but it would be to misconstrue its plainly expressed enactments. The order therefore will be to declare that the assignees are entitled to the chattels comprised in the bill of sale as part of the bankrupt's estate to be administered under the bankruptcy. Having regard to the manner in which the question has been submitted to this court for its decision, I make no order as to costs, except that the assignees are to have their costs out of the estate.

Ordered accordingly.

Solicitors: Routh and Stacey; Walker and Martineau.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Feb. 8.

In the Goods of DUGGINS.

Will—Name of attesting witness signed by another person—Probate refused.

The name of a witness who appeared on the face of the will as having subscribed and attested it, was not signed by him, but by his wife, at his request, in his presence, and in the presence of the testator and the other attesting witnesses.

Held that this was not a subscription within the words of the statute, and refused probate.

E. Duggins died Oct. 7th, 1867, having previously executed a will on Oct. 20th, 1860. One of the witnesses was Wm. Edwards, and his name appeared on the will as an attesting and subscribing witness. He had not, in fact, subscribed the will, but his wife, Susannah Edwards, who was present at the time of execution, had signed his name for him, at his request, he being an illiterate person, in the presence of the testator, her husband, and the other attesting witness.

A. Charles now moved for probate of the will, and asked the court to declare either that the subscription by Susannah Edwards, the wife, was in fact a subscription by the husband, or that Susannah Edwards was in fact an attesting and subscribing witness, although she signed the name of her husband. [Lord PENZANCE.—The case of *The Goods of Hannah Cope*, 2 Rob. 885, is against you.] He admitted that that case went so far as to show that to give directions to another person to sign a name was not a subscription by the person whose name was signed, but on the second point he submitted that it was not absolutely essential that a witness should sign his own name, provided that he was an attesting witness, and signed with the intention of attesting the will. He cited *In the*

Goods of Oliver, 2 Spinks. The case of *Pryor v. Pryor*, 29 L. J. 114, P. & M., was against him, but he distinguished that case from the present, inasmuch as the name signed was that of a person not present at the transaction.

Lord PENZANCE, J. O.—I think this application cannot be granted. The will is signed by the testator in the presence of witnesses, and that part of the statute no doubt is satisfied. But the statute also requires that the signature shall be made and acknowledged, not only in the presence of witnesses, but also that the witnesses shall attest and subscribe the will. One of the attesting witnesses, Wm. Williams, did so subscribe and attest the will, but Wm. Edwards did not subscribe nor write his name, nor put his mark, nor did he, in fact, touch the will. Upon the authority of the case I have quoted, I am of opinion that some other person writing the name of a witness is not sufficient to satisfy the words of the statute. The same section in which those words occur provides that a testator shall subscribe the will at the foot or end thereof, and then it goes on to say it shall be done by the testator, or some other person by his direction. Provision is then made for somebody else writing the name of the testator, but no such provision is made with regard to the attesting witnesses. I think, therefore, the will has not been attested by Wm. Edwards. Then it is suggested that the attesting witness is not Wm. Edwards, but Susannah Edwards. To make that out it would be necessary to show that the signature of Wm. Edwards was either the signature of Mrs. Edwards, or that if it were not she subscribed it as her signature with the intention of attesting the will. There have been cases in which witnesses have signed somebody else's name, and if the court were satisfied that this had been done inadvertently it would not be right to hold that the witness had failed in his object of attestation. But that is a very different thing from holding that a person who never intended to sign her name did so because she has written the name of somebody else. I am bound therefore to reject this application.

Solicitor: Johnson.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by T. BROOKSBANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law

STONE v. STONE.

Statute of Limitations—Breach of trust—Covenant to settle—Covenant to invest in joint names—No investment made—Liability of person in whose name an investment was to be made—Lapse of time.

In 1814, S., after his marriage executed a settlement, which recited that he had, prior to his marriage with his then wife A., agreed to settle 1000l. in manner thereafter mentioned, and also to enter into the covenant therein contained, and that he had paid into the hands of G. the sum of 1000l. G. then covenanted with S. that he would stand and be possessed of the said sum of 1000l., and also such further sum as should be paid to him as thereafter mentioned, upon trust (with the approbation of S. testified in writing), to invest the same sum upon the securities therein mentioned in the names of G. and S., and from time to time (if S. should so think fit and direct by writing under his hand), to alter the securities, and to apply the income thereof to S. during his life, and on his death to his wife A. for her life, and after the death of the survivor to hold the capital on trust for the children of the marriage as the survivor of S. and A. should by will appoint, and in default of appointment, among the

CHAN.]

STONE v. STONE.

[CHAN.

children of the marriage in equal shares. There was a further covenant by S. with G., that S. would at the expiration of twelve months from the date of the settlement, pay to G. the further sum of 1000*l.* to be held by him upon the same trust as the first 1000*l.*

In 1821 G. died; in July 1851 A. died; and in July 1868 S. himself died. There were two daughters of the marriage who survived S. After the death of S. it was found that there were no investments to answer the two sums of 1000*l.*, and it was believed that they had never been paid to G., though the evidence did not prove this conclusively. A suit having been instituted to administer the estate of S., the two daughters carried in a claim against his estate for the two sums of 1000*l.* mentioned in the settlement. James, V. C. held that S. was not a trustee of either of those sums, and that consequently the claim of the daughters was barred by the Statute of Limitations:

On appeal held (reversing the V. C.'s decision), that with regard to the first sum of 1000*l.*, mentioned in the settlement to have been actually paid to G., S. had constituted himself a trustee of the covenant entered into by G. for investment, and was bound to enforce that covenant. Consequently the claim against the estate of S. in respect of the first 1000*l.* was not barred by the Statute of Limitations.

But, with regard to the second 1000*l.*, it was held (affirming the V. C.'s decision), that as S. was only liable upon a legal covenant, the claim of the daughters was barred by the Statute of Limitations.

This was an appeal by Miss Eliza Parish Stone and Mrs. Georgiana Cole, two daughters of John Stone, the testator in this cause, by Ann Stone, his first wife, from a decision of James, V. C., whereby his Honour refused to admit a claim made by the appellants against the estate of John Stone under the following circumstances:—

The suit was instituted to administer the estate of John Stone, and to carry into execution the trusts of his will. In an indenture dated the 17th Feb. 1814, and made and executed between and by John Stone of the first part, Ann Stone, his wife, of the second part, and Robert Gatcombe of the third part, there were the following recitals:

Whereas the said John Stone did, by a certain agreement or memorandum in writing, made and executed previous to his marriage with the said Ann Stone, agree to settle the sum of 1000*l.* in manner hereinafter mentioned, and also to enter into the covenant herein contained; and whereas the said John Stone hath paid into the hand of the said Robert Gatcombe the sum of 1000*l.*, at or before the sealing and delivery of these presents, the payment and receipt whereof he, the said Robert Gatcombe doth hereby acknowledge.

The indenture of settlement contained the following covenant by Robert Gatcombe:

He, the said Robert Gatcombe, doth hereby, for himself, his heirs, executors, and administrators, covenant, declare, and agree with and to the said John Stone, his executors, administrators, and assigns, that he, the said Robert Gatcombe, shall and will stand and be possessed of, and interested in the said sum of 1000*l.* and also such further sum as shall be paid to the said Robert Gatcombe as hereinafter mentioned, upon the trust, and to and for the ends, intents, and purposes hereinafter mentioned, expressed and declared of and concerning the same—that is to say, upon trust that he the said Robert Gatcombe, his executors, administrators, or assigns do and shall (with the approval of the said John Stone, testified by some writing under his hand), lay out and invest the sum of 1000*l.* in Parliamentary stocks or in the public funds, or otherwise put and place the same out at interest on Government or real securities, or on the security of lands held for any long term or terms of years absolute in the names of him the said Robert Gatcombe, his executors, administrators, or assigns, and of his the said John Stone, and from time to time (if the said John Stone shall so think fit and direct by writing under his hand), to alter and change such stocks funds and securities wherein the same shall be lent and invested, and shall and do pay, apply, and dispose of the interest, dividends, and proceeds to arise by or out of the said trust money in such manner as is hereinafter mentioned.

The indenture went on to declare the trusts, the

income being payable to John Stone for his life, and after his death to his wife, Ann Stone, for her life. After the death of the su vivor of them the capital was to go to the children of the marriage in such shares as the survivor of the husband and wife should appoint, and in default of appointment to be divided between the children in equal shares. Then followed a covenant by John Stone for himself, his heirs, executors, and administrators, with Robert Gatcombe, his executors, administrators, and assigns, that he John Stone would, at the expiration of twelve months from the date of the indenture of settlement, pay into the hands of Robert Gatcombe, his executors or administrators, the further sum of 1000*l.*, which sum when paid to Gatcombe, his executors, or administrators, was to be put and placed out at interest in such manner and upon the several trusts, and to and for the several ends, intents, and purposes, and under and subject to the several provisions, declarations, and agreements thereinbefore declared of and concerning the first sum of 1000*l.*

Robert Gatcombe died in the year 1821. There was no conclusive evidence to show that either of the sums of 1000*l.* had been paid to him by Jno. Stone, but the belief of the parties was that neither of the sums had been paid to him. On the 5th July 1861 Ann Stone died, and on the 7th July 1868 Jno. Stone died. At the time of his death no investments of the two sums of 1000*l.* could be discovered. This suit having been instituted on behalf of children of Jno. Stone by a second wife, to administer his estate and to carry into execution the trusts of his will, the present appellants carried into chambers a claim against his estate for the two sums of 1000*l.* The Vice-Chancellor, when the matter came to be argued before him, was of opinion that Jno. Stone had not by the settlement constituted himself a trustee of either of the sums of 1000*l.*, and that therefore the claim was barred by the Statute of Limitations. His Honour consequently refused to admit the claim, and from that decision the present appeal was brought.

Eddis, Q. C., and Dumergue, on behalf of the appellants, contended that under the terms of the settlement Jno. Stone had in fact made himself a trustee of both the sums of 1000*l.*, and that therefore the claim of the appellants was not barred by the Statute of Limitations.

Bristowe, Q. C. and Lindley, on behalf of the executors of John Stone, argued that by the terms of the settlement no trust attached to John Stone, even with respect to the first sum of 1000*l.* until he should have given a written direction to Gatcombe to invest the money. Till that direction had been given Gatcombe was the sole trustee, and it would have been impossible for this court to compel John Stone to give a written direction to Gatcombe to invest the money. As to the second sum of 1000*l.* there was no liability on the part of John Stone beyond a legal covenant to pay a sum of money.

Eddis, Q. C. was heard in reply.

The following authorities were referred to in the course of the argument:—

Butler v. Carter, L. Rep. 5 Eq. 276; 18 L. T. Rep. N. S. 11;
Brittlebank v. Goodwin, L. Rep. 5 Eq. 545;
Burrowes v. Gore, 6 H. L. Cas. 907;
Spickernell v. Hotham, Kay, 669;
Wych v. The East India Company, 3 P. W. 309;
Rolfe v. Gregory, 12 L. T. Rep. N. S. 162;
Burrell v. Lord Egremont, 7 Beay. 205.

Lord Justice GIFFARD, agreed with the Vice-Chancellor as to the second sum of 1000*l.* With

CHAN.]

Ex parte GREAVES; Re GREAVES.

[CHAN.]

regard to that sum, John Stone had entered into no other obligation than a legal covenant, and it would be very unwise to imply a trust in a case where it was clear that no trust was intended. The obligation was a mere legal one, and, being so, was, after the lapse of time that had taken place, barred by the statute. The case of *Rolfe v. Gregory*, did not apply, as there was a direct trust. With respect, however, to the first sum of 1000*l.*, the case was different, and his Lordship could not agree in the conclusion of the Vice-Chancellor. His Lordship could not allow that the settlement left it any way at the option of John Stone whether he would be a trustee of that sum of 1000*l.*, or that he could, if he chose, decline to assume that trust. The 1000*l.* was to be put into Gatcombe's hands, and then to be invested in the joint names of himself and Stone. Stone was to have the right to point out the manner of investment, but if he omitted to do so that was not to prevent the investment being made. Stone was bound to give his written approbation to the making of an investment in the names of himself and Gatcombe, and, if Stone did not do this, Gatcombe was still bound to make an investment in the two names. Stone, in fact, constituted himself a trustee of the covenant entered into by Gatcombe, and it was his duty to enforce the fulfilment of that covenant, and to take all the steps necessary for that purpose. As he neglected to perform this duty his estate must be liable for the consequences. Therefore, the claim of the applicants would be admitted so far as it related to the first sum of 1000*l.*

Solicitor for the appellants, *W. Compton Smith*

Solicitors for the executors, *Meredith and Co.*

Jan. 15 and 22.

(Before Lord Justice GIFFARD.)

Ex parte GREAVES; Re GREAVES.

Bankruptcy—Creditors' deed—Registration—Certificate—Jurisdiction to cancel the registration and revoke the certificate—Fraudulent deed—B. A. 1861, ss. 192, 197—Bankruptcy Amendment Act 1868, s. 1—Gen. Ord. 22nd May 1862, B.

The Court of Bankruptcy has, in a proper case, jurisdiction to cancel the registration of a creditors' deed, registered under the B. A. 1861, and to revoke the certificate of protection given to the debtor upon the registration of the deed, inasmuch as such a deed is a substitute for bankruptcy; the registration makes the deed a record of the court; and the court may, under sect. 197 of the Act, have to take action upon the deed.

The case differs entirely from that of a judgment registered with the master of a court of common law, as he does not make the registration in the character of an officer of that court, and the thing which he registers does not, unless it is a judgment of that court, become a record of the court.

*A debtor, formerly in the army, and afterwards an officer of a regiment of volunteers, had an income from his pension, pay, and allowances, amounting to 310*l.* a year. His only property was his furniture, worth 50*l.* His debts amounted to more than 620*l.* He executed a deed of composition with his creditors by which he was to be released from his debts on payment of 2*s.* 6*d.* in the pound in two months. The deed contained a provision that, if it should not be assented to by the necessary statutory majority of the creditors within a time named, it should be void. The deed appeared to be duly assented to by the creditors, but by a majority in value which only exceeded the necessary statutory majority by about 10*l.* Among the as-*

*senting creditors were two sons of the debtor for moneys advanced to the father; the elder son's assent being given for 265*l.*, and the younger son's assent for 17*l.* 10*s.* This deed was registered under the B. A. 1861, and the usual certificate of protection given to the debtor. It appeared upon examination of the father and sons in the Court of Bankruptcy that the assent of the younger son to the deed was given when he was an infant; and that there was included in the elder son's debt a sum of 28*l.* for interest, which he had no right to charge. The father admitted that the deed was executed for the purpose of relieving the eldest son from the necessity of having to contribute to his support:*

Held, that this was a fraudulent deed, and the order of the commissioner, made on the application of a non-assenting creditor, cancelling the registration of the deed and revoking the certificate, was affirmed.

This was an appeal from a decision of Mr. Thring, late Commissioner of the Liverpool District Court of Bankruptcy.

George Hudson Greaves was for many years a sergeant-major in a regiment of the line. He retired upon a pension which amounted to 45*l.* 12*s.* 6*d.* per annum. In the year 1863 he was appointed to be captain and adjutant of the 64th Regt. Lancashire Rifle Volunteers. In that capacity his pay amounted to 10*s.* per diem, or 182*l.* 10*s.* per annum, and he also had an allowance for forage for a horse and for a servant, which amounted to 5*s.* 3*d.* per diem, or 95*l.* per annum. His whole income from these various sources amounted, after making the necessary allowance for income-tax, and some other deductions, to about 310*l.* per annum. Two of his sons, who earned their own living, lodged in his house, and paid him respectively 60*l.* and 40*l.* a year for their board and lodging, which did not include their dinners. The eldest son was assistant secretary to an insurance company in Liverpool, and had a salary of 250*l.* a year; the second son was a clerk in a merchant's office at Liverpool, and had a salary of 100*l.* a year. Both his sons lent him sums of money; the elder son to a considerable amount. He ultimately became much embarrassed, and on the 22nd Oct. 1869 he executed a deed of composition for the benefit of his creditors. This deed provided that Greaves should pay his creditors, on or before the 7th Feb. 1870, a composition of 2*s.* 6*d.* in the pound on the respective amounts of their debts. In consideration of this the creditors agreed to release him in full from his debts.

The deed contained a proviso that, unless it should be assented to by a majority in number representing three-fourths in value of the creditors whose debts should respectively amount to 10*l.* or upwards on or before the 17th Nov. 1869, it should be void and of no effect. This deed was registered under the Bankruptcy Act 1861, on the 11th Nov. 1869. The affidavit of the debtor and the accounts filed by him under the Bankruptcy Act 1861 and the Bankruptcy Amendment Act 1868 showed that the total amount of Greaves's debts was 622*l.* 10*s.* 9*d.*, of which the debts of less than 10*l.* amounted to 35*l.* 6*s.* 9*d.*, the debts of 10*l.* and upwards amounting to 587*l.* 4*s.* There were sixteen creditors whose debts amounted to 10*l.* and upwards, and of these eleven assented to and five dissented from the deed. The debts of the eleven assenting creditors amounted to 451*l.* 4*s.*, and the debts of the five dissenting creditors amounted to 136*l.* The requisite statutory majority of three fourths in value would have amounted to 440*l.* 8*s.*, consequently the actual majority exceeded that sum by only 10*l.* 16*s.* The largest creditor was the debtor's eldest son, and his assent was given to the deed for a sum of 265*l.* 4*s.* 2*d.* The account which he delivered of this debt showed that he claimed this sum in respect of moneys from time to

CHAN.]

Ex parte GREAVES; Re GREAVES.

[CHAN.]

time advanced to his father, against which on the other side were set off the sums which were from time to time due to the father in respect of board and lodging. The balance of 26*l.* 4*s.* 2*d.* included a sum of 28*l.* 19*s.* claimed for interest on the moneys advanced. The other son assented to the deed for a sum of 17*l.* 10*s.*, also in respect of moneys lent to the father.

The evidence showed that the debtor had, besides his pay and allowances, no property except his household furniture, which he valued at 50*l.* The father and his sons were also examined in the Court of Bankruptcy, and it appeared from what was then elicited, that at the time when the younger son's assent to the deed was given he was an infant, he having attained twenty-one on the 16th Nov. 1869, whereas the deed was registered on the 11th Nov. 1869. It appeared also that the father had never agreed to pay the eldest son any interest upon the moneys advanced by him. The father, in the course of his examination, said that he entered into such an agreement with his eldest son in the year 1861, but it was shown that at that time the eldest son was only fifteen years of age, and that he made no advances to his father until the year 1865. The eldest son in his examination admitted that he expected to be repaid the moneys which he lent to his father by means of the board and lodging which the father was to provide for him. Upon cross-examination the father said that his object in executing the deed was to relieve his son from the necessity of having to contribute to his support. Under these circumstances some of the dissentient creditors applied to the commissioner to have the registration of the deed cancelled, and the certificate of protection given to the debtor revoked, and his Honour made an order accordingly. In giving his judgment he said:—

The principle which governs this description of case has been very clearly laid down by Lord Cairns, in *Ex parte Cowen*, L. Rep. 2 Ch. 563. He there says, "The position of the majority of the creditors is a very strong one; that of the minority is very weak, and requires to be carefully guarded by the court, especially as it has been held that a deed under these sections need not contain a *cessio bonorum* It was much pressed in argument that wherever the court finds a deed to be unreasonable in its provisions it will be treated as invalid, and that it is unreasonable if the amount of composition be not in fair proportion to what the debtor is able to pay. But in my opinion there is a statutory power given to the majority of the creditors to bind the minority. They are made the judges of the propriety of the arrangement, so long as they exercise their power *bona fide*, and it certainly seems to me that it would be contrary to the spirit of the Act that this court should sit in review on their decision as to the quantum of composition they may agree to accept. But this is subject to the paramount obligation that this power, like all other powers, must be exercised fairly, so that there may be a *bona fide* bargain between the creditors and the debtor. If it should be found that the bargain was tainted with fraud, the arrangement will not be binding on the non-assenting creditors. If, for example, it were found that there was a bargain with some of the creditors to give them some peculiar benefit, that would be a fraud. But even without any ingredient of fraud, if the creditors, from motives of charity and benevolence, which might be highly honourable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority." This decision has been followed by the Lord Justices in *Ex parte Deacon*, (*infra*) and by the Court of Queen's Bench in *Mart v.*

Smith (*infra*), where Cockburn, C. J., says: "I never could bring myself to think that it was intended that the majority of the creditors should be enabled to relieve the debtor of his liability to pay his debts, as far as his assets would go, at the expense of those creditors who were not disposed to take the same benevolent view of the position of the debtor as the majority of the creditors." Now, what are the facts of the present case? The deed is carried by a sum barely exceeding the statutable amount, and depends entirely on the debt of the son, contracted in the manner which I have detailed. It is impossible for a moment to contend that the amount of the composition is proportioned to the ability of the debtor. Why, if one-fourth of his income were put aside for little more than three years the creditors would realise 10*s.* in the pound. Then arises the question of *bona fides*. There does not appear to have been any meeting of the creditors, or any examination or inquiry into the state of the debtor's assets, or the nature and extent of his liabilities, and the debtor himself has stated that the deed was entered into for the purpose of relieving his eldest son. Under these circumstances I do not find that the deed was absolutely tainted with fraud; but I am clearly of opinion that the arrangement was made for the benefit of the debtor and his sons, and not in the interests of the general body of the creditors. This case consequently falls within the principle laid down in the judgments which I have cited. I, therefore, order the registration of the deed to be cancelled in conformity with a decision of Mr. Commissioner Bacon, in *Re Wilde*, 17 W. R. 368, in a very similar state of facts; and I further order the debtor to pay the costs of the applicants.

From this decision Mr. Greaves appealed.

De Gex, Q.C. and *Ernest Reed*, on behalf of the appellant, contended (1) that there was no jurisdiction to cancel the registration of the deed; (2) that if there was jurisdiction a proper case was not shown for exercising it. On the first point they urged that the registration of the deed was not an act of the court, but a purely statutory proceeding, and the statute made no provision for cancelling the registration. A deed was not necessarily a good deed because it was registered. The proper course for a dissentient creditor was to come under sect. 198 to ask the leave of the court to issue execution against the debtor notwithstanding the deed. No one could be injured by leaving the deed as it stood, as, if it was bad, a dissentient creditor would not be stopped in proceeding at law, or in getting leave to issue execution. The decision of Mr. Commissioner Bacon in *Re Wilde* was given without all the previous authorities being brought to his Honour's attention. On the second point they urged that the deed was *bona fide*, and that the creditors would get more under it than they could possibly obtain under a bankruptcy, the debtor's only property being 50*l.*, which was considerably less than the amount of composition offered. The sons were as competent to assent as the other creditors, as their debts were real debts. The debtor's pay ought not to be taken into account, as no part of it could be set aside for the creditors without the consent of the War Office, and that would not be given in a case where the debtor's pay was not more than enough for the proper maintenance of his position as an officer. They cited

Ilderton v. Jewell, 16 C. B., N. S., 665; 10 L. T. Rep. N. S. 815;
Ex parte Page, re Neal, 1 De G. J. & S. 283;
Re Rawlings, 1 De G. J. & S. 225; 7 L. T. Rep. N. S. 288;
Re Savin, L. Rep. 1 Ch. App. 616; 15 L. T. Rep. N. S. 150;

CHAN.]

Ex parte GREAVES; Re GREAVES.

[CHAN.]

Ex parte Ness, 5. C. B. 155;
Re Harnden, 3 De G. & J. 489;
Re Cowen, L. Rep. 2 Ch. App. 563; 16 L. T. Rep. N. S. 469;
Re Deacon, L. Rep. 4 Ch. App. 87; 19 L. T. Rep. N. S. 438;
Hart v. Smith, L. Rep. 4 Q. B. 61; 19 L. T. Rep. N. S. 409.

Little, Q. C. and *Ford North*, for the respondents, contended that the deed did not comply with the statutory requisites, as there was not a sufficient assent by the creditors. The assent of the younger son was worthless, as it was given when he was under age, and the sum of 28l. 19s. claimed by the elder son for interest ought to be struck off. The result would be that there would not be the requisite majority of three-fourths in value. By sect. 1 of the Bankruptcy Amendment Act 1868 (31 & 32 Vict. c. 104), the fulfilment of the conditions there mentioned is made a statutory condition precedent to the validity of the deed. The registration of the deed in the present case was procured by a misstatement; it was said that the necessary majority in value of the creditors had assented, whereas in truth they had not. The creditors who assented must be taken to have done so only upon the footing of there being a valid deed. The court has power to order the cancellation of the registration, for it has by the Act a duty imposed upon it with reference to the registration of the deed, and is bound to see that duty properly performed. The deed, when registered, becomes a record of the court, and the certificate of protection given to the debtor is issued under the seal of the court. The court must have power over its own records. The case of *Ex parte Ness* relates to the registry of a judgment, which is not a record of the court, and is really an authority in our favour. *Ex parte Page* and *Re Rawlings* are not really against us. As to *Re Savin* there was no judicial determination that the power to cancel registration did not exist, and Turner, L. J. in what he said did not seem to have properly considered that the statutory effects of registration only followed if the prescribed statutory conditions were duly fulfilled. *Re Wilde* is a distinct authority in our favour, and must be overruled if the appellant is to succeed. In bankruptcy the court has always asserted and exercised a jurisdiction to supersede or annul an adjudication, obtained by an abuse of the process of the court, with regard to the right of creditors who have proved.

Ex parte Prosser, Buck. 77.

Ex parte Brookes, Buck. 257.

Ex parte Battier, Buck. 426.

De Gex, Q.C. in reply, urged that the deed could not be pleaded in defence of an action at law by one of the assenting creditors, unless it could be produced in evidence; and if the registration were cancelled the deed could not be produced in evidence at all: (The Bankruptcy Act 1861, sect. 194.) If, therefore, the registration were cancelled, the rights of the appellant as against the creditors who assented to the deed would be affected, whereas if the deed remained registered it would not, if invalid, interfere in any way with the rights of the dissentient creditors. Registration is essential as a matter of evidence, and can do no harm to any one. It should, therefore, remain for what it is worth. He referred to

Rossi v. Bailey, L. Rep. 3 Q.B. 621; 19 L. T. Rep. N. S. 130.

Ex parte Stanford, 1 Q. B. 886.

Lord Justice GIFFARD said:—First of all, what one has to ascertain is, whether there are facts which would justify such an order being made

if there is jurisdiction to make it. As regards the facts, I have no hesitation in saying that they are such that, if the court has jurisdiction, it ought unquestionably to make the order. [His Lordship stated the facts.] Under these circumstances neither of those two sons gave or could give a valid assent; and, to speak in plain terms, I hold this to be a fraudulent deed, and I do not mean to speak otherwise of it than as fraudulent in the plainest sense of the term. That being so, the next question to consider is whether there is jurisdiction to cancel the memorandum. Before I go to that I may observe that Mr. De Gex has presented his argument thus—namely, that the registration and the certificate are only *prima facie* evidence, and that there are other creditors who are interested in this matter. I do not say that in every case where a deed may be questioned the registration of that deed ought to be cancelled, but I do say that where a deed is fraudulent it unquestionably ought to be cancelled, and that there is jurisdiction to cancel it, especially where no act has been done under that deed, and where every creditor must be taken to have assented on the supposition that a valid assent to the deed must be obtained, or that it could not be registered. That being so, all I have to consider is whether the court has or has not jurisdiction. Certainly nothing that was said by Lord Westbury in *Ex parte Page*, and nothing that was said by Turner, L. J. in *Re Rawlings* and *Re Savin* goes at all to decide, or, in my judgment, to show, that the court has not jurisdiction. And when we come to consider this matter I think it is absolutely essential that the court should have jurisdiction. The case is not at all like the case of *Ex parte Ness* in the Common Pleas, where the master of the Common Pleas happens to be the person whose duty it is to register judgments. But he does not register judgments as an officer of the Court of Common Pleas, or as being under the jurisdiction of the Common Pleas; nor does the thing which he registers, unless it happens to be a judgment of the Common Pleas, form in any sense a record of the Court of Common Pleas.

Then, again, with respect to the registration of births and deaths, that has nothing to do with any court at all. What we have to with here is, first of all, a thing substituted for bankruptcy; secondly, a thing which is to form a record of the court; and, thirdly, a thing on which the court may have to take action, because, if we turn to the 197th section, it is this: that from and after the registration of such deed the debtor and the creditors and all parties may come upon the footing of that registration, and take action, and get judgment on almost every question that can possibly arise on the footing of that deed. It would be strange, I think, if a matter is a record of the court, that the court should not have jurisdiction over its own record. But, beyond and besides that, there is this fact, that when the registration has been made and the matter has become a record of the court, the direction is that a certificate shall issue, and that certificate is to issue under the seal of the court; and to suppose that, if a certificate of that description under the seal of the court was obtained from the court upon a fraudulent representation that certificate could not be recalled, is in fact to suppose that the court could not exercise one of the most ordinary jurisdictions which is exercised by it every day. I have no hesitation in saying that where you have a matter to be registered by an officer of the court, in respect of which that officer is amenable to the court, and where the thing to be registered is to be a record of the court, on which the court has to act, and with reference to which the court has duties to perform, this court has jurisdiction, without its being mentioned in the Act of

CHAN.]

Re THE HEYFORD COMPANY (LIMITED); FORBES'S AND JUDD'S CASES.

[CHAN.]

Parliament, to cancel that registration and revoke that certificate.

That being so, I am of opinion that this appeal should be dismissed with costs; and I may state, with reference to the case before the present Chief Judge in Bankruptcy, that although he does not go into his reasons in that judgment, I have no doubt whatever that that case, and in fact other cases, have been well considered before that judgment was given; and I believe it was not only the opinion of the learned Chief Judge, but the unanimous opinion of all the commissioners, that this was a jurisdiction which could be exercised, and certainly it is in this case a most proper and salutary one.

Solicitors for the appellant, *Vizard, Crowder, and Co.*

Solicitor for the respondents, *W. W. Wynne.*

Tuesday, Jan. 18.

(Before the LORD CHANCELLOR and Lord Justice GIFFARD.)

Re THE HEYFORD COMPANY (LIMITED);

FORBES'S AND JUDD'S CASES.

Company—Winding-up—Subscriber of memorandum—Allotment of fully paid-up shares to him.

The appellants (F. and J.) and P. subscribed the memorandum of association of this company for 50, 50, and 1350 shares respectively, in the ordinary way, there being nothing to show that the shares were fully paid-up. In the articles of association an agreement was embodied and adopted, by which P. was to sell and transfer certain property to the company, and was to accept in part payment of the purchase money 1500 fully paid-up shares. He executed the transfers, and 1350 of the 1500 shares were allotted to him, and fifty shares to each of the appellants, who made no payment in respect of them. The remaining fifty were in like manner allotted to another nominee of P. The company was ordered to be wound-up, and F. and J. contended that they could be settled in the list only as holders of fully paid-up shares, but it was

Held (affirming the decision of the Master of the Rolls), that buying the shares of P. was not a satisfaction of the obligation which, by signing the memorandum of association, F. and J. had entered into, and that their names must consequently be inserted in the list for fifty shares on which nothing had been paid.

This was an appeal by Mr. Forbes and Mr. Judd against an order of the Master of the Rolls, which settled their names on the list of contributories of the company in respect of fifty shares each, upon which nothing had been paid.

The facts of the case are fully stated in 21 L. T. Rep. N. S. 632, and it is unnecessary to add anything to that report.

Jackson supported the appeal, and referred to

Re The China Steamship and Labuan Coal Company, Drummond's case, L. Rep. 4 Ch. App. 772; 21 L. T. Rep. N. S. 317;

Re Heyford Company, Pell's case, L. Rep. 8 Eq. 222; 21 L. T. Rep. N. S. 320

Re The London, Hamburgh, and Continental Exchange Bank, Evans's case, L. Rep. 2 Ch. App. 427; 16 L. T. Rep. N. S. 252;

Re South of France Wine Company, Baron de Beville's case, L. Rep. 7 Eq. 11;
and distinguished the present case from

Re The South Blackpool Hotel Company, Migotti's case, L. Rep. 4 Eq. 288; 16 L. T. Rep. N. S. 271.
on the ground that in this case the agreement was one between the company and the appellants, and not between two shareholders.

Roxburgh, Q.C., for the official assignee.

The LORD CHANCELLOR said:—Mr. Roxburgh, I do not think we ought to call upon you. It appears to me that *Migotti's* case proceeds upon this simple principle—that when a person subscribes to the memorandum of association of a company for so many shares, by virtue of that act, coupled with the enactments contained in the Company's Act 1862, he has placed himself in this position, that he (that individual) must take the shares which he has so subscribed for, and must pay for them, as was said by Giffard, L. J. in that case, either “in malt or in meal.” If he has chosen to put his name down as a subscriber, he has undertaken to take the number of shares set opposite to his name. Then it is said that here there is an agreement with Pell that Pell, having sold this property to the company for 30,000*l.* which is the presumed value, is to be paid for it by having 1500 shares allotted to him, and that he is content to put his name down for 1350 shares, and to allot the remaining 150 shares in such manner as regards the two appellants, as that they shall be considered as having taken fifty fully paid-up shares, and so to have satisfied their obligation to the company. If that be a proper way of dealing with a company's shares, then instead of Pell finding two shareholders, each of whom should take fifty shares, he might have split these 100 shares, and he might have put 100 persons as shareholders on the register of this company, none of whom would have given anything to increase the funds of the company, but who would have been told, “You have satisfied any obligation you might otherwise have been under by my saying, I hand over to you my shares, and those shares represent the shares which you have undertaken to subscribe for with the company.” I apprehend that the engagement they entered into did not cease upon those shares being given to them in that manner, but that their obligation was to take shares issued by the company to them, for which they undertook to pay. *Migotti's* case went upon the principle that I have stated—putting your name down, you must accept the issue of those shares, and you must pay for them in one way or the other—“either in meal or in malt.” Then, when you come to *Drummond's* case, all that that case amounts to is this: *Drummond* put down his name for a certain number of shares, and he was thereby held bound to take and pay for that number of shares. Although he took a certain number of shares, and although he was bound to pay for them, yet he satisfied his obligation in this way. He undertook to accept certain shares in another company with which he had been connected, and which was to be amalgamated with the other company. He satisfied the engagement he entered into, namely, he made payment by means of the shares which he had contracted to take, and it was quite right that the account should be settled as between him and the company, and, if there was a balance between the two, that that balance should be handed over. They were entitled at once by the very nature of the transaction to take the shares on the one hand, and fulfil the obligation on the other. The two things were performed simultaneously. With great submission to the Master of the Rolls as to his observations in the present case, I do not see any difference in principle, when a debt is contracted with the company, whether it is before or after the shareholder has contracted to take shares. Of course it must be assumed that the company was in a position at the time to contract the debt. If there be a debt, then the material existence of the debt seems to be of no consequence beyond this: is it an existing valid debt at the time calls upon the shares are due? So in *Pell's* case what happened was this: Pell entered into this agreement with the company. He agreed

CHAN.] *Re* BANK OF HINDUSTAN, CHINA, AND JAPAN; MITCHELL AND ASPINALL'S CASE. [CHAN.]

to sell certain property for 30,000*l.* In explanation of what I have last said, I assume that the company was in a position to contract with Pell for 30,000*l.* Of course a contract of that kind, if *ultra vires*, would be set aside. But assuming that it is a valid and existing debt due from the company to Pell, and that they bought this property for 30,000*l.*, and had agreed to pay for it in this manner, when Pell came to ask for his 1500 shares, according to the express terms of the contract, he might say, you have agreed with me for this price, and you have it in the land, in the leases, and in the other things handed over to you, and you can not ask me to pay anything for these shares. As regards hardship to the outside world there is none. The company and its shareholders are in just as good a condition as if it had been paid for in cash. Therefore, plainly and distinctly, he pays what is due, and the difference between the case as decided by the Lord Justice and by the Master of the Rolls seems to have been this: The Master of the Rolls seems to have thought that, being obliged to pay the full consideration of the shares, he was not to be taken as paying that full consideration, it being paid in the form of a sale of his leasehold estate and so on, but that there ought to be an inquiry what that leasehold estate was worth, and if it was worth less than the sum stated, and for which the shares were issued, he ought to be charged with the difference. That is the effect of the Master of the Rolls' decision. But that did not invalidate the contract. Of course if there was no power in the company to enter into such a contract then the contract must be set aside, and Pell must pay what was due on the shares. That seems to have been the opinion of the Lord Justice on appeal. He assumed, the contract not being impeached, that it was a good contract. It is said that these two gentlemen have contributed their money to the company simply by reason of some arrangement with Pell, by which they had been substituted for Pell in his contract as to a portion of the amount to be paid; that is, that he should take 1350 shares, and that they should be substituted as his nominees in respect of 100 of the shares remaining, and that in that respect alone are they to be considered as having contributed to the assets of the company. If that be so, that completely overthrows the whole *ratio decidendi* in *Migotti's* case, because if that can be done Pell might just as well have distributed the 100 or 150 shares to as many shareholders, and all the persons who might have made themselves responsible might raise the same contention.

Therefore the whole case reduces itself to this simple proposition, that buying shares of Pell is not a satisfaction of the obligation they have entered into, and that therefore the decision of the Master of the Rolls appealed from must be confirmed, and the appeal dismissed with costs.

LORD JUSTICE GIFFARD said.—The question raised in this case is a very plain and simple one. First of all, to my mind the decision in *Migotti's* case is clear enough. If a man agrees to take shares in a company, and he takes shares belonging to some one else, by taking those shares from somebody else, and not from the company, he does not satisfy the contract he has entered into with the company. In the court below, first of all, it was said that *Drummond's* case was inconsistent with *Evans's* case; but to my mind there is no inconsistency between *Evans's* case and *Drummond's* case, because *Evans's* case was a case in which a person had signed a memorandum of association, but had taken no shares at all. He had agreed to become a shareholder, and he was very properly put on the list. *Drummond's* case was

a case of a different description. That was a case in which there had been an arrangement between two companies for what is termed an amalgamation, and each of the shareholders in the one company were to take shares in the other company in respect of their interest in the property of the company which was about to be amalgamated, and there had moved consideration from Drummond to the company for the shares which Drummond took, and in consequence of that he satisfied the contract entered into between him and the company. There was, in point of fact, direct dealing between the company and him, and the company got the benefit of the property in which he was interested. So in *Pell's* case. Pell sold the property to the company, and took shares from the company. There was a direct agreement between him and the company, and that direct agreement satisfied the claim subsisting between him and the company by reason of his having signed the memorandum of association. In this case what these gentlemen purport to do is not to take shares belonging to the company, but to take shares belonging to Pell, and they have paid nothing to the company. If they bought them from Pell it would be entirely and completely a transaction as between them and Pell, with which the company would have nothing to do. So plainly is this case to be distinguished from *Migotti's*, that I think it ought never to have been taken from the Chief Clerk to the Master of the Rolls, and, in my judgment, ought not to have been brought from the Master of the Rolls here, and that being so in my opinion, the appeal must be dismissed with costs.

Solicitors for the appellants, *Elmslie, Forsyth, and Sedgwick*.

Solicitors for the official liquidator, *Denton, Hall, and Barker*.

Friday, Feb. 18.

(Before Lord Justice GIFFARD.)

Re THE BANK OF HINDUSTAN, CHINA, AND JAPAN.
MITCHELL AND ASPINALL'S CASE.

Winding-up—Contributory—Deed of inspectorship—Subsequent calls—Liability for—Process to enforce.

M. and A., partners, held shares in their joint names in the above-named bank at the time when a resolution for voluntary winding-up was adopted. They subsequently executed a deed of inspectorship, which provided that their estate should be administered according to the rules in bankruptcy, but it contained no cessio bonorum. It was duly registered. The schedule contained the names of the liquidators as creditors for calls at the time of its execution, but not for any estimate of future calls. Such calls were, however, made, and as they were not paid Stuart, V.C. granted the usual balance order against the debtors, but ordered them to apply in the Court of Bankruptcy for leave to issue process. On appeal

Held, that as the deed was subsequent to the commencement of the winding-up, the order must be discharged, and the liquidators must prove under the deed.

This was an appeal by Messrs. Mitchell and Aspinall against an order of Stuart, V.C., made in the winding-up of the above-named bank, that the appellants should pay the balance ascertained to be due from them to the bank, notwithstanding the execution by them of a certain deed of inspectorship under the provisions of the Bankruptcy Act 1861, but that the liquidators of the bank must thereupon apply to the Court of Bankruptcy for leave to issue process against the debtors according to the course of this court.

The case before his Honour is fully reported in 21 L. T. Rep. N. S. 812, and it appears necessary

only to state in addition to the circumstances there set forth that the inspectorship-deed contained no *cessio bonorum*.

Karslake, Q.C. and *Willis* supported the appeal, contending that after due registration of the deed all personal liability on the part of the debtors ceased as completely as if there had been an adjudication of bankruptcy against them. The liquidators should prove under that deed, and the 75th section of the Companies Act 1862 would have enabled them to prove for the full amount to which the contributories might in any possibility become liable for calls. They referred to

Re The Richmond Hotel Company; Ex parte King, L. Rep. 3 Ch. App. 10; 17 L. T. Rep. N. S. 188;
The Financial Corporation v. Lawrence, L. Rep. 4 C. P. 731;
Martin's Patent Anchor Company v. Morton, L. Rep. 3 Q. B. 306;
Hastie's case, L. Rep. 4 Ch. App. 274; 20 L. T. Rep. N. S. 93;
Re Duckworth, L. Rep. 2 Ch. App. 578; 16 L. T. Rep. N. S. 580;
Rossi v. Bailey, L. Rep. 3 Q. B. 621; 19 L. T. Rep. N. S. 130;
Martin v. Powning, L. Rep. 4 Ch. App. 356; 20 L. T. Rep. N. S. 133.

Greene, Q.C. and *Lindley*, for the liquidators, supported the order, contending that, as it was necessary to ascertain in the winding-up the amount due from each contributory, and the order did no more, but left it then to the liquidators to proceed for the recovery of that amount in the court where the deed was registered, it was manifestly right; and this was the more essential as the winding-up was a voluntary one. But as there was no *cessio bonorum*, and as, consequently, no trustees were appointed, the appellants could alone be settled on the list of contributories; and if that were not done, the shares which they had held would be wholly unaccounted for. At the utmost, however, the calls made subsequently to the deed were not proveable under it, and the order, so far as the balance was made up of such calls, ought not to be disturbed. They commented upon and distinguished the authorities relied on by the appellants.

Without calling for a reply,

Lord Justice GIFFARD said:—The first question to be determined in this case is whether or no the first call is a debt proveable under the inspectorship-deed, or by whatever name it may be called. I quite agree that if it is not the same as *Ex parte King* in this respect—namely, if this call is a debt not proveable under the deed—then the form of order which has been adopted would be a proper form, because the party would beyond all question be liable to pay. But when we look at the question it is, I think, sufficiently plain, because the deed is made between the debtors of the one part, and certain persons who are inspectors of the other part, and between “the several persons, companies, and co-partnership firms who, at the date hereof, are respectively creditors of the said debtors or one of them, or of Mitchell or Aspinall in respect of their late partnership, or who would be entitled to prove under a joint adjudication of bankruptcy against the debtors.” That of course includes all persons who could prove under an adjudication of bankruptcy; and if under an adjudication of bankruptcy this call could be proved, it would make all persons who could prove parties to the deed.

One need not go into the law; that is now settled—if bankruptcy, or that which is equivalent to bankruptcy, come after the order for winding-up, there may be a proof. That is settled by *Ex parte*

Hastie following the cases at common law, and it has, I think, also been followed by common law decisions. But then it has been said that only those creditors are included whose debts are due according to the ninth article of the deed; but that depends upon how you read the word due there. It is a very comprehensive term. To my mind it does not mean a debt payable at this moment, but “due” means a debt which existed at the date of the deed, and which is provable under it. That is quite manifest when you read the terms, because when you come to look to the ninth article, it is this—this property is to be applied “in or towards paying the debts due from the said debtors, or any of them, to the said creditors, regard being had in the application of the joint and separate estates for the payment of the said joint and separate debts, to the rules, rights, and equities which govern the administration of joint and separate estates in bankruptcy;” which, of course, means that you are to administer that estate by paying everything which, if there was a bankruptcy, would be provable under the bankruptcy. That, therefore, disposes of that part of the case.

Then we come to the other part of the case, whether it was right that the order should be made in this form, which in terms directs these parties actually to pay the sum within four days. Now as to the amount, there is not, and never has been, the slightest dispute between the parties. It is perfectly clear that if these parties are liable at all, they are liable to pay this amount; if there ought to be a proof, it ought to be a proof for this amount. In the first place, I do not think this question is open to me, because I think it is quite concluded by *Ex parte King*. That was decided by the present Lord Chancellor as Vice-Chancellor in the first instance, and subsequently by Lord Cairns as Lord Justice, and I should not consider myself at liberty to overrule an antecedent decision of this court, unless there had been some inadvertent mistake, or something of that kind; but when a decision has been come to, and all the grounds for coming to that decision have been opened before the court, and considered by the court—and in that case beyond all question, every one of those grounds, must have been considered by the court—and the court has looked at the deed, and looked to see whether the deed was a good one or not, and determined that the deed was a good one, and that a certain portion of the debt was provable under the deed, and therefore made an order in a particular form, but found that another portion of the debt was not provable under the deed, and that therefore as regarded that question there ought to be an order for payment, I am not at liberty to overrule it.

I cannot help thinking that the Vice-Chancellor has overlooked what the result of the decisions in the courts of common law has been, because if his order were to stand, beyond all question it would be wrong in any court of common law to consider any one of these inspectorship-deeds—or, in other words, they would not be properly pleaded as an answer to any action; and every person whose affairs were wound-up under a deed of this sort would have no defence to an action, and would be compelled to have, whether he liked it or not, judgment against him, unless he had some other grounds of defence; and he must then go to the Court of Bankruptcy, and have it determined there whether execution should be issued or not. That, I think, in the first place, is a most inconvenient state of the law; and in the next, it is opposed to scores of cases the courts of common law have had to consider whether the deed was a good deed or not; or, in other words, whether the deed was pleadable or not; and they had to consider that question, because, if the deed was a good deed

CHAN.]

PEARCE v. MORRIS.

[CHAN.]

and was pleadable, it followed that there ought to be no judgment at law.

That being so, I am of course very much relieved from the difficulty of setting my own opinion against that of the Vice-Chancellor, because these are the opinions of the courts of common law, the opinion of the present Lord Chancellor, and the opinion of Lord Cairns on the subject; and I must confess that I think these opinions are quite consistent with good reason and good sense, because the inconveniences of the alternative course would be very grave; and the Legislature has enacted, in so many words, that a deed of this sort, if it fulfil certain conditions, shall have precisely the same effect as if it were executed by all the creditors. That being so, we turn to this deed, and we find it does contain a release. It really has not been argued that it does not contain all the requisites under the statute. The only argument is that it does not apply to this particular debt; but if it does apply to this particular debt, it does contain all the requisites under the statute. That being so, what we have here is a release executed for all practical purposes by this company and the official liquidators of this company.

Under all the circumstances, therefore, the proper course is, I think, to discharge the order of the Vice-Chancellor. But I think it will be right to preface my order by saying this: that the court being of opinion that the amount (517*l.* 13*s.* 4*d.*) is a debt proveable under the deed, make no other order except to discharge the order of the Vice-Chancellor, and give the appellants the costs below; I cannot give them the costs of the appeal. Costs are, in similar circumstances, given in the Privy Council, and I am not at all sure that it would not be a good thing if the rule here were altered; but here the ordinary course in all cases is to give only the costs below. The liquidator will have his costs out of the estate.

Solicitors for the appellants, *J. Harwood.*

Solicitors for the liquidator, *Ashurst, Morris, and Co.*

Dec. 16 and 17, 1869.

(Before the LORD CHANCELLOR (Hatherley).)

PEARCE v. MORRIS.

Mortgage—Acceptance by mortgagee of amount tendered—Right to conveyance and title-deeds—Costs.

A., who had contracted with a mortgagor for the purchase of a portion of the mortgaged property, tendered to the mortgagee the full amount of his principal, interest, and costs, which was accepted by the mortgagee, who, however, refused to convey the real estate, and to deliver up the title-deeds to A.

Held that A. had been premature in filing his bill before he obtained his conveyance, but that the mortgagee having accepted A's tender, was bound to convey the legal estate, and to deliver up the title-deeds to him. A., however, must pay the costs of the suit.

This was an appeal by the defendant from a decree of the Master of the Rolls, reported 21 L. T. Rep. N. S. 287.

The facts were shortly these:—The defendant Morris was mortgagee of an estate in the neighbourhood of Maidenhead. Pearce, the plaintiff, had contracted to buy part of the estate from the mortgagor, and had accepted the title, subject to confirmation, by certain persons appearing to be beneficially interested therein. In this state of circumstances, Morris gave notice that he intended, under the powers vested in him as mortgagee, to proceed to a sale of the mortgaged property. Pearce thereupon tendered to Morris the amount of his principal,

interest, and costs, and Morris accepted the tender. Pearce applied to Morris to convey to him the legal estate in the mortgaged property, and deliver up the title-deeds, but Morris refused. Pearce then filed his bill against Morris alone, praying that Morris might be decreed to execute a conveyance and deliver up the deeds. In the court below it was held that Morris, having accepted the plaintiff's tender, could not dispute his right to redeem, and was therefore bound to convey the legal estate to him and deliver up the deeds, the costs of the suit to be paid by the defendant.

The defendant appealed.

Jessel, Q.C. and Nalder for the appellant.

Southgate, Q.C. and Villiers for the plaintiff.

The following cases were cited:—

Wicks v. Scrivens, 1 J. & H. 215;

James v. Bion, 3 Swanst 234;

Smith v. Green, 1 Coll. 555;

Elisha v. Elisha, 1 Seton on Decrees 384, 455, 475;

Cholmondeley v. Clinton, 2 J. & W. 134;

Titley v. Davies, 2 Y. & C. C. C. 399;

Henley v. Stone, 3 Beav. 355.

The LORD CHANCELLOR (Hatherley).—With regard to the point which has been argued upon the question of the position of mortgagor and mortgagee, in a transaction of this character, the authorities have now completely settled what the proper course to be taken upon the part of anybody interested is, as to asserting his right to redeem, and tendering the money. Of course, if the money is accepted it is carried a step further. Then, as far as his rights in equity are concerned, any person interested in the equity of redemption is entitled to redeem; and when, being so entitled, he tenders the purchase-money, and whatever interest is due, to the mortgagee, he, having a part in that equity of redemption, is entitled to the delivery of the title-deeds, and to have a conveyance made to him of the property. In what form that conveyance shall be drawn depends upon the circumstances of the case. The case of *Smith v. Green*, and the subsequent case referred to by Mr. Southgate of *Elisha v. Elisha*, show how that ought to be dealt with by the person who takes the conveyance and the deeds. Provision is made reserving any portion of the equity of redemption that he is not interested in, giving those parties the opportunity at the proper time of coming themselves and redeeming by paying their portion of the debt. In making use of the phrase, "when the proper time comes," I mean in the case of a tenant for life. I had to consider that point very expressly in the case of *Wicks v. Scrivens*. The tenant for life, having a conveyance, and having the deeds, cannot be redeemed by those in remainder; he retains the life estate, and when their turn comes for having possession of the estate they can then obtain a redemption of that charge which the tenant for life so acquired. I think, therefore, looking to the position in which the court is now placed in this matter, and seeing that any person having an interest in the estate is entitled to a conveyance; it is impossible, with regard to the interest of the parties concerned in the property, to hold that there must necessarily be a Chancery suit in order to determine who the persons are who are entitled to the other parts of the equity of redemption. All that either the court or the mortgagee has to attend to is, that the person tendering him the money has an interest, whatever it may be, in the equity of redemption. It would be very mischievous to mortgagees if the court were to hold that they were bound to inquire into the titles of all the persons who have got other interests

CHAN.]

PEARCE v. MORRIS.

[CHAN.]

in the equity of redemption; or that they cannot ascertain that matter without a suit; or, if they accepted their money without a suit, that it was at their peril, because they have been constituted trustees for other parties. It would also involve mortgagors in a vast amount of litigation and costs, which would be entirely unnecessary in most cases. A mortgagee, though a trustee, when he is paid off (as in the case of *Cholmondeley v. Clinton*) by the right person, has a plain duty to perform. He is only a trustee in this sense, namely, for the persons interested in the equity of redemption. As far as the authorities have gone hitherto, he is not entitled to convey to a mere stranger to the estate. It appears to me, as at present advised—and I say “as at present advised” because I am not aware of any express authority upon the point—that he is only entitled to convey to some person having an interest in the estate, so long as that person’s interest in the estate gives him a right to redeem. Then the mortgagee has to discharge his duty fully by making a conveyance to the person tendering him the money and handing him over the deeds. As regards the form of the conveyance, I apprehend it should be drawn in such a manner as that there should be very little difficulty arising upon the subject afterwards. But still, I think it desirable that there should be expressed on the face of the conveyance a statement of some kind or other with reference to the exact position of the parties, and showing that the person so redeeming, having only a partial interest, is to hold subject to the rights as regards all the persons who hold other interests, of redeeming him. That I think should have been stated in the decree, and so far, it appears to me, that there must be a variation in the decree. The point which, I confess, has given me most trouble in the case has been with reference to the costs of this defendant. The court always feels reluctant to depart in any way from the course which the case has taken in the court below with reference to the matter of costs; so much so, that it is a well known rule of the court that if the decree is sought to be varied in respect of costs only, no appeal can lie. In this case it seems to me that a grave question did arise in this respect. The mortgagee is told by the person who tenders him the money that he is the owner of a portion of the estate by contract, or that he has entered into a contract to purchase it. Of course the mortgagee is himself in considerable peril if he refuses. I am not saying whether he would or would not be entitled absolutely to refuse, but if he does so, and it turns out that the person tendering the money is entitled to redeem, then he loses all subsequent interest. It may turn out of course that the person who has entered into this contract may finally not be the owner of the estate, because the contract may go off, and the matter may never be completed. He has ground for asserting a right which I apprehend would entitle him to do what he did here (especially under the pressure which was put upon him by the threat of the mortgagee to sell), he is entitled to come and make a tender. But whether he is entitled to make a conveyance and to have a delivery up of the deeds until his title is completed, is quite another matter. I confess it appears to me, upon the best consideration that I can give to the case, that, although he is entitled to tender the money, and if he turns out ultimately to be the owner, as the owner he is entitled to demand a conveyance and a delivery up of the deeds, yet I do not think he is in that condition that he can be said to have actually got the complete title which is necessary to enable him to complete his purchase and perfect it. It is that part of the case which has given me the most anxiety. It does appear to me that this gentleman was premature in filing a bill to have the deeds

delivered up to him or to have a conveyance made to him unless indeed he did so because the party had threatened to deliver up the deeds to a third person. There is something to that effect said in the bill, but nothing verified. Further than that, when the bill was filed the defendant did what he was bound to do; he undertook to do nothing whatever as to parting with the deeds until the whole matter was determined between the parties. The case of *James v. Bion* has been cited as an authority by the appellants, who have put their case a great deal too high. It was cited to show that a man is not bound to make this conveyance unless he has before him a clear account of who all the parties interested in the equity of redemption are. I do not think that the case of *James v. Bion* decided any such thing; but it decided that he is entitled to require that of every man who is a stranger. The party says: “I am not bound to take your word that you are entitled; I am not bound to part either with the deeds or with the property, or to accept the money from anybody who is a stranger to the estate; I am not bound to transfer my mortgage; therefore you must do something to show me that you are the owner, and you must prove yourself to be the owner.” I think this gentleman is entitled to do that also; and, having taken the money, he is bound to hand over the deeds to the person who proves himself to be entitled. But, until that proof is made—by which I mean proof with reasonable certainty that nobody disputed it—he is not bound to hand them over. That was the point decided in the case in *Swanston*, where a person brought his suit, asserting that he was the heir, and gave *prima facie* evidence of it; and, upon the person claiming to be paid, the Lords Commissioners were asked for an issue to try whether he was the heir or not. But, on the rehearing before the Lord Chancellor, the defendant in the issue, who was the plaintiff in the redemption suit, succeeded in showing that that was erroneous; and, in the absence of any claim to the contrary, he made out a sufficiently *prima facie* case. So I say here, that the affidavit does satisfy me that a conveyance had been made to this gentleman, and his title by purchase was complete. But it was not so when the bill was filed; because, when the bill was filed, he states that he entered into a contract. In paragraph 9 he says: “The plaintiff has accepted the title to the said property, subject to the confirmation of his said purchase by certain persons appearing to be beneficially interested therein, and alleged by the plaintiff to be necessary parties to the conveyance of the said land to him.” Of course, if persons who are beneficially interested are supposed to be necessary parties to the conveyance, it is not a matter of conveyance, at least, not *prima facie*; they may be mortgagees, that would be a conveyance, the mortgage having been paid off; but if they are persons having an interest, as in the case of dower, any person having an interest over which the vendor had no control, the parting with which the vendor could not compel, in that case the title could not have been accepted in the vague manner in which it is described, and the conveyance would not have been complete. Therefore, I certainly must hold that the mortgagor is not bound in that state of things, to convey, because the court would not force him, although he had accepted the tender in its inchoate title, which might or might not be perfected, to make the conveyance, and hand over the deeds until such title had been perfected, and until the purchaser, who himself tells you the difficulty, had shown that that difficulty was cleared up, and that he was therefore in a condition to make the purchase. I think, upon that ground, I am bound to hold that the bill was filed prematurely. But it seems that the inchoate title is really now perfected and made out, and is ripe for decision,

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CHAN.]

JARRATT v. ALDHAM.

[ROLLS.]

and that the decision ought to be in pursuance of every form of decree which I have consulted, that this gentleman now being entitled to a portion of the estate, having paid off the mortgage, is entitled to have the conveyance made and the title-deeds delivered up to him. I do not enter into the question suggested by Mr. Jessel as to the possibility of its turning out upon a balance of account hereafter that there might be something due as regards the purchase-money to the vendor, and to show that he has no right to have the estate conveyed at all. That is a matter which, it appears to me, ought not to be entered into, because if I were to enter into inquiries of that description, I should in effect be saying that there should be no conveyance in these matters without having a Chancery suit. The plain and simple rule is this: The mortgagee is some one who pays off some portion of the debt, which gives him a title; and upon that being done, has handed over to him the deeds of conveyance, and he is the person to hold, subject to all equities. One point which has troubled me a great deal is with respect to the costs, especially as upon that point I differ from the judgment of the court below. Undoubtedly this gentleman asserted his rights, and they were asserted again at the bar, much higher than those which he could effectually maintain. He asserted the right to be the judge—to hold the deeds and to hold the legal estate as trustee for all the various purchasers, as they should make out their titles to him. They were to come and show him their titles, and he was to be a sort of arbitrator or judge to determine what the state of their title was, and to hand over their portions of the money. That is putting it a great deal too high. But, nevertheless, it appears to me that I cannot lay too much stress upon that, considering that in effect, the persons who came to him were not in a position to assert an immediate right to that which he now asks for, and which I hold him to be entitled to, as the Master of the Rolls did. He might be asserting a somewhat extravagant view of what his rights ultimately would be whenever the plaintiff's title should be complete, but we do not find the defendant threatening any adverse steps. He simply says, he will hold the legal estate and deeds until all that is done, he does not threaten to part with the deeds or create any adverse title. That being the state of things, the matter might have been left until the plaintiff could complete his purchase. I confess, therefore, I think the decree as to the costs erroneous. Having to alter the decree upon a point which was discussed at the hearing, in directing that there should appear on the face of the conveyance the circumstance of this gentleman holding all the property, only subject to the right of redemption of the owner of that other portion of the property, I feel myself competent to say that this gentleman, like every other mortgagee, ought to have his costs. I throw aside the circumstances which Mr. Southgate has pressed upon me, but which, as he has urged them, I ought to notice. They amount to suspicion and no more. He calls my attention to this, that this gentleman became a transferee of the mortgage after the sale had taken place to Coleman and to this gentleman himself. He also calls my attention to the fact that he immediately gives notice of sale on becoming possessed of the mortgage, and tenders the money. Then, Mr. Southgate says he finds him afterwards setting up Coleman's right in the shape of notice, and that he finds Coleman filing a bill; and after the filing of the bill, the mortgagee supporting Coleman. But I think that is open to the observations which were urged upon me by Mr. Jessel, namely, that no misconduct is alleged in the bill, so that this gentleman could not know what he has to meet. No such accusation being charged by the bill, no opportunity was given him

of offering an explanation. Although *prima facie* there are suspicious circumstances, they might have been cleared away for aught I know, if his attention had been directed to them, and he had been desired to answer the charge. Nothing of the sort appears in the bill. It is a plain simple bill saying that this gentleman is wrong in his law. To a certain extent no doubt he was wrong in his law, but I think the plaintiff has been precipitate in taking the steps he has taken. I have no reason to believe that the plaintiff was contemplating any steps improper for him to take. It is simply raising two points, as to how much of the estate he has a right to redeem on perfecting his title through other persons. I think upon the whole, the proper decree to make, varying that of the Master of the Rolls, is this:—First, tax the costs of the defendant Morris, and upon the plaintiff paying such costs, direct the conveyance as before, down to the words, "direct him to convey the legal estate in the mortgaged premises in the plaintiff's bill mentioned," and after the word "mentioned" to introduce these words: "subject to the portion of the said premises in which the equity of redemption is vested in any other person than the plaintiff to such right or equity of redemption." That I think ought to be the form. Then the rest of it will run on as before directed, of course striking out the part which directs the defendant to pay the costs of the suit.

Villiers.—No costs of the appeal?

The LORD CHANCELLOR.—No costs of the appeal.

Villiers.—I presume we may add the costs to our security.

The LORD CHANCELLOR.—That affects other persons. I cannot do that. I have not got those parties before the Court. That would be making other parties who are not here, pay the costs.

Villiers.—We have notice from the mortgagor.

The LORD CHANCELLOR.—I cannot charge a number of absent people with costs.

Jessel.—We have paid the plaintiff's taxed costs. I think the order should go to direct the repayment of those costs to us.

The LORD CHANCELLOR.—Yes, there must be a repayment.

Solicitors for the plaintiff, *Gurney and Son Furnival's-inn, H. T. Turner, Maidenhead.*

Solicitors for the defendant, *Coverdale and Co., Bedford-row.*

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Feb. 9, 10, 11, and 23.

JARRATT v. ALDHAM.

Settlement executed under misapprehension—Bill to set aside—Subsequent confirmation—Lapse of time.

A., a tenant in tail, immediately upon attaining the age of twenty-one, in 1857, executed a disentailing deed, and resettled the estate to the use of himself for life, with remainder to the use of his first and other sons in tail male, with remainder to his brothers and sisters and their children in like manner, with remainder over and with power for himself to jointure and charge portions. A. executed this settlement under the advice of a friend of the family, and in ignorance of its real effect, though it was read over to him by the family solicitor, who prepared it. A. married in 1859, and then executed a settlement, in which he recited the deed of 1857, and exercised the power to jointure and charge portions.

ROLLS.]

JARRATT v. ALDHAM.

[ROLLS.]

In 1868 he filed a bill to set aside the deed of 1857 without prejudice to the jointure and portions charged by him on the occasion of his marriage :

Held, that the settlement of 1859, in which A. confirmed a portion of the deed of 1857, operated as a confirmation of the whole deed.

Semble, that independently of the confirmation, the mere lapse of time would have barred A.'s title to relief.

The plaintiff attained the age of twenty-one on the 16th April 1857, and became entitled to considerable real estate in Yorkshire as tenant in tail. On the following day he executed a disentailing deed affecting the greater part of the property, and on the 18th April 1857 he executed a settlement of the disentailed property, by which settlement the property was limited to the use of the plaintiff for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of his brother John Jarratt for life, with remainder to the use of John Jarratt's first and other sons in tail male, with remainder to the use of the plaintiff's daughters in tail male, with remainder to his sisters and their children in like manner, with remainders over, and with power for the plaintiff to charge a jointure of 300*l.* a year, and to raise 6000*l.* for portions for younger children.

This settlement was executed by the advice of a friend of the family, and the plaintiff alleged that he executed it in ignorance of its real effect, of which he was not aware until he obtained possession of the deed in 1865.

In 1859 the plaintiff married, and on that occasion he executed a settlement, in which, after reciting the settlement of the 18th April, 1856, he exercised the power to jointure.

The present bill was filed in 1868 against the trustees of the settlement of the 18th April 1857, and the remaindermen, for the purpose of setting aside the deed of re-settlement of the 18th April 1857, without prejudice to the jointure.

The circumstances under which the deed of re-settlement was executed and the evidence are fully examined in the judgment.

Sir Roundell Palmer, Q. C., Sir Richard Baggallay, Q. C., and Charles Hall, for the plaintiff, submitted that the plaintiff, having executed the deed under influence and misapprehension, and without independent advice, was entitled to have it set aside. They cited

Coutts v. Ackworth, 21 L. T. Rep. [N. S. 224; L. Rep. 8 Eq. 558 ;

Wollaston v. Tribe, 21 L. T. Rep. N. S. 449 ; L. Rep. 9 Eq. 44.

Southgate, Q. C., and W. W. Streeten appeared for the trustees of the settlement.

Jessel, Q. C., and W. Pearson, for the persons interested in remainder, contended that this was the case of an ordinary family settlement not executed under undue influence, but with the advice of the family solicitor; it was, therefore, not a case for setting aside the deed. Moreover, by executing the power to jointure the plaintiff had in effect confirmed the settlement. They cited

Hoghton v. Hoghton, 15 Beav. 278 ;

Wright v. Vanderplank, 8 De G. M. & G. 133.

Hickson v. Lombard, L. Rep. 1 E. and I. 314.

Sir Richard Baggallay, Q. C., was heard in reply.

Feb. 23.—Lord ROMILLY.—This is a bill which is filed for this purpose : It prays "that the indenture of re-settlement of the 18th April 1857 may be declared not to be binding on the plaintiff without prejudice to the jointure and portions charged by the plaintiff on the occasion of his marriage as

aforesaid." That is very peculiar. It does not seek to set aside the settlement absolutely, it only seeks to set it aside, without prejudice to certain things done subsequently. The transaction itself took place in the year 1857, just after the plaintiff attained his age of twenty-one years. It was a general settlement of all his affairs. I think upon reading the whole of the evidence, without going into the exact details of it, it is quite clear that the plaintiff himself exercised very little judgment or wish in the matter. Mr. Denison, who was an old friend of the family, thought it would be right, it being necessary to do something with respect to the settlement of the affairs for the purpose of raising portions for his sisters, that the whole thing should be settled, and that the estate in question—an estate of about 2000*l.* a year—should be settled and be put out of the control of the plaintiff. Accordingly, I think from the best of all possible motives, Mr. Denison deriving no sort of benefit from it himself, he persuaded the plaintiff to allow him to arrange what should be done for the settlement of his affairs. Thereupon Mr. Denison went to Mr. Baxter, the family solicitor, and gave him instructions how to proceed. It is quite clear that the instructions proceeded from Mr. Denison ; that no communication took place with Mr. Jarratt beforehand ; and that it was not till subsequently that any communication passed between them. What took place is singular enough in other respects, for the settlement having been proposed to be made in one particular way by instructions to the conveyancer, Mr. Denison thought it ought to be altered so as to make it in accordance with the will of Mr. Jarratt, from whom the property was derived. Accordingly he gave instructions for such alterations ; and upon the evidence I cannot find the slightest trace that the plaintiff himself had anything to do with those alterations. When the matter came before the plaintiff I think he was made fully aware of it, that Mr. Baxter explained the whole matter to him, and that he voluntarily executed the deed. I am convinced that he did not understand the full effect of it at the time, and that he was controlled by the advice of the old family friend ; and if he had come within a reasonable time afterwards, and no steps had been taken subsequently, I do not see how the deed could have been maintained. I think this court must in that case have directed the deed to be set aside. But the subsequent transactions give a totally different character to the whole case. The remarkable thing is that this bill is not filed till Jan. 1868, the transaction itself having taken place in 1857, that is to say, it is not filed until eleven years afterwards. In addition to that, most serious alterations took place, and one of the most serious alterations is this—that in 1859 he married a lady, and he made a settlement upon the marriage. It is very properly observed by the gentleman who advised the plaintiff, Mr. Hall, who drew the bill and carefully so framed it, that the plaintiff offers to confirm everything which was entered into by that transaction. But I do not think that that is sufficient. In my opinion he has confirmed the whole of the transaction absolutely and indiscriminately, and he is not at liberty to say, "I will adopt one part of it which I have adopted hitherto and will set aside the rest," and it is not possible so to affirm it. What took place upon the plaintiff's marriage was to this effect : He made a marriage settlement in 1859, by which, having reserved to himself a right of jointuring his wife to the extent of 300*l.* a year, and also portions for younger children in the sum of 6000*l.* ; and having a power of jointuring 200*l.* upon the rest of the property, he gives that jointure to his wife, and he also made provision for the younger children. At that time it

ROLLS.]

SWIFT v. WENMAN.

[ROLLS.]

is quite clear that the matter was entered into upon the faith and upon the substance of the former settlement; and without going into the evidence of Mr. Denison and Mr. Baxter, every word of which I believe, though they are naturally disposed to do what they can to support the transaction in which they were the principal actors, the evidence of Mr. Dunn, the father of the lady, is conclusive, and it is impossible, I think, to get over it. Mr. Dunn says, "I have a perfect recollection of what took place upon the treaty for the marriage. The plaintiff then told me that his estates were entailed, except an estate at Wallinglay, and that he was entitled to a life interest under the deed of entail, and that after his death the estate would go to his eldest son, and that the other children, if there were any, would be provided for. He also told me that he could settle 500*l.* a year on his wife for her life, and proposed to settle that sum on my daughter. Mr. Fisher, of Doncaster, acted as the solicitor of me and my daughter, in preparing the marriage settlement, and I clearly remember that the deeds, and all concerning them, had to be submitted to Messrs. Baxter and Co. for their approval on the part of the plaintiff. I and my daughter consented to the marriage, which was solemnised on the faith of the plaintiff's representations, and on the faith that the settlement of the plaintiff's estates was a valid and effectual settlement." Mr. Fisher also gives evidence to the same effect. He goes into it very fully, and this paragraph is very material: "I well remember that on the 28th Oct. 1859, the plaintiff saw me on the subject of his then approaching marriage with Miss Dunn, and wished me to see the deeds by which his property was settled as to his power to create a jointure for his intended wife. The plaintiff told me that his deeds were with his solicitors, Messrs. Baxter and Co., of Doncaster, and he offered to give me a written authority to them to show me the deeds." He does give them a written authority, which was produced, and they showed him the deeds of settlement; then three days afterwards he explains to the plaintiff and Mr. Dunn what the powers were which he had under the settlement; and thereupon he draws the marriage settlement. It is very true that the plaintiff only proposed to affirm certain of the transactions; but I am of opinion that this amounts to an absolute and complete confirmation of the settlement, when he knew what the matter was. In the case of *Milner v. Lord Harwood* (18 Ves. 259), Lord Eldon expressly held that where a person confirmed a portion of a deed, it operated as a confirmation of the whole transaction; and in that case the settlor said nothing about it, but merely confirmed a part of the transaction. I am of opinion that the present case must be treated in the same manner, and that it is impossible for the plaintiff to say that he did not know of the effect of the transaction until 1865, when he got the deeds into his possession, because it is obvious that it was perfectly well known to him at the time of his marriage in 1859. It is true that he had a sister married, who may have some interest under this settlement. It is not sworn that this marriage took place expressly upon the faith of the settlement, but it is to be observed that the marriage took place subsequently, and that various interests have arisen under it. My opinion is that, regarding the whole of the transaction, the plaintiff cannot, after the acts on his part, now come here to set aside the settlement. The result is that I must dismiss the bill, but I shall not give any costs except to the trustees.

Solicitors for the plaintiff, *Reed, Phelps, and Sidgwick*, for *Sale, Shipman, Seddon, and Sale*, Manchester.

Solicitor for the defendants, *R. Baxter*, for *Baxter and Co.*, Doncaster.

Tuesday, Feb. 15.

SWIFT v. WENMAN.

Husband and wife—Settlement of wife's property—Divorce equivalent to death of husband.

By a marriage settlement the wife's property was vested in trustees upon trust for the separate use of the wife during the joint lives of the husband and wife, with remainder for the children of the marriage, and in default of children, if her husband should die in her lifetime, for the wife absolutely.

The wife obtained a decree for dissolution of the marriage, of which there was no issue:

Held, that the wife was absolutely entitled to the trust fund, and that it must be paid over to her.

This was a suit instituted by a Mrs. Swift against the trustees of her marriage settlement for the purpose of obtaining a declaration that she was absolutely entitled to the trust fund under the following circumstances.

The plaintiff was married in Oct. 1843, at which date she was an infant. In contemplation of the marriage articles of agreement for a settlement were entered into, by which it was agreed the husband should pay the sum of 1000*l.* to the trustees of the settlement, and should insure his life in their names in the further sum of 1000*l.*; and it was thereby provided that these sums and also certain property to which the plaintiff was entitled under her father's will should be settled for the separate use of the plaintiff during the joint lives of herself and her husband, with remainder to the survivor for life, with remainder to the children of the marriage; and if there should be no children, then, if her husband should die in her lifetime, upon trust for the plaintiff absolutely.

The plaintiff attained her age of twenty-one in March 1845, and a settlement of the property to which she was entitled under her father's will was then executed in accordance with the articles, but the husband did not pay over to the trustees the sum of 1000*l.*, nor did he insure his life in accordance with the articles, and no property of his was subject to the provisions of the settlement.

There was no issue of the marriage; and in 1854 the plaintiff's husband deserted her and went to Australia, where he married another woman. Thereupon the plaintiff instituted a suit in the Divorce Court against her husband for dissolution of the marriage, and on the 15th Feb. 1868 she obtained a decree *nisi* for dissolution of the marriage on account of adultery and bigamy. On the 3rd Nov. following the decree became absolute.

The Divorce Court having no power to deal with the settlement in consequence of there having been no issue, the plaintiff filed the present bill praying that it might be declared that she was absolutely entitled to the trust fund, and that the same might be paid over to her.

Roxburgh, Q. C. and *T. A. Roberts*, for the plaintiff, submitted that the dissolution of the marriage had the same effect as the death of the husband, and that, therefore, as there were no children, the trust property belonged to the wife absolutely. They cited

Wells v. Malbon, 6 L. T. Rep. N. S. 39; 31 Beav. 48;
Wilkinson v. Gibson, 16 L. T. Rep. N. S. 733;
L. Rep. 4 Eq. 162.

Bardswell appeared for the trustees.

C. Howard, for the husband, cited
Milford v. Milford, L. Rep. 1 P. & D. 715.

Lord ROMILLY, without calling for a reply, said that it was evident that the husband had no inte-

ROLLS.] *Re THE FREEHOLD LAND AND BRICKMAKING COMPANY; Ex parte MASSEY.* [ROLLS.]

rest in the trust fund, and that as there was no issue of the marriage, a decree must be made in the terms of the bill. The trustees would have their costs out of the fund.

Solicitor for the plaintiff, *R. W. Roberts*, for *R. Woof*, Worcester.

Solicitors for the other parties, *J. T. Fry*; *Sharpe*, *Parkers*, and *Pritchard*.

Saturday, Feb. 19.

Re THE FREEHOLD LAND AND BRICKMAKING COMPANY; Ex parte MASSEY.

Company—Winding-up—Bill of costs—Solicitor's lien—Liquidator's remuneration—Priority—23 & 24 Vict. c. 127, s. 28.

In the winding-up of a company the costs of the petition are the first charge on the estate, and next to them come the costs of the winding-up, including the bill of costs of the solicitor employed, which bill of costs must be paid before any payment is made by way of remuneration to the official liquidator.

This was a petition by Mr. Massey, a solicitor, praying that he might be declared entitled to a charge under the 28th section of 23 & 24 Vict. c. 127, on the assets of the above-named company under the following circumstances.

In Oct. 1866, John Clarke Kent, a shareholder in the company, filed a bill against the company, the directors and the promoters, seeking to have his name removed from the register of shareholders, and to have the money which he had paid in respect of his shares returned, on the ground of fraudulent misrepresentation and suppression of facts. In this suit of *Kent v. The Freehold Land and Brickmaking Company*, Wood, V. C., made a decree in favour of the plaintiff, 17 L. T. Rep. N. S. 77; L. Rep. 4 Eq. 588, which, however, was reversed on appeal by Lord Cairns, L. Rep. 3 Ch. 493.

The company had been ordered to be wound-up before the appeal was heard; and after the appeal had been decided against Kent, he paid 400*l.* to the official liquidator in compromise of an action which the latter had commenced against him to enforce payment of certain calls which had been made on his shares.

Mr. Massey claimed a charge for his costs of the suit on the amount so recovered or preserved in the suit under the 28th section of 23 & 24 Vict. c. 127, and he also claimed a lien on all the sums obtained in the winding-up for his costs of the winding-up.

The assets of the company were not sufficient for the payment of the solicitor's costs, and of the official liquidator's remuneration.

Mr. Massey had ceased to act as solicitor for the official liquidator.

The 28th sect. of 23 & 24 Vict. c. 127, is in the following words:

In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such matter or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of, and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bona fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right. Provided always that no such

order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any statute of limitations.

Jessel, Q. C. and *D. Holmes* appeared in support of the summons.

Roxburgh, Q. C. and *Jones*, for the official liquidator, contended that after payment of the solicitor's costs out of pocket, the surplus should be divided between him and the liquidator, as the assets had been recovered by their joint exertions. The following case was referred to:

Re Audley Hall Cotton Spinning Company, L. Rep. 6, Eq. 245.

Lord ROMILLY.—In winding-up petitions the petitioner is entitled to have his costs paid first; they are the first charge on the estate, and next to them come the costs of the winding-up including the bill of costs of the solicitor employed. The bill of costs must, therefore, be paid before anything is paid by way of remuneration to the official liquidator. The present petition is, however, quite unnecessary, as the petitioner might by application in chambers have obtained an order for payment of his bill of costs. I will, therefore, make no order on the petition.

Solicitors for the petitioner, *Stuart and Massey*.
Solicitor for the official liquidator, *A. J. Cox*.

Feb. 26 and 28.

Re BAYLEY'S SETTLEMENT.

Settlement—Construction—"Younger sons"—Vesting—Period for ascertainment of class.

By a marriage settlement certain real estate was limited to the use of the wife for life with remainder to the use of all and every the son and sons (other than and except an eldest or only son) and daughter and daughters of the marriage in equal shares as tenants in common, and to the heirs of their respective bodies issuing. And it was thereby provided that in case any such younger son or sons should become an eldest or only son before he or they should attain the age of twenty-one years then the share or shares of such younger son or sons so becoming an eldest or only son as aforesaid should go over to the others or other of the said younger son or sons, daughter or daughters, as tenants in common, and to the heirs of their respective bodies issuing.

The second son of the marriage became the eldest and only son, and obtained the family estate after he attained the age of twenty-one, but before the period of distribution:

Held, that the period of distribution was the time for ascertaining the class to participate, and that the second son was excluded from participating as a younger son.

Windham v. Graham, 1 Russ. 331, examined and explained.

This was a petition for payment out of court of a fund paid in under the Trustee Relief Act.

Upon the marriage of James Bayley, the younger, with Elizabeth Franklin, in the year 1812, two settlements were executed, one of which comprised the real estate of the husband, and the other the real estate of the wife. By the former settlement, the husband's real estate was settled on him for life, with remainder, subject to a limitation to secure a jointure for the wife, to the use of the first and other sons of the marriage in tail male. By the second settlement, which recited the former settlement, and was expressed to be made in consideration of it, the wife's real estate was limited, subject

ROLLS.]

Re BAYLEY'S SETTLEMENT.

[ROLLS.]

to an annuity, to the use of the wife for life, with remainder "to the use of all and every the son and sons (other than and except an eldest or only son) and daughter and daughters of the body of the said James Bayley, the younger, on the body of the said Elizabeth Franklin to be begotten, in equal shares as tenants in common, if more than one, and to the heirs of their respective bodies issuing. And if any one or more such younger son or sons, or daughter or daughters, shall depart this life and there shall be failure of issue of his or their body or respective bodies, or in case any such younger son or sons shall become an eldest or only son before he or they shall attain the age of twenty-one years, then as well as to the original share or shares of such younger son or sons, daughter or daughters, who shall so die, or whose issue shall so fail, and of such younger son or sons so becoming an eldest or only son as aforesaid, as to the share or shares which shall survive or accrue to any such younger son or sons, daughter or daughters, or to their or any of their issue by the decease or failure of any other the said younger son or sons, daughter or daughters, or by any other younger son or sons becoming an eldest or only son before he or they shall attain the age of twenty-one years, to the use of the survivor or others or other of the said younger son or sons, daughter or daughters, to be divided between or among them, if more than one, as tenants in common, and to the heirs of their respective bodies issuing; and if all such younger son or sons, daughter or daughters, save one, shall die without issue, or in case all such younger son or sons, save one, shall become an eldest or only son, or if there shall be but one such younger son or daughter, then as to the entirety of the said hereditaments and premises to the use of such remaining, or such one or only younger son, or such only daughter, and the heirs of his or her body issuing, and in case there shall be no younger son or daughter of the said James Bayley the younger on the body of the said Elizabeth Franklin begotten, or being such they and every of them shall depart this life, and there shall be failure of issue of their respective bodies, then in default of such issue to the use of the only or eldest son and child of the said James Bayley the younger by the said Elizabeth Franklin, and the heirs of his body issuing."

The husband died in 1842. There were several children of the marriage, and the eldest son, Edward, became tenant in tail on his father's death of property comprised in the first settlement.

Edward Bayley died in Jan. 1859 without issue, and without having executed a disentailing deed. One brother, John Salmon Bayley, and two sisters survived him. On the death of Edward Bayley, John Salmon Bayley, who attained twenty-one in 1852, became tenant in tail of his father's estate, and he died in March 1859, leaving an infant son, who is the present tenant in tail of the property comprised in the first settlement.

Mrs. Bayley died on the 30th Sept., 1867; part of her real estate had been sold under a power of sale contained in the settlement, and the proceeds of sale had been paid into court. A petition was now presented by the two daughters for the payment of the fund out of court, and the question to be decided was whether the present tenant in tail of the husband's estate was entitled to share in the fund, or whether his father, John Salmon Bayley had become an eldest son within the meaning of the settlement, so as to preclude his issue from sharing in the fund.

Jessel, Q.C. and Wickens, in support of the petition, submitted that the second son had become an eldest son within the meaning of the settlement, as he took his father's estate; that he and his issue were therefore excluded from sharing in the fund,

which they submitted must go to the petitioners in equal shares. They cited

Lord Teynham v. Webb, 2 Ves. Sen. 198;

Ellison v. Thomas, 7 L. T. Rep. N.S. 342; 1 D. J. & Sm. 18;

Collingwood v. Stanhope, L. Rep. 4 E. & I. App. 43.

Sir Richard Baggallay, Q.C. and Charles Hall for the infant tenant in tail, contended that the second son not having become an eldest or only son before he attained the age of twenty-one, he was not excluded by terms of the settlement, which must be construed strictly, from sharing in the fund. They cited

Windham v. Graham, 1 Russ. 331;

Heneage v. Hunloke, 2 Atk. 456.

Jessel, Q. C. was heard in reply.

Feb. 28.—Lord ROMILLY read the words of the settlement, as above set forth, and stated the facts of the case and continued:—The question to be determined is, whether John Salmon Bayley was one of the younger sons within the words of the limitation, and whether his estate is entitled to share in the property. It is argued that he was a younger son within the limitation for this reason, because in the words I have read he is to forfeit it if he becomes an eldest son before attaining twenty-one, which he did not do. It was suggested that this specifies the only case in which he is to lose it, that in every other case he must take it, and that it is a case of *Expressio unius est exclusio alterius*, and the case of *Windham v. Graham* (*sup.*), is cited for the purpose of establishing that proposition. But, after considering the whole of the cases and rules of court upon the subject, I am of opinion that the argument cannot prevail, and that under the proper construction of this limitation, in the events which have happened, John Salmon Bayley took no interest in this property. The state of the authorities is somewhat singular in this respect. It is in fact a contest between two principles of law—that of the vesting at the time of the birth of the child, and that of ascertaining who are the class at the period of distribution. The rule is quite settled that when an estate is given to a person, and, after his death, to his children, those children take vested interests from time to time as they are born. But here the estate is given to younger children, and the cases seem to establish that that means the children who do not take the family estate. I am of opinion that the rule is quite established, that the period of distribution is the time when the class is to be ascertained in these cases of younger children, and in the present case the period of distribution was the death of the mother, who died in 1867. John Salmon Bayley was not then in existence, and I am of opinion that he cannot be considered as a member of the class to be ascertained at that period. I think the cases cited to me are very strong on that point. *Windham v. Graham* (*sup.*), seems to be a case which was decided the other way; but I think, upon examining that case, that the distinction taken by Mr. Jessel is a correct one, and that *Windham v. Graham*, does not affect the rule at all. I repeat again that it has always been a contest between the two rules of the vesting of the estate and the period when the class is to be ascertained. In *Windham v. Graham* there were two funds, 4000*l.* and 6000*l.*; and the Master of the Rolls (Lord Gifford) determined that with respect to one of those sums there could be no question, because the words of the settlement were distinct and positive that it should become a vested interest on birth and treated specially. Lord Gifford considered that this indication of what was to be done with respect to the sum of 4000*l.* was a clue to show

V.C. M.]

ASHTON v. BLACKSHAW.

[V.C. M.]

what the intention was with respect to the 6000l., and that they must both go in the same way. Therefore he determined that the rule of vesting applied in that case, and not the period of distribution. Of course it is admitted, in all these cases, that the settlor or the testator, whichever it is, can fix the time if he pleases, and give directions exactly as he likes; and any directions given by him will control the rule of law upon the subject. It is, therefore, really a question of intention. In *Windham v. Graham* Lord Gifford determined that the intention was shown by the words which were used in the direction for the vesting of the property. In this case I think that the intention to be gathered from the settlement is the other way. I think that the rule of construction is the same whether in a will or a settlement. I do not think there is any difference. I admit there might be some distinction if it were an executory settlement, as in the singular case *Mr. Hall* referred to, in which articles of settlement were executed on the same day; but there is no question of that sort upon the present occasion, and I am of opinion that upon the true construction of the settlement, in the events which have happened, John Salmon Bayley had ceased to be a member of the class to take, and that, therefore, the petitioners, the two daughters, are entitled to have the maternal estate. The costs of all parties will come out of the estate.

Solicitors for the petitioners, *Gregory, Rowcliffes, and Rawle*.

Solicitors for the respondents, *Clarke, Woodcock, and Ryland*.

V.C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.

Tuesday, Jan. 11.

ASHTON v. BLACKSHAW

*Bankrupt—Bills of Sale Act (17 & 18 Vict. c. 36)—
Married woman—Separate estate.*

A husband in 1868, after marriage, assigned his household furniture to a trustee for his wife. The deed of assignment was never registered under the Bills of Sale Act; the husband was adjudged a bankrupt in 1869, and the assignee under the bankruptcy took possession of the furniture. Upon motion by the wife to restrain such assignee from disposing of the furniture:

Held, that inasmuch as the Bills of Sale Act provided that property could not be taken out of the order and disposition of a bankrupt, except by bill of sale registered under the Act, the assignee in bankruptcy was entitled.

This was a motion for an injunction to restrain an assignee in bankruptcy from removing or disposing of certain household furniture and effects under the following circumstances. The plaintiff, Annabella Ashton, who sued by her next friend, was married to her husband, Thomas Ashton, on the 17th July 1862, at which time there was standing in the name of her brother, Daniel Love, as her trustee, a sum of 500l. Consols. In 1863, this sum was lent to Thomas Ashton upon the understanding that all his household furniture and effects should be assigned by him for the separate use of his wife. It appeared by evidence in the case that after this payment had been made the plaintiff frequently urged her husband to carry out his agreement in this respect, and two years after the payment—viz., on the 3rd April 1868, Thomas Ashton executed a deed poll, by which in consideration of love and affection he assigned to Frederick Clayton as trustee for the plaintiff all his household furniture

and effects, which were described as being placed in F. Clayton's possession by the delivery of a chair in the place of all the chattels assigned. This deed was prepared by an auctioneer, and did not contain many of the legal phrases usually inserted in similar documents. There was no mention of separate use in the trust declared in favour of the wife. Steps were taken to register this deed as a bill of sale in the Court of Queen's Bench, but the registration had never been effected, inasmuch as Thomas Ashton was inaccurately described in the deed.

Thomas Ashton executed a deed of composition with his creditors in Dec. 1868, and on the 21st Oct. 1869 he was adjudicated a bankrupt on his own petition, and the defendant, John Blackshaw, was appointed creditors' assignee under the bankruptcy. On the 18th Dec. Blackshaw took possession of the furniture, and threatened to sell it for the benefit of Ashton's creditors.

The suit was instituted against Blackshaw, the assignee in bankruptcy, the plaintiff's husband, Thomas Ashton, and her trustee, Frederick Clayton, and the bill prayed for a rectification of the settlement, so far as might be necessary, for the purpose of creating thereby a binding trust of the furniture and effects for the separate use of the plaintiff, in accordance with the object and intention with which such deed was executed, and that in the mean time John Blackshaw might be restrained from removing or disposing of the said household furniture and effects.

Upon the motion for an injunction being made, it was arranged between the parties that the motion should be taken as the hearing of the cause.

Cotton, Q.C. and Hastings, for the plaintiff, submitted that the object of the parties had been to create by the deed of April 1868 a trust in favour of the plaintiff, and that if such intention was not effectually carried out, the failure had occurred by the common mistake of all parties, and the deed ought to be altered and to be made to agree with the parol agreement, by which a valid trust had been created. The goods which had been taken were not in the order and disposition of the bankrupt, but in the possession of the wife.

Simmons v. Edwards, 16 Mee. & W. 838;

Jarman v. Woolloton, 3 T. R. 618;

Ex parte Massey, 2 Mont. & A. 173.

Glasse, Q. C. and Haddan for the defendant.—It was intended that the deed should operate as a bill of sale, and as it did not come within the exceptions in the 7th section of the Act, it must be registered as a bill of sale in the manner prescribed by the Act. The deed was void against the assignee both at law and equity.

Fowler v. Foster, 5 Jur. N. S. 99.

Cotton, Q. C. in reply, cited

Stansfield v. Cubitt, 2 De G. & J. 226;

Badger v. Shaw, 1 L. T. Rep. N. S. 323.

The VICE-CHANCELLOR.—This was originally a motion by the wife of a man who had become a bankrupt, to prevent his assignees taking possession of certain furniture which had become, by certain transactions mentioned in the bill, the property of the wife. The plaintiff, Annabella Ashton, being entitled to a sum of 500l. to her separate use, married in 1862, and in 1866 this sum was sold by her trustees, and advanced to her husband. This advance was made upon a contract by the husband that he would secure to the separate use of his wife all his household furniture and effects. No settlement was executed till 1868, but it was sworn by the wife that she constantly urged her husband to make a settlement, and the deed of the 3rd April 1868, by which the agreement was ultimately carried out,

V.C. M.]

LONGUET v. HOCKLEY—*Re* THE TIMES ASSURANCE COMPANY.

[V.C. J.]

was an inartificial document, prepared by an auctioneer, and the words "separate use" were not used in the trust for the plaintiff. If there were no other objection to the document but this, I am clearly of opinion that the wife would be entitled to have the settlement rectified. It has been arranged that this motion shall be treated as the hearing of the cause, and the only question is as to the effect of the Bills of Sale Act. Before that Act it was not necessarily assumed that a man in possession of household furniture was the owner of it. If the possession of the goods was in accordance with the provisions of the deed, the order and disposition clause in the Bankruptcy Act did not apply. For example—if the assignment was made for a loan to be repaid at the expiration of a year, and the mortgagor was to have possession of the goods until default was made, if the mortgagor became bankrupt within the year, the clause had no application. If, however, the bankruptcy took place after the expiration of the year, the goods, if in the reputed ownership of the mortgagor, could be taken by the assignees in bankruptcy. [The Vice-Chancellor referred to *Clark v. Crownshaw*, 3 B. & Ad. 804.] Now, how did the Act affect this? [The Vice-Chancellor read the preamble and the first section of the Act.] The words of the first section imply that the deed should be good if registered, provided that the possession was in accordance with the title. To take the case which I have before supposed of a mortgage made for a loan to be repaid at the end of a year, the bill of sale, if registered, would protect the goods if the possession was in accordance with the title in the same way as a bill of sale before the Act. But if, as in *Stansfield v. Cubitt* (*sup.*), the possession and right were inconsistent, the law was the same as before the Act. In *Stansfield v. Cubitt* there was an assignment out and out; and when the assignee has a right to take possession, and allows the assignor to remain in possession, there is no alteration in the law. The policy of the Act was that there must be a registration in all cases in which the assignor remained in possession. A person knowing the assignor to be owner, was entitled to assume that the property remained the same until the possession was changed, unless a bill of sale was registered. The Act was intended to include all cases not expressly excluded, and as this is a purchase of furniture by a wife with her separate property, registration was therefore necessary in this case. It was not a marriage settlement, and was therefore not protected. I take the transaction as being in reality a purchase for the benefit of the wife, and the assignment as being intended for her benefit, so that the possession was in accordance with the deed. Before the Act the bill of sale would have been good, inasmuch as the possession was consistent with the title; and if registered it would have been good under the Act, but not being registered, it was absolutely void as against assignees in bankruptcy. The bill fails, and must be dismissed with costs.

Solicitors: *Harper, Broad, and Manby; Weeks and Son.*

Friday, March 25.

LONGUET v. HOCKLEY.

Practice—Costs—Petition—Tenant for life.

Upon a petition by a tenant for life for the payment to her of the income of a fund in court under an administration suit, the costs of all parties were ordered to be paid out of corpus.

A testator, by his will, devised and bequeathed all his real and personal estate and stock in trade to trustee in trust for investment in the public

funds or Government securities, and to pay the income of the investments to his sister (since deceased) for her life, and after her death to pay the same for the maintenance of Eliza Longuet until she attained the age of twenty-one years, and upon her attaining that age, in trust to pay to her for her separate use and benefit all the principal money and stock so to be invested, and after her decease to pay the same to her children in equal shares. In 1836 a suit was instituted, on the equity side of the Court of Exchequer, for the administration of the testator's estate, and the usual inquiries were directed. A petition was presented by Eliza Longuet, then Mrs. Vallentin, for the payment to her during her life of the income of a fund which had been found due to the testator's estate, and which was then standing in trust in the cause, and also asking that the costs of all proper parties to the petition might be payable out of the corpus instead of the income.

F. H. Colt, for the petitioner, cited
Scrivener v. Smith, L. Rep. 8 Eq. 310.

F. Waller and Ince for different respondents.

The VICE-CHANCELLOR made the order as prayed, and was of opinion that it was a proper case for the costs to come out of the corpus.

Solicitor, *J. Jones.*

V. C. JAMES'S COURT.

Reported by Hon. ROBERT BUTLER, Barrister-at-Law.

Monday, Feb. 14.

Re THE TIMES ASSURANCE COMPANY.

Assurance company—Amalgamation—Novation of contract.

The deed of settlement of Company T. provided that the company might be dissolved by resolution duly passed and confirmed, and that upon dissolution the immediate liabilities should be discharged, and if possible an undertaking obtained from another assurance company to pay the future claims, and that so much of the funds of Company T. as should be agreed upon to be sufficient to enable the other company to comply with the undertaking, should be transferred to the other company.

In 1852 a life policy was effected with Company T., the business of which was in 1857 transferred to Company A., in consideration of 9500l., Company A. undertaking the liabilities of Company T., and to indemnify them. Company T. was afterwards dissolved, the money was paid, and the T. policies were handed over. The policy-holder paid premiums to, took receipts from, and in 1863 accepted a bonus from Company A.

In 1867 the policy-holder assigned his policy to the petitioner as a policy in Company T., "now amalgamated with Company A." In 1869 the life dropped.

Held, that there had been a complete novation of contract with Company A., and the petition to wind-up Company T. was dismissed.

This was a petition on the part of Joseph Nunneley to have the above-named company wound-up.

The company was incorporated under the 7 & 8 Vict. c. 110, and by the deed of incorporation provisions were made for dissolving the company upon resolutions being passed and confirmed at extraordinary general meetings to that effect; and it was further provided that immediately upon the dissolution of the company the directors should, out of the funds and property of the company, satisfy all immediate claims, and should make over their business and liabilities to the directors of some

V.C. J.]

Re THE TIMES ASSURANCE COMPANY.

[V.C. J.]

other assurance company who would be willing to give an undertaking to satisfy all demands which might be made on the Times Company. On the 10th Dec. 1852 Charles Christie insured his life for 200*l.*, by two policies of 100*l.* each.

On the 21st Jan. 1857, an agreement was entered into by the agents of the Times and Albert Assurance Companies, by which, in consideration of the sum of 9500*l.* to be paid by the Albert to the Times Company before the 23rd Feb. 1857, and in consideration of the Albert taking upon itself to become responsible for the payment of the liabilities of the Times Company, and of the directors of the Albert indemnifying the Times Company, it was agreed that the Times Company should transfer and make over the business and all the benefits and goodwill thereof to the Albert. That within thirty days the Times should give to the Albert the names of its agents and policy-holders. That the Albert should be at liberty to advertise the transfer of the business and to give the policy-holders notice thereof, and that the Times should give notice to the policy-holders to pay the premiums to the Albert.

On the completion of that agreement the books and documents belonging to the Times Company were transferred to the Albert.

By a deed dated the 4th March 1857 the Times policies were assigned over in trust for the Albert, and at the same time notices were sent by the Times Company to their policy-holders, informing them of the transfer, and of the fact of the amalgamation of the Times Company with the Albert. The secretary of the Albert also wrote informing them that the Albert had undertaken all liabilities with respect to the policies issued by the Times office.

In 1863 the Albert declared a bonus, and sent circulars to the policy-holders therein, giving them notice of it, and requesting their signature as to the application of the money. This circular was headed "Albert Life Assurance Company," and was to be returned to the secretary of the Albert. Christie signed the circular, and directed the payment of the bonus to be made to himself, which was accordingly done. Christie also received receipts for his premiums from the manager of the Albert.

On the 16th Dec. 1867 Christie assigned his two policies of assurance to Joseph Nunneley, stating them to be policies in the Times Assurance Company, now amalgamated with the Albert.

On the 11th Aug. 1869 a petition was presented to wind-up the Albert. On the 13th Aug. 1869 Christie died; and on the 17th Sept. following the order was made to wind-up the Albert.

O. Morgan, Q.C., and M. Cookson, for the petitioner, submitted that this case was on the same footing as that of *The Family Endowment Society*, 21 L. T. Rep. N. S. 775. They cited also *Winter v. Janes*, 4 M. & Cr. 101.

Roxburgh, Q.C., and J. N. Higgins, for the Times Company, referred to *Re the Waterloo Life Assurance Company, Carr's case*, 33 Beav. 542, but were not called upon.

Kay, Q.C., and Whitehouse, for the Albert Company and their liquidators.

Fry, Q.C., and Smithett, for opposing shareholders of the Times, who had not been served.

Williams's case, 1 H. & M. 672.

The VICE-CHANCELLOR.—I am of opinion that this case is in many important respects substantially different from that of the Family Endowment Society, in which I made an order for winding-up the society, which order was affirmed by the Court

of Appeal. In this case the petitioner claims under an assignment of a policy assigned to him expressly as a policy "in the Times Assurance Society, now amalgamated with the Albert." He took the assignment with an intimation that the policy was merely at that time a contract (which had not ripened into a claim) with a society which amalgamated with another. Then, when we look to what took place at the time of the amalgamation, which was as far back as the year 1857—nearly thirteen years before the presentation of this petition—we find that the circumstances were these. The policy of the petitioner (I shall consider it as his policy) was a policy by which the Times office undertook, in consideration of his paying to the directors of that society an annual sum or premium, that the assets of that company should, subject to the provisions of their deed of settlement, be liable, on the death of the life assured, to pay a certain specified sum. There was a condition that there should be a premium paid to the directors of that society. No premium since that year has ever been paid to any directors of that society. Possibly that circumstance having arisen through default, if it were a default, or through a wrong, if were a wrong, of the society itself in not having it directors or officers to receive it, would give the persons who held the policy a right of action against the company which by its own act had prevented the person assured from complying with the terms of the policy. That is by the way. But the society also in its deed of settlement had a provision of which I must hold that every person who contracted with the society had knowledge; just as if every word of that deed of settlement had been written *in extenso* into the policy of assurance itself. In that way the person effecting the assurance had distinct notice that the company was to be dissolved in a certain manner, and under certain circumstances, and the assets divided; that is to say, that the company, if it should be minded to dissolve, should call two general meetings for that purpose, and upon the passing of a resolution to that effect at the confirmation meeting, the company should be dissolved. Then every creditor who had a present demand capable of being paid or satisfied, must have the amount paid or satisfied. With regard to outstanding liabilities which might or might not ripen into claims which were contingent upon the policies being kept up, and of course expectant on the dropping of lives, it was expressly provided that the directors were, if possible, to procure from some other company an undertaking to pay and satisfy the liabilities, and then having made their terms, and paid whatever the assets would allow to that other company to enable them to comply with their undertaking, they were then to be dissolved and the business concluded, and all existing assets divided amongst the shareholders. That was the position in which the person who had effected the policy placed himself in regard to the society. It seems to me that this may have been a very foolish thing for him to do; but I suppose persons would assume, if any company were selected to take the business and assets of their company it would be one that was solvent and respectable, and it would be done honestly and *bona fide*; and if it were done honestly and *bona fide*, there does not seem to be any substantial objection to it. Of course if a better office took the liability, it would be difficult to say that there was anything which would be injurious to the interests of the policy-holders. Nor must we try the prudence of such a provision as that by the light which is now thrown retrospectively upon it by the fact of the Albert, eleven years afterwards, having failed. One must take it that the provision in the original deed of settlement, at the time it was made, was intended to be a provision for the transfer to a *bona*

V.C. J.]

Re THE TIMES ASSURANCE COMPANY.

[V.C. J.]

fide and substantial office. If it were otherwise, I suppose this court would have power enough to prevent the transfer to any sham office, or the doing of anything which was not honest and substantial. That being so, the policy-holder, at all events, was in this position, when there was a choice given to him as to whether he would take the security of the Albert; he might either have taken the security or refused it. If he refused it, he might have enforced such claim as he might have at that time against the Times office for their breach of contract with him. But then the Albert and the Times both write to the policy-holders and say, "We have made arrangements," not, as has been pressed upon me, arrangements for the amalgamation of the two companies. There was no fraudulent representation there. What they have done is, they have said, "We have made arrangements for the amalgamation of the businesses of the two companies, that is to say, the business of the Times Life Assurance Company has been amalgamated with the Albert Life Assurance Company, No. 11, Waterloo-place, Pall Mall, at which place the united business will be conducted henceforth." That was, in truth, the nature of the transaction. One office was taking a small business of a small assurance office having the benefit of the existing policies and contracts of that office. Then the Times say to the policy-holders, "The united business will be conducted henceforth under the title of the Albert and Times Life Assurance and Guarantee Company, which company is now responsible for the sum assured under your life policy; and we have the satisfaction of adding that the Albert Life Assurance Company has been established nearly twenty years, and that by the amalgamation therewith of the business of the Times Life Assurance and Guarantee Company considerably increased security is afforded to the policy-holders of the latter." That is to say, not that you have got the security of the Albert in addition to the security of the Times which is to continue liable, notwithstanding that provision in the deed of settlement; but you have got the security of a much better office, of an older one and larger one. Then the Albert say, "we shall be happy to make the usual endorsement upon your policy on your forwarding the same to this office." The endorsement appears not to have been made, but following this the policy-holder goes and pays—not to the directors of the Times Company, or any persons whom he could have supposed to be directors of the old Times office; but to the directors of the company who were carrying on the amalgamated business—the premiums on the policy, which premiums are accepted by that company. It appears to me, if the case were reversed, upon that alone if he had been minded to say, "I am not a creditor of the Times which is an insolvent concern; I am a creditor of the Albert," that the Albert would not have had a shadow of a defence to such a claim on behalf of the policy-holder with whom they had so dealt. Beyond that there is this: The policies were policies with participation in profits, that is to say, participation in profits of the Times Office. Then there comes a time when it is arranged there shall be a participation in the profits of the amalgamated company, the one with the new name which the Albert has taken; then a circular is sent to every policy-holder giving an account of the bonus or profit on the policies, and in what way he may have it—either in addition to the amount assured, in present payment, or in reducing the amount of premiums. Accompanying that, there is a document containing a very full account of what the society is. The one I have before me was issued in the year 1863, but they are all in the same form. It gives an account of what the office is, "The Albert Medical and Family En-

dowment Life Assurance Company, established 1838;" there is the chief office, the city office, the officers, trustees, directors, and so on. Then there is the "position, business, and progress" of the company; the assets exceed so much; the subscribed capital exceeds so much; the annual income is so much; and then "the directors beg leave to submit to the proprietors a statement of business for the year 1861," and so on. Then they give an account of what the whole business of the society has been, what the profit has been, and the mode in which the proportion of that profit is to be distributed between the policy-holders of the whole company, entirely excluding therefore any possibility of a notion on behalf of the policy-holder that when he received this circular and the intimation that a bonus had been allotted to him, it possibly might be a bonus upon the business of the Albert kept entirely separate and distinct from the old Times Life Assurance and Guarantee Company. It is quite manifest from this that there was one business of the office, which was carrying on the amalgamated business with the other amalgamated businesses. Then there is an offer made to this policy-holder. He accepts that offer, and does, upon the footing of the transfer of the business to the Albert, accept a share—it is a small one it is true—but he does upon two occasions, except a share of the profits of the Albert Company as being a person assured with the Albert. After that, I am of opinion that there is, in this case, a complete novation. The Albert has told the policy-holder, "we treat you as a policy-holder of ours." He accepts the position of being a policy-holder of the Albert, and after so many years it seems to me that it would be very oppressive upon the shareholders of the other company if I were compelled to come to a different conclusion in the case of a person who, with his eyes open, has really dealt with the Albert as the office which was to pay him the amount of his policy when it became payable. I believe in a case somewhat similar to this, Vice-Chancellor Malins came to a like conclusion, distinguishing the case of a policy-holder from that of the petitioner in *The Family Endowment* case, who was an annuitant, on the ground that there had been payment of premiums, and so on.

Fry.—It was the case of *Re National Provincial Life Assurance Society* (V.C.M., 28 Jan. 1870).

The VICE-CHANCELLOR.—I do not know whether there was any bonus in that case. Therefore it would have been sufficient for me to have rested my judgment entirely upon the fact that the same point in substance had been decided by a co-ordinate branch of the court, from which it would not be seemly for me to differ unless that decision had been reversed by a superior tribunal; but I have thought it right to go into this case at full length, and to give my reasons why, if it had come before me in the first instance, I should not have differed from the judgment of the learned Vice-Chancellor. Independently of that, I should have come to the conclusion that I have, and therefore I must dismiss the petition.

Roxburgh asked for his costs.

The VICE-CHANCELLOR said the petition must be dismissed with costs as to the Times.

Fry asked for his costs. He said that considerable doubt existed as to whether there were seven members of the Times in existence. If so, winding-up would be impossible.

The VICE-CHANCELLOR refused to give any costs to the shareholders not served, and directed the

V.C. J.]

WALKER v. WALKER—WILSON v. WILSON.

[V.C. J.]

Albert liquidators to take their costs out of their own fund.

Solicitors: *Burton, Yeates, and Hart*, agents for *W. and A. F. Morgan*, Birmingham; *Edwards and Edwards*; *Lewis, Munns, and Co.*; *Kingsford and Dorman*.

Friday, Feb. 18.

WALKER v. WALKER.

Practice—Revivor and supplement—Infant born since decree—Necessary party—Omission to make infant a party—Supplemental order nunc pro tunc—15 & 16 Vict. c. 86, s. 52.

After a decree had been made in an administration suit an infant was born, who soon after his birth became interested in possession in the estates, but was overlooked in the subsequent proceedings. A sale having been made and approved, upon investigation of the title the omission was discovered:

Held, that it was not necessary to revive the suit; but a supplemental order was made that the proceedings should be of the same force and effect as if the infant had been made a party immediately after his birth.

This was a suit to administer the trusts of the will of Nicholas Walker, who died in 1856.

By his will the testator gave and devised all his real and personal estate to his brother John and his nephew Wainman Holmes, the younger, upon trust, after the death of his widow Elizabeth, as to one moiety, for the children of his brother John in equal shares, and as to the other moiety for the children of his sister Ann, wife of Wainman Holmes the elder in equal shares.

The testator died on the 2nd Aug. 1856.

The bill was filed on the 5th Feb. 1859, by two of the children of Ann Holmes, four infant children of John Walker, and one born since the death of the testator, against John Walker, Wainman Holmes the younger, Elizabeth Walker, and Wainman Holmes the elder, and Ann, his wife.

On the 19th Feb. 1859 a decree was made, directing the usual accounts and inquiries, and on the 8th Aug. 1859 the chief clerk made a certificate.

On the 27th Aug. 1859 another infant child of John Walker was born; but he was overlooked in the subsequent proceedings in the suit.

On the 12th March 1860, on further consideration, the real estate was ordered to be sold. Under this order several sales were made, and at length one was made, which was confirmed on the 23rd Dec. 1869. On investigation of the title in this last instance the omission of the infant from the proceedings in the suit was discovered.

Wickens, for the plaintiffs, now moved for a supplemental order, making the infant a party *nunc pro tunc*. He cited *Morgan's Chancery Acts and Orders*, 4th edit. p. 213, note (2), and the authorities there referred to.

Fry, Q.C. (amicus curiæ) referred to *Griffin v. Morgan*, L. Rep. 4 Ch. 351.

The VICE-CHANCELLOR at first thought an order of revivor would be necessary, but finally held otherwise, and made a supplemental order, to the effect that, the court being of opinion that the direction contained in the order dated the 12th March 1860, and the sales thereunder, were for the benefit of the infant, ordered that the said order, and the inquiries and accounts thereby directed, and the proceedings thereunder, be carried on and prosecuted as against the infant, and be of the same force and effect as if he had been made a party to the suit immediately after his birth.

Solicitors: *Paterson, Snow, and Burney*.

Friday, Feb. 18.

WILSON v. WILSON.

Practice—Revivor and supplement—Death of one of two plaintiffs—Revivor unnecessary.

Plaintiffs claiming to be respectively tenant for life and tenant in remainder in fee, of one third of the entirety of an estate, filed a bill against a defendant who claimed the entirety, to restrain the cutting of timber. The tenant for life died:

Held, that it was not necessary to revive the suit, and that the surviving plaintiff was competent to continue the suit alone.

This was a motion by a defendant, Thomas Wilson, to dismiss the bill for want of prosecution.

The bill was filed by Sarah Wilson, as tenant for life, and the Rev. Benjamin Powett, as tenant in remainder in fee of certain real estate, against Thomas Wilson, and parties claiming to be interested in the other two-thirds of the estate under the same title as the plaintiffs, praying that Thomas Wilson might be restrained from cutting timber.

Thomas Wilson claimed to be owner in fee of the entirety of the real estate.

The injunction was moved for, and ordered to stand to the hearing on the defendant's undertaking.

On the 13th Aug. 1868, the defendant, Wilson, put in an answer.

In March 1869 the plaintiff Sarah Wilson died, and in November a summons was taken out to adjourn the time within which to file replication or give notice of motion for decree; but nothing had been done notwithstanding numerous applications on the part of the defendant, the plaintiff alleging that the suit was abated.

Fry, Q.C., for the defendant Thomas Wilson, supported the motion.

North, for the plaintiff, contended that the suit had abated and was defective, and cited

Daniell's Ch. Practice, 4th edit. 755;

Adamson v. Hall, T. & R. 258;

Chichester v. Hunter, 3 Beav. 491;

Robinson v. Norton, 10 Beav. 484;

Hinde v. Morton, 2 H. & M. 368;

Here the timber has been cut, and part of the proceeds must be paid to the personal representatives of the deceased tenant for life.

The VICE-CHANCELLOR, after referring to the statements in the bill, said he was of opinion that revivor was wholly unnecessary; and that the plaintiff was quite competent to have gone on with the suit.

The usual order was made that the bill be dismissed for want of prosecution unless notice of motion were given, or the cause set down, or replication filed within one month; the plaintiff to pay the costs.

Solicitors: *Sharp and Ullithorne*; *Paterson and Co.*, for *Strother and Son*, Killinghall.

BEWDLEY (No. 2) ELECTION PETITION.

Election Petitions.

Reported by F. O. CRUMP, Esq., Barrister-at-Law.

THE BOROUGH OF BEWDLEY (No. 2) (a.)*Thursday, April 29, 1869.*

(Before BLACKBURN, J.)

Register—Jurisdiction of revising barrister—Notice of objection—Express decision—6 & 7 Vict. c. 18, s. 98.

By sect. 98 of 6 & 7 Vict. c. 18, power was given to election committees to inquire into and decide the right to vote of any person who, being upon the register of voters in force at the time of such election, shall have tendered his vote at such election, or not being upon such register, shall have tendered his vote at such election, in case the name of such person shall have been specially retained upon such register, or inserted therein, or expunged or omitted therefrom, by the express decision of the revising barrister who shall have revised the list of voters from which such register shall have been formed:

Held, that the intention of the Legislature was that where a matter of fact has been fairly raised before the revising barrister, and the revising barrister has heard it, and come to an express decision upon it, then his decision may be reviewed by an election committee—now an election judge—in order to see that injustice has not been done.

A revising barrister decided that a notice of objection was bad when it was good:

Held, that this was an express decision reviewable by the election judge, and giving him jurisdiction to inquire whether the vote of the person objected to was good or bad.

The principal decision in this matter is reported 19 L. T. Rep. N. S. 676.

Stephen, Q. C., Chandos Leigh, and Sturge appeared for the petitioner;

Giffard, Q. C. and Poland for the respondent.

BLACKBURN, J.—I must take this case as a mixed question of law and fact, in order to see what the jurisdiction is. First of all, the Act of Parliament originally establishing the register of voters, and requiring the revision before the barrister, made the register conclusive at the time of the election; the returning officer must go by the registration, and the registration alone, at the time of the election; but there was some doubt as to the extent to which an Election Committee of the House of Commons might think that they should look into it; it was, no doubt, part of the scheme of the revision that points of law might be reserved for the Court of Common Pleas; and the decision of the Court of Common Pleas upon those points of law was made final. Questions of fact there was no appeal upon at all unless it was to an election committee. Then the Act of the 6 & 7 Vict., c. 18, s. 98 (which is the one now in force), after reciting the doubts, says that "It shall and may be lawful for any such committee" (and now the election judges stand in the place of the committee) "to inquire into and decide upon the right to vote of any person who, being upon the register of voters in force at the time of such election, shall have voted in such election, or, not being upon such register, shall have tendered his vote at such election, in case the name of such person shall have been specially retained upon such

(a.) This second judgment in the matter of this petition was inadvertently omitted, and being of some importance it is here inserted.

register, or inserted therein, or expunged, or omitted therefrom by the express decision of the revising barrister who shall have revised the list of voters from which such register shall have been formed; and also that it shall and may be lawful for such committee to inquire into and decide upon the right to vote of any person who, being upon such register, shall have voted in such election, so far as the same may be disputed on the ground of legal incapacity at the time of his voting under and by virtue of any statute now or hereafter to be in force, or on the ground of any legal incapacity at the time of his voting which may have arisen subsequently to the expiration of the time allowed for making out the list of voters from which the register of voters in force at the time of such election shall have been formed. There were some other provisions relating to other matters. Now I consider the effect of that to be, that inasmuch as on matters of law there was an appeal to the Court of Common Pleas, yet upon matters of fact the decision of the revising barrister would be final, and it was not a matter that he could send to the Court of Common Pleas." Supposing, for example, the barrister had taken some peculiar view of the evidence, and had found that houses were of the value of 10*l.* when most men would not have thought they were of the value of 5*l.*, or had held that houses were of the value of 10*l.* when most men thought they were of the value of 15*l.*, such matters as that he could not have sent to the Court of Common Pleas. I think what the Legislature had in view was, that where a matter of fact has been fairly raised before the revising barrister, and the revising barrister has heard it, and come to an express decision upon it, then his decision may be reviewed by the election committee in order to see that injustice has not been done. Now, in the present case, it comes with a rather peculiar sort of express decision. The first case coming before the revising barrister, the case of Chillingworth being upon the overseers' list, would have stood upon the overseers' list without any decision of the revising barrister at all, unless somebody properly objected to it. If anybody properly objected to it, then the revising barrister would have to hear the evidence upon both sides, and to come to an express decision upon the merits. As was right and proper, it was first necessary to see that there was an objection, and that there was a notice of objection which was good, and consequently the revising barrister should have inquired into the merits of the case. The revising barrister after hearing and considering it came to a conclusion which I must treat as an erroneous conclusion, considering myself, as the superior authority, to be right, and the revising barrister wrong; he decided that the notice of objection was bad when, in fact, it was good. Then the first question is, is that retaining his name by "an express decision?" If the barrister had been right in saying that the notice of objection was bad, the name could not have been removed from the list at all; but when he, upon this preliminary point, decides that he will not enter into the merits at all, and erroneously decides so, when he ought to have entered into them, I think we must consider it as "an express decision" retaining the name, and consequently enabling me to enter into the merits. It would not follow from that, that Chillingworth's was a bad vote, and should have been struck off, but only that I have the jurisdiction to inquire whether it was a good vote or not. Then after this had been decided, and after it had been stated that a great many names would depend upon this decision, and that the objections were the same, I find upon the facts before me (and I must take a view of the matter which is formed upon the facts), that in fact in each case where the form of the notice of objection was actually the same, the objection to it would arise, the

same infirmity, if it had been an infirmity, in the notice of objection. I come to the conclusion that the barrister having had his attention called to the fact that there were many such notices to the same purpose, it would have been neither respectful nor useful to attempt to argue against the decision he had already come to; and, consequently, the two advocates did say, "There is no use contesting this further, and it will govern a good many cases." I come to the conclusion from the evidence that when the barrister was calling over the names, and when there was no objection made, he did not, in fact, know in which particular cases it was that no objection was brought forward, because there really was a notice of objection, but in the form of the one which he had already decided to be a nullity, and in which particular case the objection was not brought forward, because there was really no objection at all, I think it is very probable that if I had the revising barrister here he would say he acted upon that assumption. Had the revising barrister been called, and had he given his evidence half an hour after this had happened, and he had been asked whether James Baker's name was one to which there had been really an objection, but which was not brought forward because it was in this defective form, and whether it was an objection which for some other reason was not a good one and was not brought forward, I feel little doubt that the revising barrister would have said, "It is impossible for me to tell; I know if the objection was in the same form as the other, they agreed not to bring the objection forward because I had decided it before, but whether it applied to the particular case of James Baker or not I do not know; if it did, they were quite right in not bringing it forward." I have no doubt the revising barrister would have said so if his memory had been sufficient to have enabled him to do so. Now, coming to that conclusion, I have to see whether or not his not entering into the merits of James Baker's case was in consequence of his express decision, that the notice of objection in Baker's case was no objection at all, or whether it was not so to be considered. Well, I have stated the facts and the conclusion I have come to upon them. Therefore, in this case, I can come to no other conclusion than that it amounts in point of law to just the same as if it had been stated over again to him, and it had been said, "Sir, in James Baker's case there is a notice of objection, and it is exactly the same as the other case, and I do not press it;" and the revising barrister had nodded his head and said, "Very well." Of course it would have saved some discussion and trouble now if it had then been specifically said, "Well, then, sir, since you have so decided, it may be important at some future election, and we will make a list of thirty or forty names which your decision in this case will govern;" and the barrister had said, "Yes," it would have saved time and trouble in the inquiry now; and in any future case that arises it may be well to do so. But I think the substance and effect is exactly the same as if it had been so said. Taking that to be so, I must take the decision in Chillingworth's case to be a decision which applies to govern the subsequent cases in which the point was exactly the same. What I now decide does not go further than this, that Baker's case is one which was in the overseer's list, into the merits of which the barrister by express decision refused to enter, and it is now open to the petitioners to enter into the merits of the case to show that the name ought to have been struck off by the revising barrister. If they make out their case, I will strike it out now; if not, I will retain it.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

April, 30, 1869, and Feb. 21, 1870.

FRANCIS v. COCKRELL.

Action—Negligence—Construction of stand on a race-course—Liability of member of race committee who receives money for places on the stand—Implied warranty.

The defendant acting on behalf of himself and several other persons interested in certain horse races entered into a contract with Messrs. E., by which Messrs. E., engaged to erect and let to them a temporary stand for the accommodation of persons desiring to see the races. The defendant, on behalf of himself and his colleagues, all acting gratuitously, received a sum of money, which was appropriated to the race fund, from each person who used a place on the stand. Messrs. E. were competent and proper persons to be employed to erect the stand, but it was in fact, though unknown to the defendant, negligently erected by Messrs. E., and fell and injured the plaintiff who had paid for admission to the stand, and was on it at the time it fell.

Held that the defendant, by receiving money from the plaintiff as the price of his admission to the stand, entered into a contract with the plaintiff by which he impliedly warranted that due care had been used in the construction of the stand by the persons employed to erect it as well as by himself; and therefore that the defendant was liable for the injury sustained by the plaintiff owing to the negligent construction of the stand by Messrs. E.

Redhead v. Midland Railway Company, 20 L. T. Rep. N. S. 628, commented upon.

This was a special case stated by consent of the parties given at the trial before Mellor, J., at the Gloucester Assizes, on the 16th August 1867, when a verdict was entered for the plaintiff, subject to the opinion of the court on the following facts, as found by the arbitrator.

This action is brought to recover compensation in damages for injuries sustained by the plaintiff from the falling of a grand stand which had been erected to enable persons to view the steeplechases at Cheltenham whilst he was upon it for that purpose on the 13th April 1866.

Steeplechases have been holden at Cheltenham annually for many years on the 13th and 14th April.

The steeplechases for the year 1866 were got up, managed, and conducted as those of former years had been.

There was no formal election or appointment of a committee. Meetings were held for the purposes of the steeplechases, and any subscriber to the race fund or any person interested in the steeplechases was eligible to attend them, but the same gentlemen usually attend the meeting each year.

The following gentlemen usually attended the meetings for the steeplechases of 1866, namely, Sir Alexander Ramsay, Hugh Darby Owen, P. F. Durham, Benyon Barton, Price Lewis, James Rossiter, William Robert Holman, William Smart Davies, Frederick Jacobs, and the defendant (who is a saddler), who has for many years resided and carried on business in Cheltenham, and also William Barnett and Charles Scott, since deceased.

A Mr. Jacobs acted as honorary secretary, as he had done in former years. He was paid as usual a fixed sum for his outlay.

He first started the meetings for the year 1866. The meetings were holden sometimes at his verbal,

Q. B.]

FRANCIS v. COCKRELL.

[Q. B.]

and at others by his written request to some or all of the gentlemen who usually attend them.

The first meeting for the year 1866 was holden as usual about a month or six weeks before the time of the steeplechases.

It took as usual about a month or six weeks to get up the steeplechases.

At each meeting, and there were several before the steeplechases took place in 1866, one of the members, always Sir Alexander Ramsay when he was present, was voted to the chair.

The defendant was a subscriber to the steeplechases, and attended all the meetings of the committee for that year except one.

At one of the meetings the day was fixed when the races should be holden for 1866, and the prizes which should be and were given to the winners were determined upon. Sir Alexander Ramsay, Lord Fitzhardinge, Lord Tredegar, the Earl of Coventry, Col. Berkely, Mr. Calmore, Mr. Price Lewis, Capt. Durham, and other gentlemen (not including the defendant), were invited to act as stewards, and they did so act. A judge to determine the winners of the races was appointed, and certain of the gentlemen present were requested to see to various parts of the grounds and to undertake various duties in the getting-up, carrying out, and conducting the steeplechases, which they did.

A fund was formed for the holding of these steeplechases, called the race fund, which consisted of the subscriptions of any person that thought proper to subscribe, the receipts from the various stands and booths permitted to be erected on the course, and for the carriages permitted to enter and stand thereon, the money received from the sale of the cards of the races, and the surplus remaining from the previous year.

The race fund was deposited in a bank, in the names of the defendant, Sir Alex. Ramsay and Capt. Calmore. The latter never attended any of the meetings for the year 1866. He was absent, and gave authority to the bank to pay the cheques signed by the defendant and Sir Alex. Ramsay, which the bank did.

There was a surplus from the fund of the previous year applicable to the race fund for 1866.

At one of the meetings for 1866 the copyright of the cards of the steeplechases was authorised to be sold by auction, and it was so sold, and the proceeds were added to the race fund. Printed cards stating that they were published by authority were issued and sold by the purchasers of the copyright to persons attending the steeplechases.

The ground for various booths was let under the directions of gentlemen attending the meetings to persons who applied for the same, and the amounts received for such letting were added to the fund.

The fund was applied by the gentlemen attending the meetings to the expenses incidental to getting up, managing, and holding the steeplechases, the cost of the erection of stands, the payment of the ground-rent for the course, and the prizes for the winners.

The gentlemen who attended the meetings and acted as aforesaid did so gratuitously, as also did the defendant.

A meeting was holden at the Queen's Hotel in the month of March 1866. Several of the gentlemen who usually attended were present, and the defendant being one, Sir Alex. Ramsay was moved into and took the chair. It was discussed whether they could have a grand stand, and in the discussion the then state of the race fund, and the probable future takings were considered, and it was decided that they could have it. The defendant was present and took part in the discussion. When it was decided to have a stand the chairman was desired to request the defendant to order it, as usual, with

certain modifications, as hereinafter mentioned, then determined upon; and he did so request the defendant, and the defendant agreed to order it. It was also determined in like manner that the public should be admitted to the grand stand and paddock in front upon paying as theretofore 5s. each person, and the defendant was requested to let the refreshment room under the grand stand, and manage and superintend the taking of this admission money; and he agreed to do so and did.

The defendant had been for several of the previous years in like manner requested to perform the like duties, and had performed them.

The grand stand, for many of the previous years, had been erected by Messrs. Eassie, of Gloucester, architects and builders, and none of those had ever been found insufficient or improper.

Messrs. Eassie are very experienced and competent and proper persons to be employed by the gentlemen attending the meeting, or by the defendant in and about the erecting of a sufficient, safe, secure, and proper grand stand for the purpose required.

The defendant, after being so requested as aforesaid, went to Messrs. Eassie, and told them that it was determined to have a grand stand as usual, with certain modifications, as hereinafter mentioned, and asked them to submit their offer in writing.

Messrs. Eassie caused to be written and sent a letter, of which the following is a copy:—

High Orchard Works.
London Offices, 19, Great George-street,
Westminster, S.W.

Gloucester, March 26th, 1866.

The Secretary of the Steeplechase Committee, Cheltenham.

Dear Sir,—We hereby offer to erect a race stand for next month's meeting, of same size as usually hired by you of us at previous meetings, but with weighing and other rooms, modified as arranged with Mr. Cockrell, last year. We engage to hand same over for your use on the Saturday preceding the race, if desired, or two clear days from first race day, providing we get notice by return of post of the acceptance of our tender. Price will be 66l. 10s. (payable within a week after races) subject to a deduction of 5l., our general donation to the general fund. The fittings to comprise desks in weighing room, and judge's box, as before. Yours truly,
W. EASSIE and Co.

The ring fence to be hurdles, and provided by yourself, as usual.

This offer was accepted at one of the meetings at which the defendant was present and acted, and Messrs. Eassie erected a grand stand upon the course rented by the gentlemen attending the meetings at a part determined upon at one of the meetings, with the modifications referred to under the terms of the before mentioned letter, and the ring fence of hurdles was provided by the direction of the gentlemen attending one of the meetings.

The grand stand so erected was built of timber, with a refreshment bar at the bottom, on the ground, and a part above raised over the refreshment bar for persons to stand or sit to see the steeplechases, and which was reached by steps from the ground. There were also in it a steward's box, weighing room, and other conveniences.

It was erected upon the ground enclosed by the ring fence of hurdles aforesaid. This ring fence included a piece of ground between the front of the grand stand and the course, where persons could also stand and see the steeplechases, and it also included the betting ring and saddling paddock. It was erected about the same spot as the stand of 1865, and in a similar manner to that stand at which no accident occurred.

No person was employed by the gentlemen attending the meeting, or the defendant, to survey the stand after it was so erected, nor did they or any of them, nor did the defendant, personally inspect the stand until after it had been repaired subsequently to the accident. There was not any formal handing over of the stand by

Q. B.]

FRANCIS v. COCKRELL.

[Q. B.]

Messrs. Eassie to the gentlemen aforesaid or any one on their behalf; but Messrs. Eassie were not entitled to, and did not, in fact, exercise any control over the admission of spectators to the inclosure to the stand. Messrs. Eassie employed their foreman to superintend the erecting of the stand; and when its erection was ended, on Thursday, the 12th April, reported to the defendant that it was finished, and Messrs. Eassie, as was usual, directed their foreman to be there on the race day, in case any alteration or small thing should be required to be made. ●

The gentlemen attending the meetings, and the defendant, and the stewards, did not, nor did any or either of them, personally interfere in the erection of the stand.

The public were admitted within this ring fence upon payment of 5s. for each person, at a gate placed for the purpose, and at which a ticket was given to entitle the owner to re-admission if he afterwards went outside.

The defendant appointed a person to prevent anybody entering within the said ring fence without paying the 5s., and to take the money from those who did enter; and during part of the time of the steeplechases the defendant himself stood at the gate, took the money, and admitted persons.

Any person entering the ring fence at the gate aforesaid and paying 5s., had the right to go upon the grand stand in the place made for the purpose, to see the steeplechases.

The stewards exercised the right of entering the ring fence without any payment. Each of the gentlemen attending the meetings who held no official position, would be compelled to pay the same as one of the public. The defendant, from his position, had the right to enter without any payment.

The plaintiff was a stranger at Cheltenham; and on the 13th April 1866, being the first day of the steeplechases there, he paid 5s. at the gate, and to the person respectively placed and appointed there for the purpose, took his ticket and entered the ring fence and thereupon became and was entitled to go upon and did lawfully go upon the grand stand in the place appointed for the purpose, to see one of the steeplechases; and whilst he was so lawfully there, and without any fault or omission on his part, the portion of the grand stand near which he was, broke, gave way, and fell, and the plaintiff was thrown to the ground and was thereby injured.

The said grand stand, and the part that broke, gave way, and fell, were in fact negligently and improperly erected, and insufficient for the purpose for which they were erected and used; and the said grand stand and the said part part aforesaid, so broke, gave way, and fell, from being so negligently and improperly erected and being so insufficient as aforesaid, and not from any other cause whatsoever.

Before and at the time the said grand stand and part so broke, gave way, and fell as aforesaid, the gentlemen attending the meeting, the plaintiff, the defendant, and the stewards aforesaid, were not, nor had any or either of them, any notice or knowledge that the said grand stand and part, or either of them, had been or was so negligently and improperly erected or so insufficient as aforesaid.

The questions for the opinion of the court are: first, whether or not the plaintiff is entitled to recover compensation from the defendant for the injuries sustained by him under the circumstances aforesaid? if he is, then, secondly, whether he is so entitled in an action of tort or on contract. If the former, the verdict for the plaintiff is to stand but is to be reduced to 180*l.*; if the latter, then the verdict is to be reduced to 175*l.* If the plaintiff is not entitled to recover then the verdict for the plaintiff

is to be set aside, and instead thereof a verdict for the defendant is to be entered.

Mellish, C.C. (with whom were *H. James* and *Harington*) for the plaintiff.—There can be no doubt that there existed a contract between the plaintiff and the defendant, the defendant being a member of the race committee, and the person who appointed the receiver of the 5s. payments, receiving the 5s. himself during part of the time; and it makes no difference that the profits were not to go into the pocket of the defendant or the other members of the committee, but to go to the race fund; this amounting merely to the fact that the profits were to be applied as the committee thought fit. The defendant, in inviting, for reward, the public to go to the stand, must be taken to have contracted that it was a safe place to go to, and must therefore be held liable for negligence in the construction of it. It is not contended that there is an absolute warranty of its safety, but that there is a warranty that due care has been taken in its construction, otherwise the plaintiff would be without remedy, for there is no privity between him and Messrs. Eassie, who erected the stand; whilst, on the other hand, if the defendant is held liable to the plaintiff, Messrs. Eassie will be liable to the defendant. Negligence, no doubt, must be proved to have existed, but it is clear in the present case that there was negligence. In *Grote v. The Chester and Holyhead Railway Company*, 2 Ex. 251, in an action against a railway company for compensation for injury received by the plaintiff by the breaking down of a bridge, over which he was passing in a passenger train, it was held a proper direction to the jury to determine whether the defendants had engaged the services of competent engineers who had adopted the best method and had used the best materials, and that if the defendants had done so they would not be liable; but that the mere fact of their having engaged the services of such a person would not relieve them from the consequences of an accident, arising from a deficiency in the work. In answer to the argument that the defendants had done their duty in employing a competent engineer, *Parke*, B. said:—"It seems to me that they would still be liable for the accident, unless he also used due and reasonable care, and employed proper materials in the work." And the same learned judge said that "a coach proprietor is liable for an accident which arises from an imperfection in the vehicle, although he has employed a clever and competent coach-maker." [*LUSH*, J. referred to *Brazier v. The Polytechnic Institution*, 1 F. & F. 507, which was an action against the defendants for not properly maintaining a staircase, whereby the same fell down, and the plaintiff, who had paid for admission to the Institution, was injured, there having been alterations which, it was alleged, caused the fall, where *Wightman*, J. left two questions to the jury—viz., (1) whether the defendants themselves were guilty of negligence and (2) whether the persons employed by the defendants to make the alterations had used the necessary skill and caution to effect that object; and a rule, though granted as against evidence, was not granted on the ground of misdirection.] The widest door would be opened to negligence if those who have the management of public entertainments are not held liable for negligence in the construction of the structures to which the public are invited for reward to come. [*HANNEN*, J.—You say there is a duty on the defendant to employ a competent person to erect the structure, and also to employ some one else to see that the first person has properly performed his contract. Where is this duty to end?] The same objection would apply to the circumstances of the case of *Grote v. The Chester*

Q. B.]

FRANCIS v. COCKRELL.

[Q. B.]

and *Holyhead Railway Company*, but it was not considered to diminish the defendant's liability. Pollock, C. B., in that case states the rule to be "that if a party, in the same situation as that in which the defendants are, employ a person who is fully competent to the work, and the best method is adopted, and the best materials are used, such party is not liable for the accident." "If the jury," said the Chief Baron, "have been directed in conformity with this rule, there is no ground for the present application. It cannot be contended that the defendants are not responsible for the accident, merely on the ground that they have employed a competent person to construct the bridge." In *Burns v. The Cork and Bandon Railway Company*, 13 Ir. Com. Law Rep. 543, Pigot, C.B., stated the rule as to carriers of passengers thus—"Although a carrier of passengers does not warrant the safety or the due arrival of his passengers, yet I consider that he must be considered as warranting that the vehicle in which he conveys them is, at the time of the commencement of the journey, free from all defects, at least, as far as human care and foresight can provide, and perfectly road-worthy;" and the same principle applies to the present case. In *Hole v. The Sittingbourne and Sheerness Railway Company*, 3 L. T. Rep. N. S. 750; 30 L. J. 81, Ex., a railway company was authorised by Act of Parliament to construct a drawbridge over a navigable river, but so as not to obstruct the passage of vessels for more than a limited time; and the company agreed with a contractor to construct the bridge and complete the work as required by their Act of Parliament, but he failed to do so, and prevented the navigation; it was held that the railway company were liable, and not their contractor, for damages sustained on account of the navigation being impeded. "A party cannot," said Pollock, C.B., "avoid the responsibility incurred in acts of this sort by employing another to do the work. . . . If a person employed to build a house does it so as to darken the windows of a neighbour, no doubt the builder would not be liable, but the master who ordered it to be so built. It is his duty to know what is in course of being done, and to see that no mischief is arising or injury occasioned."

Matthews, Q.C. (with whom was *Huddleston* Q.C.) for the defendant.—The facts of this case are peculiar. The defendant is a saddler having no special knowledge, and undertaking no special duty which should fix him with liability. Any person who took an interest in the races, including the plaintiff himself, might have become a member of the committee. The position of the defendant is analogous to that of a gratuitous bailee; there is no express contract made by him with the defendant. [LUSH, J.—With whom then was the contract as to the payment of the 5s. made; and if the plaintiff had been turned out after payment, against whom could he have proceeded?] In *Wood v. Leadbitter*, 13 M. & W. 838 the plaintiff who had paid a guinea for a ticket for the stand at the Doncaster races, was held not entitled to bring an action of trespass for his expulsion. [LUSH, J.—The question there was a different one, namely, whether the plaintiff had a right to enter, or whether he was there by the leave and licence of the owner of the close, and it was held, that he was not, in the absence of a deed. But the court said as to the payment of a guinea by the plaintiff; "whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorised its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand in spite of the owner of the seal."]

If the defendant has not himself been guilty of any want of reasonable care in the performance of his duty, it is submitted that under the circumstances of the present case he cannot be held liable. In the cases cited the duty cast on the defendants was much larger than can be imposed on the present defendant. In *Grote v. The Chester and Holyhead Railway Company* (*ubi sup.*) the engineer employed was a servant of the railway company, and there was no question like that as to a sub-contractor. In *Pike v. The Polytechnic Institution*, 1 F. & F. 712, it was held that the defendants were not responsible for latent defects on the staircase (whether in construction or in materials), at the time they took the building, but were only responsible for any want of due care to keep it in a reasonably safe condition, and were liable for repair of it in an improper manner, tending to weaken its strength. The defendants, said Erle, C. J. to the jury, "are not to be deemed to have warranted the staircase as safe, or to have insured to the public that they might safely use it. They would be bound to use due care to make it reasonably fit for public use; and it is for you to say whether there was any want of due care in this instance." Negligence must consist in the breach of some duty, and it is submitted in the first place, that the defendant has not been guilty of any negligence in the breach of any duty that he undertook or that he ought to be held to have undertaken to perform. Even in the case of a shopkeeper who invites people to go to his shop he is only bound to exercise reasonable care to prevent danger to his customers. In *Indermaur v. Dames*, L. R. 1, C. P. 287; 14 L. T. N.S. 486 (confirmed in error), Willes, J. summarises the law on this subject, viz., "as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop, but it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know, such as a trap-door left open, unfenced, and unlighted. This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns himself. . . . The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation express or implied. And with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact." In similar language the duty of a canal company is stated by Tindal, C. J. in *The Lancaster Canal Company v. Parnaby*, 11 A. & E. 242. "The facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company; and the common

Q. B.]

FRANCIS v. COCKRELL.

[Q. B.]

law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal or absolutely to free it from obstructions, but to take reasonable care so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property." So that even where persons are expressly invited to come on the premises of another for reward, the exercise of reasonable care is the only duty that the law implies on the part of the occupier. Where persons are not invited but only allowed to go on the premises of another, the duty is not even so strong. In *Gautret v. Egerton*, L. Rep. 2 C. P. 375; 16 L. T. Rep. N. S. 17, which was a case of this sort, Willes, J. says, "assuming that these were private docks, the private property of the defendants, and that they permitted persons going to or coming from the docks, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee." . . . To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty; otherwise a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence." In *Southcote v. Stanley*, 25 L. J. 339, Ex. the declaration alleged that the plaintiff was lawfully in the defendant's house as a visitor by his own invitation, and that for the purpose of leaving the house, the plaintiff with the defendant's permission and knowledge, opened a glass door of the defendant's, which it was necessary to open, and that by the carelessness, negligence, and default of the defendant, the door was in an insecure and dangerous condition, and unfit to be opened, by reason whereof, and of the carelessness, negligence, default, and improper conduct of the defendant, a piece of glass fell from the door upon the plaintiff and injured him; and the Court of Exchequer held, upon demurrer, that the declaration disclosed no cause of action. [HAYES, J. referred to *Collis v. Selden*, L. Rep. 3 C. P. 495, where a declaration alleging that the defendant wrongfully, negligently, and improperly hung a chandelier in a public house knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier unless properly hung was likely to fall upon and injure them, and that the plaintiff being lawfully in the public house, the chandelier fell upon and injured him, was, on demurrer, held bad as not disclosing any duty by the defendant towards the plaintiff for the breach of which an action could be maintained.] The defendant here was bound to do nothing more than employ a competent person to erect the stand, and that he did. The sub-contractor may be regarded as an independent contractor, and many cases have held that a person who employs an independent contractor is not liable for negligence on his part in the performance of his contract; e.g. *Allen v. Hayward*, 7 Q. B. 960, where commissioners appointed for improving navigation employed a contractor who made a drain which, from a defect in the materials, could not resist water, and the neighbouring land was in consequence flooded, and the commissioners were held not liable for this act of the contractor, though the misfeasance was one for which, if committed by an agent or servant whose act in this respect was the act of the commissioners, they would have been so liable.

the contract made by a person who invites the public for reward to come to a place of amusement supplied by him. Whether the defendant had co-contractors or not is immaterial; he either himself received, or appointed the person who did receive, the 5s. He must be taken to have contracted that reasonable care has been employed in the construction of the stand; he is liable for the neglect of that reasonable care, and cannot escape liability by employing others to do the work. In *Pickard v. Smith*, 10 C. B., N. S., 480, Williams, J., in delivering the judgment of the court, said: "If an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities which were referred to in the argument. That rule is, however, not applicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned."

Cur. adv. vult.

Feb. 21, 1870.—The judgment of the court (Cockburn, C. J., Lush and Hannen, JJ.), was now delivered as follows by

HANNEN, J.—The facts material to the determination of this case are these: The defendant, acting on behalf of himself and several other persons interested in the Cheltenham Steeplechases, entered into a contract with Messrs. Eassie, by which they engaged to erect and let to the defendants a temporary stand for the accommodation of persons desirous to see the races. The stand having been erected, the defendant, on behalf of himself and his colleagues, received money from visitors for the use of places on the stand. Messrs. Eassie were competent and proper persons to be employed to erect the stand; but it was in fact negligently erected by them, and in consequence of its being so negligently erected, it fell, and the plaintiff who had paid for admission, and was upon the stand looking at the races, was injured by the fall. Neither the plaintiff nor the defendant knew of the improper construction of the stand. We think it clear that the defendant, by receiving money from the plaintiff as the price of his admission to the stand, entered into some engagement with him with reference to its condition; but in order to determine whether the defendant is liable in damages for the injury which the plaintiff has sustained, we have to consider what the extent of that engagement was. The nearest analogy to this case seems to be afforded by that of carriers of passengers. The carrier is paid for providing the means of transporting the passenger from place to place. The defendant received payment for providing the means of supporting the spectator at a particular place. This distinction does not appear to give rise to any difference of principle between the contracts to be implied in the one case and in the other as to the safety of the means provided for carriage or support. The recent decision of the Exchequer Chamber affirming the judgment of this court in *Redhead v. The Midland Railway Company*, L. Rep. 4 Q. B. 379; 20 L. T. Rep. N. S. 628, has established that there is not in such a case any implied warranty that the carriage provided is in all respects fit for its purpose. But that decision, while it gives confirmation (if any were needed) to the proposition that the carrier undertakes that he has used due care in providing safe means for the conveyance of the passengers, expressly leaves undetermined the further question the carrier also undertakes that due care

Mellish, Q. C. in reply.—The question is, what is

Q. B.]

FRANCIS V. COCKRELL.

[Q. B.]

has been used by those who have contracted with him to provide the means of conveyance: (See p. 393 of the former report.) In the present case, it is not found that the defendant was himself wanting in due care, and no power to draw inferences of fact is given to the court, and, if it were, we should not be able to draw the inference that the defendant was personally guilty of any want of care. He had employed competent and proper persons who had efficiently executed similar work on previous occasions. The circumstance that the defendant did not himself survey or employ anyone to survey the stand after it was erected, does not in itself establish the charge of negligence; for it does not appear that the defect was such as could have been discovered on inspection; and even if it had been, it cannot be laid down as necessarily a want of care not to inspect, although it would in some circumstances be evidence from which a jury might properly find that due care had not been taken. It becomes necessary for us therefore to consider whether the contract by the defendant to be implied from the relation which existed between him and the plaintiff was that due care had been used, not only by the defendant and his servants, but by the persons whom he employed as independent contractors to erect the stand. It is said in the judgment of the Court of Exchequer Chamber in *Redhead v. The Midland Railway Company* that "warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given." Applying this rule to the present case, we think that the contract by the defendant with the plaintiff did contain an implied warranty that due care had been used in the construction of the stand by those whom the defendant had employed to do the work, as well as by himself. In the ordinary course of things, the passenger does not know whether the carrier has himself manufactured the means of carriage, or contracted with someone else for its manufacture. If the carrier has contracted with someone else, the passenger does not usually know who that person was, and in no case has any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control; while the carrier can introduce what stipulation and take what securities he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care, the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier: (*Longmeid v. Halliday*, 6 Ex. 766.) Unless, therefore, the presumed intention of the parties be that the passenger should, in the event of his being injured, by the breach of the manufacturer's contract, of which he has no knowledge, be without a remedy, the only way in which effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected, and whose breach of contract has caused the mischief. We have already stated that we consider the same reasoning which is applicable to the case of a carrier of passengers is applicable to the case of a person who, like the defendant, provides places for spectators at races or other exhibitions. But not only do we think that when the reasons of justice and convenience on the one side and on the other are weighed the balance inclines in favour of the plaintiff, but we are also of opinion that the weight of authority is on the plaintiff's side. All the cases bearing on this subject are collected and

commented on in the judgment in *Redhead v. The Midland Railway Company*. It will only be necessary to refer to a few of them. In the earlier decisions the language of the judges is, perhaps, ambiguous. Thus in *Christie v. Gregg*, 2 Camp. 81, Sir James Mansfield says: "The carrier did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered." Taken strictly, this would support the plaintiff's contention, because if the manufacturer whom the carrier employed was guilty of negligence, the undertaking was not fulfilled that the carriage should be safe "as far as human care and foresight could go." But it is just possible that Sir James Mansfield meant "as far as human care on the defendant's part could go." The same remark is applicable to what is said by Best, J. in *Crofts v. Waterhouse*, 3 Bing. 319, 320. But it is clear that Alderson, B., in *Sharp v. Gray*, 9 Bing. 459, considered that the carrier of passengers was liable not only for those defects of construction which he might himself guard against, but also those which arise from want of care on the part of the maker. But in *Grote v. Chester*, 2 Ex. 255, the point now under consideration was distinctly raised. There an accident happened from the defective construction of a bridge over a railway, for the erection of which the company had employed a competent engineer. It was left to the jury in effect to say whether the engineer, as well as the company, had used due care and skill. For the defendants it was objected that they would not be liable unless they had been guilty of negligence; and after verdict for the plaintiff it was argued for the defendants that as they had engaged the services of the most competent engineer in the construction of the bridge, they had done their duty; upon which Parke, B. said, "It seems to me that they would still be liable for the accident, unless he also used due and reasonable care, and employed proper materials in the work." And later, with reference to the case of *Sharp v. Gray* (*ubi sup.*) he says, "The coach proprietor is liable for an accident which arises from an imperfection in the vehicle, although he has employed a clever and competent coachmaker." And the court held that the jury had been properly directed, saying, "It cannot be contended that the defendants are not responsible for the accident merely on the ground that they have employed a competent person to construct the bridge." In *Burns v. The Cork and Bandon Railway Company*, 13 Ir. Com. L. Rep. 543, the same point appears to have been raised upon the pleadings. The action was for not carrying the plaintiff safely. The defendants pleaded that the cause of the accident (a defect in a crank pin) was not capable of being detected by them, and that the crank was purchased from competent manufacturers, and that the defendants before the journey duly examined the crank, and had no notice of the defect. To this plea the plaintiff demurred. The court gave judgment for the plaintiff, holding the plea bad because, amongst other reasons, it did not contain any averment negating carelessness on the part of the manufacturers. Pigott, B. says, "If the defendants had been the manufacturers of the engine they would have been bound to aver and to prove that due care and skill had been exercised in the process of its manufacture. Are they to be relieved from legal liability because they allege that they have purchased it from a competent manufacturer? See also the decision of Wightman, J. in the case of *Brazier v. The Polytechnic Institution*, 1 F. & F. 509. We think, therefore, that both on

C. P.]

THE ILFRACOMBE RAILWAY COMPANY v. NASH.

[C. P.]

principle and authority the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Attorney for the plaintiff, *Tamplin and Tayler.*

Attorney for the defendant, *Bromley.*

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING,
Esqrs., Barristers-at-Law.

Thursday, Jan. 27.

THE ILFRACOMBE RAILWAY COMPANY v. NASH.

Company—Shareholder — Register of shareholders — Director—Qualification shares—Implied assent to hold shares.

N. became one of the original directors of a railway company at the solicitation of R., the promoter of, and subsequently solicitor to, the company. The qualification of a director was twenty shares, but R. promised N. that he should have twenty fully paid-up shares given to him as his qualification. The company was not bound by this promise, and had no power to allot paid-up shares except for value received. N. acted as a director of the company, and received fees for his services. He was from time to time present at the sealing of the register, on which his name was entered as the holder of twenty unpaid shares. He also received notices of calls due on these shares, but he took no notice of the applications. He also concurred in a report, which spoke of him as eligible for election as director. Subsequently R. procured twenty fully paid-up shares to be transferred to N., and N.'s name then stood on the register as the holder of twenty fully paid-up shares, and twenty other shares on which nothing had been paid. No letter of allotment was ever sent to N.:

Held, that N. was holder as well of the twenty unpaid shares as of the twenty fully paid-up shares.

This was a proceeding by writ in the nature of a writ of *scire facias*, to recover 500*l.* from the defendant as being a shareholder in the Devon and Somerset Railway Company.

The declaration stated, in substance, that the plaintiffs obtained in the Court of Common Pleas a verdict for 10,750*l.* 1*s.* 2*d.* against the Devon and Somerset Railway; that on the 10th day of Aug. 1866, execution issued, but there could not be found any of the goods of the said company, whereon to levy; that the defendant then and now was the holder of twenty shares in the said company, and that there remained unpaid in respect of each of the said shares the sum of 25*l.*, and the said court having ordered that the plaintiffs should be at liberty to issue a writ of *scire facias* against the defendant, the defendant was required, within eight days, to appear and show cause why the plaintiffs should not have execution against him for the said sum of 10,750*l.* 1*s.* 2*d.*, to the extent of the money now remaining to be paid in respect of his shares.

To this the defendant pleaded that he was not, on the 10th Aug. 1866, or now the owner of or entitled to the said twenty shares or any of them; and secondly, that the said shares were before and at the time when the defendant became the holder of the same, and when his name was entered as a shareholder, fully paid-up shares, and that never since that time did there remain unpaid in respect of any of the shares any sum of money.

The cause came on to be tried before Mr. Justice Keating at the sittings in Middlesex, after Trinity Term last, when a verdict was found for the plaintiffs for the full amount claimed, subject to the opinion of the court on the following case.

1. The Devon and Somerset Railway Company

hereinafter called "the company," is incorporated by the Devon and Somerset Railway Act 1864, which Act forms part of this case. This Act came into operation the 29th July 1864.

2. The plaintiffs, in an action brought in the Court of Common Pleas, recovered by the judgment of the said court against the said company, the sum of 10,750*l.* 1*s.* 2*d.*, and duly issued execution on the said judgment against the property and effects of the said company, and there could not be found sufficient whereon to levy such execution, and the writ of *scire facias* against the defendant issued pursuant to an order of this court made on the 8th May 1868.

3. J. T. Nash, mentioned in the 4th and 16th sections of the Devon and Somerset Railway Act 1864, is the defendant.

4. The capital of the said company was by the said Act 500,000*l.*, in 20,000 shares of 25*l.* each.

5. The 15th section of the said Act enacts that the qualification of a director shall be the possession by him in his own right of shares to the aggregate nominal amount of 500*l.*

6. By the 16th section of the said Act it was enacted that Lord Poltimore, J. T. Nash, and others should be the first directors, and should continue in office until the first ordinary meeting, and at that meeting the shareholders present in person or by proxy might either continue in office the directors appointed by the Act, or any of them, or might elect directors to supply the place of such of them as were not so continued in office, the retiring director (if any) being, if qualified, re-eligible.

7. The company was promoted by, amongst others, a Mr. Riccard, a solicitor at South Molton, who afterwards became and still is the solicitor to the company, and others. Whilst the company was in a state of promotion, and on the eve of their going to Parliament for their Act, there was a great difficulty in procuring a sufficient number of directors for the proposed company, whereupon Mr. Riccard applied to the defendant to become a director.

8. Accordingly Mr. Riccard, who was one of the said promoters, and who afterwards became solicitor of the company, applied to the defendant to become a director of the company, undertaking at the same time that on the defendant so consenting, there should be transferred to him twenty fully paid-up shares in the company as his qualification for director. Relying upon this undertaking on the part of Mr. Riccard, and having expressly told him that his qualification must be given to him, and that he would not accept any but fully paid-up shares to qualify him as a director, the defendant consented to become a director, and to allow his name to be inserted in the aforesaid Act as one of the directors of the company.

9. The first meeting of the directors was held on the 4th Aug. 1864, and no other board meeting of the said directors was held until the 23rd Sept. 1864, when the defendant was present and acted as a director.

10. Previous to that meeting a circular had been issued inviting the public to apply for shares, and at that meeting, the defendant being present, it was resolved as follows, that is to say, "That shares already applied for be allotted." Except this there has not been any resolution relating to the allotment of shares.

11. A book called the "Register of Shareholders of the said Company" was kept by the secretary of said company, and the seal of the company was first affixed to it at the second ordinary meeting of the company held on the 28th Feb. 1865, at which the defendant was present as a director (the first ordinary meeting of the company having been held on the 11th Oct. 1864, at which also the defendant was present) and in such register the defendant's

C. P.]

THE ILFRACOMBE RAILWAY COMPANY v. NASH.

[C. P.]

name had been put down as a shareholder in respect of twenty shares, without any number being appropriated to them, or to any other shares on the said register.

12. On the 11th Oct. 1864, a meeting of the board of directors was held, at which the defendant was present, and at that meeting it was resolved—"That notice of the allotment call be issued, the call to be payable within fourteen days from the date of the notice," and notices were sent to those who had applied for shares.

13. This register was made up by the secretary before the meeting, without any directions as to the persons he should place on the register, and the secretary put down the name of the defendant for the proper number of shares to qualify as a director.

14. On the 16th May 1865 a meeting of the board of directors was held, at which the defendant was present, when it resolved that a first call of 5*l.*, payable in two instalments of 2*l.* 10*s.* each, should be made, and the defendant received notice of this call, with a form of banker's receipt for the amounts attached.

15. This was the first time that the defendant had any knowledge that his name was on the register of shareholders. The defendant did not reply to this application, and did not pay the call.

16. On the 4th Aug. 1865 the defendant received from the company the sum of 52*l.* 10*s.* as director's fees for the then past year.

17. On the 4th Aug. 1865 the directors issued a report, a copy of which is annexed hereto. The defendant was never informed by the secretary, nor was the board, nor did the defendant know or suspect that the arrears claimed from him were in respect of his shares; but the secretary, in calculating the arrears, and in the 644 shares mentioned in the same report, included the twenty shares for which he had put down the defendant's name.

18. This report was approved of by the board at a board meeting, at which the defendant was present, and afterward confirmed at the general meeting of the company in the next paragraph mentioned.

19. On the 24th Aug. 1865 the next half-yearly general meeting of the shareholders was held, at which the defendant was present, and the register of shareholders was sealed; and in that register the defendant is entered as a shareholder in respect of twenty shares, numbered 521 to 540.

20. In the register the secretary had put down his own name and those of the said Mr. Riccard and Mr. Birch each for a large number of shares, for which they had not applied, and which he considered as fully paid-up, to which they were entitled for their expenses in promoting the company and obtaining the Act.

21. There was no resolution authorising this proceeding on the part of the secretary other than the following resolution:

That fully paid-up shares to the extent of 79,050*l.* be issued to the contractors or their nominees, which, with the sum of 2950*l.* in cash already advanced to them by the board on account of the expenses of the company since its incorporation, will make up the total of 82,000*l.*, the amount to which the contractors are entitled under the terms of their contract, and that the contractors pay to the promoters jointly the sum of 2950*l.* in cash and 12,000*l.* in fully paid-up shares, being portions of the above-named 82,000*l.*, and which the promoters are entitled to receive on account of the sum of 42,000*l.* granted as the total cost of obtaining the Act, and included in the said 82,000*l.* Ordered therefore, that the shares for the 67,050*l.* and 12,000*l.*, making up 79,050*l.*, be stated, but not issued to the contractors, except upon condition of their making the respective payments of 2950*l.* and 12,000*l.* to the promoters simultaneously in the respect of their shares. *

22. The secretary did not distinguish these shares in the register as fully paid-up shares.

23. On the 13th Oct. 1865 the secretary of the company sent the following circular:

Oct. 13th, 1865.

Dear Sir,—I beg to inform you that the undermentioned calls payable by you in respect of shares held in this company are still in arrear, and to request that you will pay the same to the West of England Bank, South Molton, without delay.—I am, yours faithfully,

J. M'MILLAN, Secretary.

Allotment call... 250

First call 100

J. F. Nash, Esq.

2150

24. The defendant took no action on this letter, nor did the company.

25. The next ordinary meeting of the company was held in Feb. 1866, at which the defendant was present, and the seal of the company was affixed to the register.

26. In Nov. 1865 the secretary received notice from the company that his services were no longer required, and he ceased to be the secretary to the said company, and a letter was sent to the chairman of the board, in which it was stated by Mr. M'Millan that the defendant "had never qualified, and continued to act at the board as an unqualified director," and was handed about amongst the directors at the board, and shown by the said chairman to Mr. Riccard, who was present at the board in his character of solicitor. The defendant was also present at this board.

28. Mr. Riccard then, for the first time, informed the board of the arrangement which he had made with the defendant in reference to his becoming a director of the company as mentioned in paragraphs 7 and 8 of this case.

29. Immediately after this meeting Mr. Riccard, in pursuance of the said arrangement with the defendant, which he had just communicated to the board, went into the City in order to procure to be transferred to the defendant twenty fully paid-up shares of the company, numbered 10,457 to 10,476, and on the 14th Aug. 1866 they were transferred to the defendant.

30. In June 1866 a second call of 5*l.* per share was made, and the secretary forwarded the usual notices of this call to the persons on the register, and amongst them to the defendant.

31. The next ordinary meeting of the company was held in Aug. 1866, at which the defendant was present, and in the register sealed at that meeting the defendant's name appears for forty shares without any number; and the next ordinary meeting of the company was held in Feb. 1867, at which the defendant was present, and in the register sealed at that meeting the defendant's name appears for forty shares without any number; and the next ordinary meeting was held in Aug. 1867, at which the defendant was present, and in the register sealed at that meeting the defendant's name appears for twenty shares, numbered 521 to 540, and twenty others, numbered 10,457 to 10,476, the latter being the above mentioned fully paid-up shares so transferred to the defendant, as mentioned in paragraph 29 of this case, but the defendant never knew that his name had been put down for forty shares in the register. The register of Aug. 1866 and that of Feb. 1867 are contained in a different book to the book which contains the register of shareholders which were sealed at the other meetings at which registers were sealed.

32. Half-yearly general meetings of the company have continued to be held, and the register has remained in the same state, as far as the defendant's name and shares are concerned.

34. Save as above mentioned, the defendant never subscribed to the undertaking, and never applied for shares, and never agreed to take any but fully paid-up shares, and no letter of allotment of any shares was ever sent him.

35. The defendant has never paid any money in respect of any of the said shares, and the directors

C. P.]

THE ILFRACOMBE RAILWAY COMPANY v. NASH.

[C. P.]

of the company have never taken any steps against him to enforce such payment; and, save as aforesaid, no application has ever been made to him in relation to them.

36. The defendant has never taken any steps to have his name taken off the register, and the first notice of an intended application to apply to the said court for a writ of *scire facias* was given to the defendant in Sept. 1866.

37. The defendant has acted as a director ever since the passing of the Act, believing himself qualified by the terms on which he consented to become such director.

38. It is agreed between the parties that the court shall be at liberty to draw any inferences or find any facts which in the opinion of the court a jury ought to have drawn or found, and shall make any amendments in the pleadings necessary to raise any of the points involved in this special case.

The question for the opinion of the court is, whether the defendant was and is a shareholder in the said company so as to be liable to have the execution prayed issued against him in respect of the said twenty shares numbered 521 to 540. If the court shall be of opinion in the affirmative thereof, the verdict is to be entered for the plaintiffs as aforesaid with costs; but if the court should be of the contrary opinion, then a verdict to be entered for the defendant with costs.

The following is a copy of the report mentioned in the 17th paragraph of this case, so far as the same is material.

Report of the directors to be submitted to the proprietors at the half-yearly ordinary general meeting.

24th Aug. 1865.

The directors in presenting the third half-yearly report, &c., &c., &c.

The directors retiring by rotation are J. T. Nash (the defendant) and H. G. Moysey, and, being eligible, they offer themselves for re-election.

The auditors, &c.

(Signed) POLTIMORE, Chairman.

The register of the 28th Feb. 1865, contained the name of J. T. Nash as a holder of twenty shares, without any distinguishing numbers. Amount 500*l*.

In the registers of the 24th Aug. 1865, and the 27th Feb. 1866, the numbers are stated. Amount 500*l*.

The register of the 30th Aug. 1865 states that J. T. Nash is a holder of forty shares, numbered, &c., and that the "amount paid thereon is 500*l*."

The two subsequent registers merely state the name and address, J. T. Nash, name, address, the number of shares, and reference to the ledger folio.

Keane, Q.C. (Bridge with him) for the plaintiffs.—The 28th sect. of the Companies Clauses Consolidation Act 1845 (8 & 9 Vict. c. 16) makes the register *prima facie* evidence against an alleged shareholder in settling the list of contributories. Mr. Nash's name appears on the register for twenty-five shares, upon which nothing has been paid. The question is, does he rebut the *prima facie* case against him? The company gave him notice that his name had been entered on the register for these shares; and, looking at all the circumstances, the court, judging of this question as a jury would, must come to the conclusion that he assented to this arrangement. If the court comes to this conclusion, the plaintiffs are entitled to the judgment they ask for. He cited

Re The South Blackpool Hotel Company (Limited), *ex parte Migotti*, 16 L. T. Rep. N. S. 271; 36 L. J. Ch. 531;

Re The South of France Wine Growing Districts Company (Limited), *ex parte De Beville*, 38 L. J. Ch. 18;

Re The Electric Telegraph Company of Ireland, *Bunn's case*, 3 L. T. Rep. N. S. 567; 2 De G. F. & J. 275;

Re The London and County Assurance Company, *Wood's claim*, *Brown's claim*, 9 W. R. 366.

Sir George Honyman, Q. C. (Cohen with him), for the defendant. The plaintiffs are bound to show that at the time when the execution levied by them against the Devon and Somerset Railway Company was found to be ineffectual, the defendant was a holder of unpaid shares in the company (1 Lindley, citing *Nixon v. Greene*, 11 Ex. 550, and 3 H. & N. 686; *Nixon v. Brownlow*, 3 H. & N. 686.) The substantial question is whether the defendant was at that time a holder of such shares. Whether he was or not, depends on whether he made any contract with the company to take such shares. The only evidence of any contract between him and the company is to be found in that part of the case which relates to his dealings with Riccard. That, however, has to do only with the paid-up shares. [BRETT, J.—If the Devon and Somerset Railway Company were suing the defendant for calls, and they relied on his dealings with Riccard as evidence of his becoming a shareholder, it would then become competent for the defendant to allege the terms of that contract. But now the question is, whether he has not held himself out to the other contributories and creditors as a shareholder.] It is not sufficient that he is shown to have held himself out to the world as a shareholder; it must be shown that he held himself out to the plaintiff. (See *Morris v. Bethell*, 21 L. T. Rep. N. S. 330, and notes to *Waugh v. Carver*, 1 Smith, L. C., pp. 860.) The fact of his being a director does not make him liable for these shares. [BOVILL, C.J. called attention to the report of the directors, dated 24th Aug. 1865.] He thought the paid-up shares qualified him. As to the notices of calls, the defendant was not bound to answer such applications; he simply treated them as waste paper. He took no notice of them, nor did the company. He was not bound, even when he had notice that his name was on the register of the company as the holder of twenty unpaid shares, to take any steps to have it removed: (1 Lind. 144.) He never made any application for any unpaid shares, nor did he ever receive any letter allotting such shares to him. [BRETT, J. cited 1 Lind. 618, the issue of paid-up shares, otherwise than for full value received is *prima facie* a breach of trust on the part of the directors, and the company and its creditors are entitled to have such shares treated as not paid-up."] He cited

The Waterford, &c., Railway Company v. Pidcock, 8 Ex. 279;

Abercorn's case, 8 Jur. N. S. 951;

Moss v. The Steam Gondola Company, 17 C. B. 180;

Re The International Contract Company, *Levita's case*, L. Rep. 3 Ch. App. 36; 17 L. T. Rep. N. S. 337;

Re The Universal Banking Company, *Gunn's case*, L. Rep. 3 Ch. App. 40; 17 L. T. Rep. N. S. 365; 36 L. J. 800, Ch.; 37 L. J. 40, Ch.;

Re Llanharry Hematite Iron Company, *Tothill's case*, L. Rep. 1 Ch. App. 85; 13 L. T. Rep. N. S. 485;

Re Richmond Hill Hotel Company, *Pellatt's case*, L. Rep. 2 Ch. App. 527; 16 L. T. Rep. N. S. 442;

Re The Peruvian Railways Company, *Robinson's case*, 20 L. T. Rep. N. S. 96; L. Rep. 5 Ch. App. 322;

Re St. George's Steam Packet Company, *Maguire's case*, 3 De G. & S. 81;

Guest v. The Worcester, &c., Railway Company, L. Rep. 4 C. P. 9.

Keane, Q.C. in reply cited the judgment of Sir John Rolt L.J. in *Levita's case*, L. Rep. 3 Ch. App. 39. "Great reliance was placed on the dicta in *Pellatt's case* (*ubi sup.*), but, if read with the context, they were seen not to be of universal application. In

C. P.]

THE ILFRACOMBE RAILWAY COMPANY v. NASH.

[C. P.]

this case, though nothing was done in answer to the application for shares, yet taking all these facts together—that Levita desired to be put on the register, that he must have known that he was liable to be put on it, that he attended and was paid for attending as a director; that he remained for a year or two without making any application to take his name off—his Lordship agreed in the conclusion to which the Vice-Chancellor came, and dismissed the appeal with costs.”

BOVILL, C. J.—The question raised in this case is whether Mr. Nash ever was a shareholder in the Devon and Somerset Railway Company, so as to be liable to them in respect of twenty shares, numbered 521 to 540; which stand in the register in his name. There is no question as to his liability in respect of the paid-up shares. All cases of this kind depend on the special circumstances. There has been a large variety of these cases in Chancery, and judgment has been given in each case on the particular facts. Nevertheless certain principles are clearly laid down. A man cannot be a shareholder without his consent. If application is made for shares and not responded to, the applicant is not a shareholder. Still one case is very little guide to another. It is for us to consider whether the defendant agreed to take shares, and then whether he actually took them. It is thus a question, aye or no, did he assent? The defendant's original agreement with Riccard was for paid-up shares; and if the case rested there, he could not be held responsible. After that agreement was made, the defendant became a director of the company, and as director was bound to have a qualification. He acted for some time as a director and was a party to the report published on the 24th Aug. 1865, in which it is stated, “The directors retiring by rotation are H. G. Moysey, Esq., and J. T. Nash, Esq., and being eligible they offer themselves for re-election.” Nothing could state more clearly that Mr. Nash was then the holder of at least twenty shares, leaving open the description. On his becoming a director he must be taken to have known that no paid-up shares were issued in the first instance. The case states nothing as to the issue of paid-up shares except in paragraph 22, and that relates to the paid-up shares allotted to the contractors for work done; and when we look at the report of 24th Aug. 1865 above mentioned, and the statement that paid-up shares were issued to the contractors, while no mention is made of any other paid-up shares, the defendant must be taken to know that the company had no power to allot paid-up shares to him. It is possible that the defendant relied on Mr. Riccard to protect him. That the defendant assented to become a shareholder there can be no doubt, but what sort of shareholder? He intended, no doubt, to hold paid-up shares; but the question arises whether, after he became aware that the company had no power to allot paid-up shares to him, he did not assent by his conduct as a director to be the holder of unpaid shares. It seems to me that the evidence is overwhelming that the defendant was aware that he was treated by the company as the holder of unpaid shares. In May 1865 there was a call of 5*l*. per share, and a notice was sent to the defendant. That was a distinct intimation that the company regarded him as the holder of unpaid shares. What would have been the conduct of a man in the position of the defendant on such an occasion, who thought that his shares were fully paid-up? If he had been a stranger, it would not have been incumbent on him to take any notice of the application; but we must remember that the defendant was a director of the company. This notice was sent in May; in August of the same year comes the report, in which the

defendant is spoken of as eligible to hold the office of director. How could he have been eligible except as the holder of shares? In the meantime he attends the meetings of the directors. In the October of the same year, he receives another notice of call—not an ordinary notice, but a special and unusual one. He says that the company took no notice of his failure to attend to the first notice of call; that, however, is not so, for they sent the letter of Oct. 13th, 1865. I should like to know, what would be the conduct of a man who, believing that he only held paid-up shares, received a notice to pay the allotment money and the first call, and afterwards a second notice, he being at the same time a director, and knowing that he must have some shares as a qualification, and that the company had no power to allot paid-up shares to him? In June 1866 another call of 5*l*. was made, and another notice sent to the defendant, and again the defendant took no notice of it. All this time he was acting as a director, and was present at the meetings of the board. What are we to infer from the defendant's conduct? The Act of Parliament makes the register *prima facie* evidence. Here the defendant is on the register, and time after time has notice of the fact that he is on the register as the holder of unpaid shares. The defendant was present at the meetings when the register was made up and sealed. He was a director, and was in constant communication with the other directors. If no notice had been given him that he was on the register as the holder of unpaid shares, then the case might have been different; but notice was given him, and he continued to act as a shareholder. Under these circumstances, I can have no hesitation in concluding that Mr. Nash, knowing that the original arrangement with Riccard could not be carried out, was content to act as director, as the actual holder of unpaid shares, thinking it possible that, if matters took an unfortunate turn, Riccard would indemnify him. There is thus an end of the case according to all the authorities, and our judgment must be for the plaintiffs.

M. SMITH, J.—I am of the same opinion. The defendant was at the time of the return to the writ, the holder of twenty unpaid shares in the Devon and Somerset Railway Company, and is therefore liable to the plaintiffs. The court has power to draw inferences of fact. In drawing such inferences, we must conclude that the defendant well knew that he was on the register for twenty unpaid shares, and that he assented to hold them. There is not only abundant but conclusive evidence that he agreed to become a shareholder, on the terms on which his name is on the register. In his original agreement with Riccard, he undoubtedly intended to hold only paid-up shares as a qualification. His name is in the Act of Parliament as a director, and the act specifies the qualification. After the passing of the Act, the register is made up and his name is inserted as the holder of twenty ordinary unpaid shares. He was present at two meetings when the register was sealed. But he was not only an ordinary member, he was a director, and held shares for the purpose of being a director. He was a director not only in name but in fact. He was present at several meetings, and received 50 guineas for fees. On two occasions he received notices of call. This was express notice that he was on the register for shares not paid up. It is monstrous that a director, who has attended all the meetings, and who has received notices of call, should say that he did not know his name was on the register as holder of unpaid shares. I cannot believe such a statement. He must have been well aware of his liability. The present case is distinguishable from that of the *Baron de Beville; re the South of France*

C. P.]

PIERCEY (app.) v. MACLEAN (resp.)

[C. P.]

Company, L. Rep. 7 Eq. 11; 38 L. J. 18, Ch., in which, as to a certain number of shares, the Master of the Rolls held the baron not liable, on the ground that in that case the company had authority to issue paid-up shares, so that the baron could not know that those shares were not paid up. Here it is impossible to conclude that the defendant was ignorant that the company had no power to issue paid-up shares without receiving money or money's worth. As then his name was on the register with his knowledge and assent, that amounted to an implied agreement to take the shares set against his name. This case is not like those that have been cited. Cases of this kind generally resolve themselves into questions of fact, and the decision depends on the particular circumstances. That that is so is illustrated by two cases, in *Re The Richmond Hill Hotel Company*, *Elkington's case*, L. Rep. 2 Ch. App. 511, and *Pellatt's case*, L. Rep. 2 Ch. App. 527, and 16 B. T. Rep. N. S. 442. Both these cases were originally decided by Wood, V.C., and in both it was held by that learned judge, that the applicants were not liable. These decisions were appealed against. The Lords Justices held Elkington liable, but Pellatt not. In giving judgment in the former case, Cairns, L. J. said:—"I regret that I am unable to come to the same conclusion as the Vice-Chancellor, because I cannot avoid thinking that, if Messrs. Elkington had been clearly aware of the consequences of what they were doing, they would have entered into their contract with this company in a different manner. But what we have to deal with are the acts and conduct of Messrs. Elkington, and not the question whether they themselves were aware of the legal consequences of what they were doing." What we have to deal with here are the acts and conduct of the defendant. They are clearly inconsistent with his not being a shareholder, or the holder of only paid-up shares. I cannot conceive how the defendant can say, after having acted as he has, that he did not know of and assent to his name being on the register for these shares. It would be monstrous if he were to be allowed to shirk his liability, and I should be very sorry to lend my aid to such an attempt.

BRETT, J.—It has been clearly made out that no liability rests on the defendant merely by reason of his having been a director, and the defendant is not estopped as against creditors from denying his liability, because, even if he held himself out to the world as the holder of unpaid shares, there is nothing to show that the plaintiffs acted on the faith of his being such a shareholder. It is also clear that the defendant is not liable in this action unless he was a shareholder, and he was not a shareholder unless he entered into a binding contract with the company to become a shareholder and the contract was carried out by the company. And there was no such contract unless there was mutual assent. If the defendant agreed to be bound by one set of terms, and the company by another, there was no contract. Still the defendant was on the register of the company for twenty unpaid shares. Under such circumstances the Act of Parliament throws the burden on him of disproving his liability; and I am not prepared to say that the defendant has shown that he and the company did not assent to the same terms. It seems to me that the defendant at first intended to hold nothing but paid-up shares; but afterwards he found that the company could not assent to his terms, and so he acquiesced in other terms—viz., to hold unpaid shares. He finally agreed to do so, taking his chance that, as he was a director, the company would not enforce payment. Thus I think that both parties assented to the same terms, and if

they did so there was a binding contract. Acting on that contract, the company put the defendant's name on the register. On these grounds I think our judgment must be for the plaintiffs.

Judgment for plaintiffs.

Attorneys for plaintiffs, *Bircham and Co.*

Attorneys for defendant, *Coombe and Wainwright.*

REGISTRATION APPEAL.

Friday, Jan. 21.

PIERCEY (app.) v. MACLEAN (resp.)

Registration—Counting-house—Structural severance—Rating—2 Will. 4, c. 45, s. 27.

A room or rooms used as a counting-house constitute a "counting-house" within the meaning of 2 Will. 4, c. 45, s. 27, even though in point of construction they form part of a house.

This was a consolidated appeal from the decision of the revising barrister for the city of London, who had decided that the name of the respondent John Maclean and also the names of certain other persons should be on the list of voters for the city. The following was the case stated by the revising barrister.

The said John Maclean (hereinafter called the claimant) claimed to be inserted on the list of voters for the parish of St. Katherine Free Church in respect of a counting-house, situate at and within a house, No. 10, Billiter-street, in the said parish.

The counting-house in respect of which this claim was made consisted of two rooms, forming, together with the landing of the staircase, the entire first floor of the said house.

This house was originally built for a dwelling-house, and in former years had been so occupied; but, in common with many similar houses in the said city, the use of it as a dwelling-house has been abandoned, and the whole of it was let out in separate apartments for business or commercial purposes; and at no time since the 30th July 1868 had the same or any part thereof been used as a dwelling. The landlord, who has a lease of the entire house, underlets the ground floor to a person who occupies it as a grocer's shop; the rest of the house is let out in separate holdings to tenants who occupy them as counting-houses or business offices. No structural alteration has been made in any part of the said house since it was disused as a dwelling-house. The first floor is let to the claimant as tenant from year to year at a yearly rent of 65*l.* under an agreement that the landlord should thereout pay all the rates on behalf of the claimant in respect of the premises occupied by him, the rent being higher than it would have been if the claimant were personally to pay the rates to the collector. This floor consists of two rooms communicating together by an internal door, each of which rooms has a separate outer door to the landing of the staircase which gives access to this floor and the floors above. These doors are the same doors as were attached to the rooms when the house was used as a residence. On the outside of one of these outer doors is painted the name of the claimant. These rooms were occupied and used by him as a counting-house in his trade or business of wine merchant. He alone, and to the exclusion of the landlord, had the keys of the doors that opened on the landing. These rooms were used in manner aforesaid by the said claimant and his clerk during the daytime, and after the business hours the doors on the landing were locked and the keys taken away by him or his clerk. There is an outer door to the house opening on the street which is opened during the day; after business

C. P.]

PIERCEY (app.) v. MACLEAN (resp.)

[C. P.]

hours this door is closed and secured by a latchlock of which the claimant has a key.

The claimant was rated to all the rates in manner following. Against No. 10. Billiter-street, in the rate-book, the overseers had placed the claimant's name in the occupiers' column, followed by the words "counting-house," immediately below the name of the landlord which was followed by the word "house." The two names were bracketed together and the rateable value, which exceeds 120*l.* and the rate in the pound and the rating of the whole house, including therein the said counting-house, was carried out in the appropriate columns of the rate-book against those names jointly; but no separate value or rating of the counting-house alone was inserted in the rate. There had been no special enactments as to rating in force in this parish. Both the rates and rents had been duly paid and all other requisites not herein specifically mentioned to entitle the claimant to be placed on the list of voters in respect of his occupation of the said counting-house, were duly proved. This claim was objected to on the following grounds:—First, that the tenement in the claimant's occupation was not sufficient in kind to confer a qualification by reason of there being no such structural severance of the rooms, occupied by him as a counting-house, from the rest of the house as to constitute them a counting house within the meaning of the Act to amend the representation of the people in England and Wales, passed in the second year of the reign of His late Majesty King William the Fourth. Secondly, that the claimant was not, as such occupier as aforesaid, an occupier of premises in respect of which he was legally liable to be rated, on the alleged ground that an occupier of part of a house not structurally severed from the rest of the house is not liable to be rated, and, therefore, that the placing of his name by the overseers on the rate-book in manner aforesaid, was no rating of him in respect of the premises he occupied.

The revising barrister disallowed the objections and inserted the claimant's name on the list of voters in respect of his occupation of the said counting-house. Holding, first, that there was a conversion and occupation of the said rooms into and as a counting-house, so as to make them a counting-house within the meaning of the said Act, and that no further structural severance than appears on the facts was necessary to make them a good qualification as a counting-house. Secondly, that the overseers having placed the name of the claimant on the rate-book in manner aforesaid, they had thereby so rated him in respect of the premises he occupied, as to entitle him to be placed on the list of voters as duly rated. Thirdly, he also held, if it was necessary to give a decision on the point, that the claimant was an occupier in respect of the premises he so occupied as aforesaid, and that such joint rating of him and his landlord as aforesaid in respect of the whole house, rated him in respect of the premises he exclusively occupied being part thereof.

The question upon which the judgment of the Court of Common Pleas was requested, was whether it was rightly decided that the said respondent and the other persons were entitled to have their names retained or inserted, as the case might be, in the register of voters for the city of London.

Prentice, Q. C. for the appellant. The question here is what is the meaning of the word "counting-house," in sect. 27 of 2 Will. 4, c. 45. It must be a whole house. There is in this case no structural severance as to constitute the two rooms occupied by the respondent a counting-house within the meaning of the statute. The word "house," used in the same section, means *prima facie* a dwelling-house. *Cook v. Humber*, K. & G. 418; 31 L. J.

54, C. P.; 11 C. B., N. S., 33; 5 L. T. Rep. N. S. 838, has decided that the word "house" means a whole house, and that part of a house in no case confer the franchise unless there is a complete severance in fact between it and the rest of the house. In construing the words "warehouse" and "counting-house," regard must be had to that decision. The words mean a house used for certain commercial purposes, as distinguished from a "house" properly so called, *i.e.*, a dwelling-house. The same structural severance that is required to constitute a "house" is required to constitute a "warehouse" or a "counting-house." *Toms v. Luckett*, 5 C. B. 23, and *Downing v. Luckett*, 5 C. B. 40, appear at first sight in favour of the respondent; but the decision in those cases really turned on the question whether the tenant was an "occupier" or not within the meaning of the section, and the sufficiency of the place occupied to confer a qualification was not in dispute. Whatever doubt may have been raised by these cases has been set at rest by the decision in *Cook v. Humber* (*ubi sup.*) If the respondent used these rooms for dwelling purposes, he would have no pretence to a vote. [BOVILL, C. J.—If a counting-house means a whole house, why should it have been mentioned by the Legislature?] To show that a house used for commercial purposes (which is not "a house" within the meaning of the 27th section, that meaning a dwelling-house) may confer a vote. A person who occupies rooms like these for purposes analogous to those for which a counting house is used (as chambers occupied by a barrister or a solicitor or an architect for the purpose of carrying on their profession) does not get a vote.

Wilson v. Roberts, 11 C. B., N. S., 50; 31 L. J. 78, C. P.; 5 L. T. Rep. N. S. 838.

Cuthbertson v. Butterworth, L. Rep. 4 C. P. 523; 21 L. T. Rep. N. S. 140; 38 L. J. 98, C. P.

According to the latest decisions, if the landlord lived in this house, he would have a vote as for a whole house (*Smith v. Lancaster*, 21 L. T. Rep. N. S. 491; 39 L. J. 38, C. P.); though in reality he would be letting the greatest part of it to sub-tenants, who would be also entitled to vote. Another question arises as to whether the respondent was rated so as to entitle him to vote. As to this question, *Wright v. The Town Clerk of Stockport*, 5 M. & G. 33, will be cited by the respondent. There is, however, this distinction between that case and the present, that there the claimants were rated for the whole house with their landlord; while here, the claimant purports to be rated for a counting-house, the landlord being rated for the house. He cited also

Powell v. Boraston, 18 C. B., N. S., 175; 34 L. J. 73, C. P.

Meadows White for the respondent.—A counting-house need not be a separate building. The words in the Act must be taken in their ordinary and popular sense. Taking them in this way, it is clear that these rooms constitute a counting-house within the meaning of the Act. Who ever heard of a counting-house being a whole building? The present question is one of use and furniture rather than of structure. The question discussed in *Cook v. Humber* (*ubi sup.*) was whether a certain building was a house or not; but that question does not arise here. But even if structural severance were needed to constitute a counting-house, there is sufficient severance here within the meaning of the case of *Cook v. Humber*. [He was here stopped by the court.]

BOVILL, C. J.—As far as we are informed, ever since the year 1882 the occupation of counting-houses similar to the present one has conferred a vote. That practice shows what has been the almost

C. P.]

PIERCEY (app.) v. MACLEAN (resp.)

[C. P.]

universal opinion as to the meaning of the word "counting-house." If Mr. Prentice had satisfied us that the practice was wrong, it would have been our duty to declare the law and reverse the practice; but I am unable to see that he has given us any grounds for the change. The decisions have varied as to whether a whole house is required, when the claim is made under the words "house or other building," but no decision affects this question to show that a counting-house must comprise a whole house. Since the case of *Cook v. Humber* (*ubi sup.*) the words "house or other building" must be construed to mean a whole house; if we take any other view of the section, the words "or other building" might divide a house into a part of a house. It was said that the words "or other building" might include a whole house or part of one, because they came after the words "warehouse, counting-house, or shop;" but it has been rightly held that the words must not extend the meaning of the word "house," so as to make it equivalent to part of a house; because if the word "house" at the beginning of the clause signifies a whole house, then the words "other building" at the end must bear the same signification. This case, however, does not turn on the meaning of the word "house," but on the meaning of the word "counting-house." Now, in the first place, the word counting-house, as commonly understood, means a part of a house. A shop is a part of a house, and a warehouse is generally a part of a house. In this particular case the rooms in question are known as a counting-house, and are used as one. Mr. Prentice, then, has to satisfy us, that what is known and used as a counting-house is not a counting-house within the meaning of the Act. He says it must be a whole house. But a counting-house or a shop is commonly a part of a house, and not the whole. There is no direct decision as to the meaning of these words, "warehouse, counting-house, or shop," but there are many cases in which the judges have expressed their views as to their meaning. In *Toms v. Luckett* (*ubi sup.*), which was decided in 1847, Wilde, C. J. (at p. 35 in the Common Bench Reports) says:—"We all well know that the terms 'warehouse, counting-house, shop' import parts of houses devoted to particular purposes of business; and the general words that follow, 'or other building,' must have intended to embrace other separate occupations of distinct portions of a house." The question, then, was whether part of a house, used as a dwelling-house, would confer a vote. *Cook v. Humber* (*ubi sup.*) has reversed that decision, but it leaves untouched the view there taken of the meaning of the words, "warehouse, counting-house, or shop." The Chief Justice goes on to say, "The object of the Legislature in introducing these words seems to have been to prevent the discussions that might be expected to arise out of the previous words. I cannot help thinking that the apartments which this party is described as occupying should be held to fall within the words 'other building,' just as much as the words 'warehouse, counting-house, or shop,' are satisfied by the occupation of distinct portions of a house for the purposes before adverted to." There is no doubt, then, as to the opinion of Wilde, C. J. on this question. In *Wright v. The Town Clerk of Stockport*, 5 M. & G. 33, which was decided in 1843, the question was whether rooms, being portion of a building, could entitle the occupier to a vote. There Tindal, C. J. at page 50, says, "We are of opinion that each of these rooms, held in the manner described in the case, was such a building as to confer the right of voting on its occupier." There, too, the language used seems to show that a shop, warehouse, or counting-house was, in the opinion of Tindal, C. J. equivalent to a part of a house. In *Cook v. Humber* (*ubi sup.*), where the question of

whole or part of a house was again raised, it was said that the word "house" meant a whole house in the first place, and that therefore the words "other building" at the end could not mean a part of a house. But the only question was as to the meaning of these words, and nothing was said to interfere with the views of Wilde, C. J. and Tindal, C. J. as to the meaning of the words "shop, warehouse, or counting-house." In *Cook v. Humber* (*ubi sup.*), Erle, C. J., says at p. 45 of 11 C. B., N. S., "as to the kind of tenements which qualifies, the statute has described two classes of buildings, namely, those used for residential, and those used for commercial purposes—house, for residence—warehouse, counting-house, shop, or other analogous building, for commerce. When the claim is in respect of a house, we consider that the Legislature did not intend to create a part of a house used for residence, and not for commerce, a tenement sufficient to qualify." I should expect to find that if Erle, C. J., had thought that a shop must be the whole building, he would have said something of the sort. So far, however, from his doing so, his language seems to show that this court in his time entertained the contrary opinion. At p. 46 of this same report, the case of *Wright v. The Town Clerk of Stockport* (*ubi sup.*) is referred to, and no dissatisfaction is expressed with that decision. The next case is *Wilson v. Roberts* (*ubi sup.*), decided in 1861. At p. 50 of the 11 C. B., N. S. report, the court say: "The claimant occupied the first floor, being a part of a house, which part had not become by actual severance an entire house in any sense of the word; and we consider that the qualification fails, because the tenement, the subject of occupation, was not sufficient." That is to say, it was not sufficient as a house. He continues: "It is not stated to be a shop, warehouse, or counting-house. It was not a house, because it was only a part of a house. It was not a building analogous to the others described in the statute, because it was only one part of a building, without any actual severance from the other parts." If rooms are occupied as warehouses, shops, or counting-houses, the case is different. There, however, the claimant could not be said to occupy a house, because he only occupied a part; and his rooms could not fall under the description of shop, warehouse, or counting-house, because they were not used for that purpose. I am of opinion, then, that these words "shop, warehouse, or counting-house," include parts of a house. That is the common meaning of the words. The language seems to me to have been used advisedly to designate a place like that, in respect of which the present claimant claims. As to the rating question: I do not understand Mr. Prentice to insist much upon it, so I merely observe that this case must be governed in this respect by *Wright v. The Town Clerk of Stockport*.

WILLES, J.—I am of the same opinion. The words "counting-house" in the absence of anything in the context to restrain them to any particular sort of counting-house, must be held to include any place that is a counting-house in the largest ordinary sense of the word. This rule has been consistently followed by this court in these cases. Now, in ordinary cases, a counting-house is a part of a house, and it is not necessary to convey the idea of a counting-house, to introduce the circumstance that the whole of the building is devoted to that purpose. There is nothing to prevent the word "counting-house" in its ordinary sense including such a tenement as this. Is there, then, anything in the context to show that the whole house is meant? I will assume that *Cook v. Humber* (*ubi sup.*) rightly decided that the word "house" means a whole house. To determine this question about the

C. P.]

REG. v. ELIZA COOK.

[STAFFORD ASSIZES.]

context, let us look at *Cook v. Humber*. Reading the section by the light of that case, it is just as though the Legislature had said that every person occupying a whole house, warehouse, counting-house, shop or other building shall have a vote. That is the most favourable way of putting it for the appellants. All that *Cook v. Humber* decided was that the adjective "whole" must be prefixed to the word "house" in this section. There is, then, I think nothing either in the subject matter or the context, to prevent our regarding a part of a house as a counting-house. A counting-house commonly is a part of a house. In such a case, however, I would not say but that the occupation may be in some sense qualified. I do not speak now of the question whether a "counting-house" must be an entirety in point of building, but of the nature of the occupation. It is conceivable and probable that a person might have what is called a counting-house, or a place of business, without exposure of wares to make it a shop, and that his occupation would give him no more control over or access to the place than a mere lodger would have. I could understand that it might be decided under such circumstances, that such an occupant is nothing more than a lodger. But that applies to the case of a person who has a room in a house, the general control of which is vested in the owner. That exclusion of a mere lodger would necessarily arise from our giving to the words of the Act their plain and ordinary meaning. The same doctrines as to the sufficiency of the occupation might apply to the case of a person having a counting-house, as to a person having a dwelling-house. It is unnecessary, however, to pursue this matter further, as, if there is anything to qualify the claimant's occupation here, that would affect the sort of occupation, and has nothing to do with the question of a whole or part of a house. The claimant in this case is in no sense a lodger. He has as complete control over his counting-house as he could have if it were in point of structure a separate house. The only difference between the two cases is that, in the one case he could get in at night without a latch-key, while here he must use his latch-key in order to get through the outer door. But this door is put up and kept locked, not in order to exclude him, but to exclude improper characters. His occupation, then, is sufficient, and as I think that he occupies what the Legislature must be considered to have contemplated when it used the word "counting-house," the decision of the revising barrister must be affirmed.

BRETT, J.—The question here is whether Mr. Maclean is qualified to be entered on the list of voters for the City of London. The words of the 27th sect. of the Reform Act 1832 (2 Will. 4, c. 45) are to the effect that the occupier of a "house, warehouse, shop, counting-house, or other building" of a particular value shall be entitled to a vote. There are then two points to be here considered—first, what is the nature of the occupation? secondly, what is the thing occupied? Here the occupation is found to be of such a character as to entitle the occupier to a vote, if the thing occupied be sufficient. The place occupied is alleged to be a counting-house, and the question for us is whether it is a "counting-house" within the meaning of the statute. The facts raise the question, not whether the place is in point of structure sufficient to be a counting-house, but whether it is to be said that it is not a counting-house, because in point of structure it is part of another building. The appellant relies on the decision of this court in the case of *Cook v. Humber* (*ubi sup.*), but that case decides only that a part of a house is not sufficient to entitle the occupier to a vote, because the word "house" means a whole house. It is consistent with that decision,

that part of a building, if there be sufficient structural severance, may constitute a "house." Flats and chambers are in one sense parts of another building, but, in another sense, they are so contrived as to form separate houses. When Mr. Prentice supposes *Cook v. Humber* (*ubi sup.*) to have overruled *Toms v. Luckett* (*ubi sup.*), and to have decided that a part of a building can under no circumstances form a qualification, he must think that the court, in deciding *Cook v. Humber* adopted the doubt expressed by V. Williams, J. in his judgment in *Toms v. Luckett*. All, however, that the cases decide is that, in the ordinary and popular sense of the word, a part of a house is not a house; but there is nothing to show that a part of a house may not be occupied as a counting-house, merely because it happens to be a part of and not a whole house. If a man occupies a part of a warehouse, i.e., a part let off to him, those decisions show that he would not be entitled to a vote; but they do not go to the length of deciding that if a man occupies a whole warehouse or counting-house, he is to have no vote because the warehouse or counting-house (as the case may be) forms a part of another building. If we were to allow this appeal, we should disfranchise most shopkeepers and whole columns of voters. There is nothing in the authorities to lead us to do that; on the contrary, I think that, if the same mode of decision be applied to this case as to them, the decision of the revising barrister must be upheld.

Appeal dismissed with costs.

Attorney for the appellant, *Harper, Broad, and Co.*

Attorneys for the respondent, *Travers Smith and De Gex.*

STAFFORDSHIRE LENT ASSIZES.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

OXFORD CIRCUIT.

Tuesday, March 15.

• (Before LUSH, J.)

REG. v. ELIZA COOK.

Concealment of birth—Evidence of.

Although the fact of the prisoner having placed the dead body of her newly-born child in an unlocked box is not of itself sufficient evidence of concealment of birth within 24 & 25 Vict. c. 100, s. 60, yet all the attendant circumstances of the case must be taken into consideration, in order to determine whether or not an offence under the above-mentioned section of the statute has been committed.

Indictment for concealment of birth.

The prisoner was in domestic service as a cook. On Dec. 18 she told a fellow-servant that she was suffering from toothache, and would go to bed. She did so, and remained in her room until Dec. 20, but did not lock the bedroom door. The housemaid observed that the prisoner had changed the sheets on her bed, and that those which she removed were stained.

On the morning of Dec. 20 the prisoner was discharged by her master. The housemaid helped her to complete the packing of her box, which was already half filled when the housemaid went to it, but which was not locked. Having finished packing the box, the housemaid locked it, and gave the prisoner the key. The prisoner, with her box, was then sent home to her mother. A short time after her arrival at home the police went to the mother's house, and found the box in the parlour. The prisoner was requested to empty it. She removed some of its contents, and in doing so was seen to

STAFFORD ASSIZES.] REG. v. FREDERICK JONES—*Re* THE ASIATIC BANKING CORPORATION. [CHAN.

take out a bundle and throw it into the mouth of a flour sack behind the door. This bundle contained the dead body of a child.

Motteram for the prosecution.

Young, for the prisoner, contended that there was no evidence of concealment; that merely to abstain from immediately confessing the fact of a birth was not to conceal it. In *Reg. v. Sleep*, 9 Cox C. C. 559, it was held that the endeavour to conceal the birth of a child by a secret disposition of the dead body within the meaning of the stat. 24 & 25 Vict. c. 100, s. 60, must be by putting it into some place where it is not likely to be found; and that placing it in an open box in the prisoner's bedroom, and afterwards, on inquiry by the medical man, informing him that the child was in the box, where it was found, is not a secret disposition within the statute. In the present case the box was left unlocked, and the housemaid had access to it. And in the recent case of *Reg. v. Jones*, tried at the Gloucester Summer Assizes 1869, M. Smith, J. held that the placing of the dead body of a child in an unlocked box was not of itself sufficient evidence of concealment.

LUSH, J.—That may be so; but then all the attendant circumstances of the case must be taken into consideration.

The learned Judge left the case to the jury, who found the prisoner guilty.

Sentence, two months' imprisonment.

Attorney for the prosecution, *Hand*, Stafford.

Attorney for the prisoner, *Sheldon*, Wednesbury.

Wednesday, March 16.

(Before LUSH, J.)

REG. v. FREDERICK JONES.

Manslaughter—Contributory negligence by deceased.

If a man undertakes to drive another in a vehicle, he is bound to exercise proper care in regard to the safety of the man under his charge, and if by culpably negligent driving he causes the death of the other, he will be guilty of manslaughter. But he cannot be found guilty of manslaughter if the deceased himself interfered in the management of the horse, and thereby assisted in bringing about an accident.

Even if the doctrine of contributory negligence applies to criminal cases (as to which point—quære?) yet there is no contributory negligence on the part of anyone in merely getting into a vehicle and allowing himself to be driven, although the driver be perceptibly drunk.

Indictment for manslaughter.

The prisoner drove the deceased (a friend) in a trap to some races. At the races the former became intoxicated, and when his trap was ready to take him and the deceased home, he made several ineffectual attempts to get into it before he succeeded in doing so. The deceased, noticing this, wished to take the reins, but the prisoner said he would drive his own horse, and added that he would drive him (meaning the deceased) "quicker than he was ever driven in his life."

The prisoner whipped the horse and drove off at a furious rate, standing up and flogging the animal first on one side and then on the other. The trap was upset, and the deceased, being thrown out, received the injuries from the effect of which he died.

G. Browne, for the prosecution, opened the facts above set forth.

Young, for the prisoner, submitted that upon the statement of the counsel for the prosecution there

was no case. There had been contributory negligence on the part of the deceased. [LUSH, J.—That is not allowed as an excuse in a criminal case.] In *Reg. v. Birchall*, 4 F. & F. 1087, Willes, J. held that where the deceased has contributed to his death by his own negligence, although there may have been negligence on the part of the prisoner, the latter cannot be convicted of manslaughter, observing that until he saw a decision to the contrary, he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action. Now in the present case Mr. Wedge, the deceased, had volunteered to get into the trap, although he knew what condition Jones was in, and by so doing contributed to his death by his own negligence.

LUSH, J.—The prisoner undertook to drive the deceased. He must drive carefully, must he not? And if he neglects that duty he is responsible. The case cited is quite at variance with what I have always heard laid down. I cannot see that there is any contributory negligence on the part of any one in merely getting into a trap and allowing himself to be driven.

The witnesses for the prosecution being then called, one of them, Mrs. Cooper, in giving evidence, said that just before the accident she saw the deceased put his hand out; but in her deposition before the coroner she was represented as having said that he put his hand out and caught hold of the rein. She now stated that she did not make that statement before the coroner, and she did not know why the deceased put his hand out.

LUSH, J. (summing up to the jury).—The question for you to consider is, whether the death of Mr. Wedge was caused by the culpable neglect of the prisoner. For my own part I must say that I consider it a matter of law that a man who takes another man into a trap with the intention of driving him is bound to exercise reasonable care both in regard to the safety of the man under his charge and also in regard to the safety of persons whom he may meet in the road. A man cannot claim any indulgence on account of being drunk. If you think the carriage was overturned by the prisoner's culpably negligent driving, and that caused the death of the deceased, you will find the prisoner guilty of manslaughter; but if, on the other hand, you have reason to believe that the deceased himself interfered with the management of the horse you will acquit the prisoner.

Verdict guilty; sentence, one month's imprisonment.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSBANK and E. STEWART
ROCHE, Esqrs., Barristers-at-Law.

Monday, Jan. 31.

(Before Lord Justice GIFFARD.)

Re THE ASIATIC BANKING CORPORATION; *Ex parte* NUSSEERWANJEE.

Contributory—Transfer to an infant—Registration—Commencement of winding-up—Infant subsequently twenty-one—His readiness to accept the shares—Right of liquidator to retain transferor as shareholder.

N. transferred shares to S., an infant, who was accepted and registered by the company in ignorance of the fact of infancy. S. continued an infant at the commencement of the winding-up. On application by the official

CHAN.]

Re THE ASIATIC BANKING CORPORATION; *Ex parte* NUSSERWANJEE.

[CHAN.]

liquidator to substitute the name of N. for S. in the list of contributories, it was

Held (affirming the decision of Stuart, V. C.), that the company was entitled to full knowledge of the facts before accepting a transfer, and that as it had not had such knowledge prior to the winding-up, the order asked for must be made; and that, even if S. were now willing to confirm that transfer, that fact would not affect the official liquidator's right.

This was an appeal by Nusserwanjee, a person residing in Bombay, against an order of Stuart, V. C. removing from the list of contributories of the above-named company the name of one Bromley Symons, and substituting for it that of the appellant, under the following circumstances.

In Aug. 1866 the appellant presented to the company for registration a deed duly executed, and in proper form, whereby he purported to transfer into the name of Mr. Bromley Symons, forty shares in the company, which the company, in ignorance of the real fact that Symons was at that time an infant, accepted and registered. In Oct. 1866, a petition to have the company wound-up by the court was presented, and on the 3rd Nov. following the usual order was made. The official liquidator in the first instance inserted the name of Nusserwanjee in the list of contributories, relying on the fact that the transfer to Symons had never been approved by the London directors in compliance with the articles of association, and it continued there until a decision of the Lords Justices in another case that such an omission did not invalidate the transfer. The official liquidator then in Nov. 1868, took out a summons to substitute Symons's name for that of Nusserwanjee, and on the 18th Dec. his Honour varied the list accordingly. Up to this time the official liquidator had remained ignorant of the infancy of Symons at the dates of the transfer and of the commencement of the winding-up, but on discovering this fact after the order last mentioned, he again applied to the court to remove the name of Symons, and insert that of Nusserwanjee, and in the month of Dec. last his Honour made an order to that effect, from which the present appeal was preferred.

In the course of the argument it was alleged that Symons, who attained twenty-one in Jan. 1867, was ready and willing to confirm the transfer and accept the shares.

Karslake, Q. C. and Cottrell supported the appeal, and referred to

Castello's case, L. Rep. 8 Eq. 504;

Curtis's case, L. Rep. 6 Eq. 455;

Lumsden's case, L. Rep. 4 Ch. App. 31; 19 L. T. Rep. N. S. 437;

Capper's case, L. Rep. 3 Ch. App. 458;

Mann's case, 15 W. R. 1124;

Wilson's case, L. Rep. 8 Eq. 240; 21 L. T. Rep. N. S. 164;

Parson's case, L. Rep. 8 Eq. 656;

Litchfield's case, 3 De G. & Sm. 141.

Dickinson, Q. C., and Kekewich, for the official liquidator, were not called on.

Lord Justice GIFFARD said:—This is an appeal from an order of Stuart, V. C., directing the name of Bromley Symons to be taken off the list of contributories, and directing the name of this appellant to be put upon the list instead of it. The facts of the case are very simple, and not in dispute. Bromley Symons was an infant at the time of the winding-up; the transfer to him took place in July 1866, the winding-up order was made in Nov. 1866, on a petition presented in Oct. 1866, and Mr. Bromley Symons attained the age of twenty-one on the 12th Jan. 1867. The order was made

by the Vice-Chancellor upon the application of the official liquidator; he had nothing to do, and I have nothing to do, with what the relative rights of the appellant and Mr. Bromley Symons may or may not be, nor would it make the slightest difference if I had before me now the evidence, which I have not, of Mr. Bromley Symons' confirmation of all that has been done. I take the Vice-Chancellor, with reference to the facts both of *Costello's* case and of this case, to have been perfectly accurate in what he said, namely, that the commencement of the winding-up is the period which fixes the status of the contributory. I have no doubt that he said that with reference to *Curtis's* case and the other cases of that class, and the principle is as simple as possible, that a man who executes a transfer of shares in a company remains liable, unless and until there is on the list a transferee who is legally liable to the company, and you take, for the purpose of ascertaining whether the transferor has or has not placed on the register such a transferee, the date of the winding-up.

If you try this case, the utmost that is said now is, not that the liquidator has consented to any confirmation, or is bound by any confirmation, but that Mr Bromley Symons himself either has confirmed, or will confirm, the transfer. But, stopping there for a moment, suppose you had this state of things; suppose you had this company still in existence, and the appellant, together with Bromley Symons, had sent this transfer to this company, they not knowing that Bromley Symons was an infant at the date when that transfer was sent to them; as a matter of course, when they first knew that Mr Bromley Symons was an infant, if they had sent to the transferor, and said, "We shall apply to put your name on the list, and to take Mr Bromley Symons' name off," they would have been entitled to do that, and upon a motion could have put the one name in the place of the other, for this simple reason, that it requires two things to make such a transfer valid, not only the confirmation of Mr Bromley Symons, but the acceptance of that confirmation, either implied or actual, on the part of the company. When you examine the facts here, there has been no acceptance by the official liquidator, and nothing done by the official liquidator which precludes him from saying that Mr Bromley Symons never was a proper transferee, and that the person who purports to have transferred to him ought to be on the list of contributories in his place. The only fact that is stated to the contrary of that is this order which was made on 18th Dec. 1868. That order was made at a time when the parties who were parties to the making of it knew nothing of the infancy of Bromley Symons. I am, therefore, clearly of opinion that it was open to the official liquidator to say whether he would or would not accept the confirmation by Bromley Symons. Bromley Symons's confirmation of it without that acceptance is just so much waste paper, and it is clear, upon the authority of *Curtis's* case and others, that the appellant ought to be on the list, the official liquidator desiring it, and that Mr Bromley Symons's name ought not. The appeal therefore must be dismissed with costs.

Solicitor for the appellant, *W. Roberts Harris*;
Solicitors for the official liquidator, *Freshfields*.

CHAN.] *Re* COMMERCIAL BANK CORPORATION OF INDIA, &C.—*Re* UNIVERSAL BANKING CO. [CHAN.]

Tuesday, Feb. 8.

(Before Lord Justice GIFFARD.)

Re THE COMMERCIAL BANK CORPORATION OF INDIA
AND THE EAST;
FERNANDEZ'S CASE.

Winding-up—Creditor domiciled abroad—Death of creditor—Foreign probate—Dividends on debt—English probate.

F., domiciled at Bombay, died there, being then a creditor of the above-named bank, which was incorporated by Royal Charter for the purpose of carrying on business in London, Bombay, and other places in India and the East. The company was ordered to be wound-up, and a first dividend was paid to *F.* in his lifetime. His will was proved in India only, and his executors claimed a second dividend, which became payable after his death. The Master of the Rolls decided that the dividend ought to be paid to the executors without requiring them to take out an English probate; but upon appeal

This decision was reversed, and payment was ordered only upon production of an English probate.

This was an appeal by the Attorney-General against a decision of the Master of the Rolls, that a dividend payable out of the assets of the company above-named (which is now being wound-up) to the Indian executors of a creditor whose domicile had been in India, might properly be paid to him without requiring probate of the will to be taken out in England.

The hearing before the Master of the Rolls is reported in 21 L. T. Rep. N. S. 575.

Sir Roundell Palmer, Q. C. and W. W. Karlake supported the appeal.

Bagshawe for the respondents, Mr. Fernandez's executors.

The authorities cited were:

The Attorney-General v. Bowens, 4 Moo & W. 191;
1 Williams on Executors, 279—543;
Partington v. The Attorney-General, L. Rep.
4 Eng. & Ir. App. 100; 21 L. T. Rep. N. S. 370;
Pearse v. Pearse, 9 Sim. 430;
Lasseur v. Tyrconnel, 10 Beav. 28;
Bond v. Graham, 1 Hare, 482;
Christian v. Devereux, 12 Sim. 264;
Tyler v. Bell, 2 Myl. & Cr. 89.

Sir Richard Baggallay, Q. C. and Kekewich, for the official liquidator, took no part in the argument.

Without calling for a reply,

Lord Justice GIFFARD said:—There seems unfortunately before the Master of the Rolls to have been a mistake, it being supposed that this was an Indian company. Beyond all doubt, when the charter is looked at, it is, to all intents and purposes, an English company. The gentleman whose estate is now represented by the parties stated to be his Indian executors, was domiciled abroad; he proved here, and he obtained payment of one dividend here. After that he died, and the state of things upon which I have to give a decision is this: The official liquidator, who is, to all intents and purposes, the officer of the court, desires the direction of the court as to whether he can or not safely pay this money to those persons who have obtained no probate in this country. I take it first of all that, under these circumstances, one can only look upon this proceeding as a judicial proceeding, and I take it the officer of the court has no right to act upon any other evidence than such as the court would itself act upon; and beyond all question the court

itself would only act on letters of administration in this country. But the matter goes much further than that, because the Act of Parliament (55 Geo. 3, c. 184) says distinctly that no person is to administer, under a penalty, without first proving and paying certain duties. Well, probate duty, as we all know, attaches on *bona notabilia* in the place where the goods happen to be situated, irrespective of the question of domicile altogether. Beyond all doubt and question, those goods are *bona notabilia* in London. There can be no doubt about that, and I have no hesitation in saying that this court cannot, by any means, authorise the payment to a person who really, if he did receive this money and administer it, would be going directly in the teeth of the Act of Parliament, and doing a thing for which, not the person who pays, but the person who receives and administers, if the Crown chooses to proceed against him, would unquestionably be liable to a penalty.

Upon these grounds, I must say that there must be payment only upon production of an English probate. There is no doubt, as Mr. Bagshawe said, that it is a matter of first principle that no court in this kingdom can look at anything under any circumstances, but the proper probate. The costs of all parties ought to be borne by the estate of the company.

Solicitor for the Crown appealing, *The Solicitor of Inland Revenue*.

Solicitors for the official liquidator, *Freshfields*.

Solicitors for the representatives of Fernandez, *Tucker, New and Langdale*.

Friday, March 4.

(Before Lord Justice GIFFARD.)

Re THE UNIVERSAL BANKING COMPANY (LIMITED);
Ex parte STRANG; *Ex parte* MACKRETH.

Winding-up—Contributory a creditor—Calls made on him—Set-off—Composition-deed—Assignment of debt owing from company.

Subsequently to the commencement of winding-up, *M.* a shareholder in the above named bank, assigned a debt due to him from the company to *S.*, who gave notice of the assignment to the company. After this he executed and registered a deed of composition with his creditors, in the schedule to which the official liquidator was included for the utmost amount that could by possibility be called up on his shares, which was very much below the debt due to him; and as soon as he was settled on the list of contributories he tendered the amount of the composition in respect of all possible calls. *Stuart, V. C.*, having held that a balance order for the amount of the calls must issue against *M.*, and that *S.* was not entitled to set-off the calls against the debt, it was

Held, on appeal, that the former order must be discharged, the debt being proveable under the deed, and that *S.* was entitled to deduct from the debt due from the company the amount due from *M.* for calls, and to receive a dividend (which was about to be declared), as the balance after such deduction.

In this case there were two appeals from *Stuart, V. C.*, against his Honour's orders, reported 22 L. T. Rep. N.S., 85, where all circumstances are sufficiently stated.

Dickenson, Q. C. and *Bathurst*, supported the appeals, and had referred to

Re Duckworth, L. Rep. 2 Ch. App. 578; 16 L. T. Rep. N. S. 580;

Re The Anglo-Greek Steam Navigation Company v. Caralli and Haggard's case, L. Rep. 4 Ch. App. 174; 19 L. T. Rep. N. S. 706;

ROLLS.]

Re SMITH'S TRUSTS—GOLDSCHMIDT v. JONES.

[ROLLS.]

The Bankrupt Law Consolidation Act 1849, s. 171;
The Companies Act 1862, s. 101;
when

Tuesday, March 8.

GOLDSCHMIDT v. JONES.

Greene, Q. C. (with whom was *Brooksbank*) said that he felt, after the recent decision of his Lordship in *Mitchell and Aspinall's case*, 22 L. T. Rep. N. S. 188, that he could not contend that the amount due for calls was not proveable under the composition-deed; and that being so, that the case *Re Duckworth* applied, and entitled the contributory to set-off the calls due from him against the debt due to him.

Lord Justice GIFFARD thought that *Duckworth's* case concluded the whole matter, and that it was of no consequence that that authority and the present case differed in this, that here there was more due from the company than from the contributory, while the case was the reverse in *Re Duckworth*. In the case of bankruptcy the 101st section of the Companies Act did not apply as it did where there was no bankruptcy (*Grissell's case*, L. Rep. 1 Ch. App. 528; 14 L. T. Rep. N. S. 843), and therefore the parties were left to the mutual credit clauses of the Bankrupt Law Consolidation Act 1849. A dividend would, therefore, be paid to Mr. Strang on the balance of the debt after deducting the calls, and the balance order against Mr. Mackreth would be discharged. The official liquidator would have all his costs in the court below and here; but the appellants could only have out of the estate their costs before the Vice-Chancellor.

Solicitor for the appellants, *John Roe*.

Solicitor for the official liquidator, *Pulbrook*.

ROLLS COURT.

Reported by HENRY PLAT, Esq., Barrister-at-Law.

Saturday, March 5.

Re SMITH'S TRUSTS.

Practice—Costs—Petition for payment of dividends—Trustee Relief Act—Costs of trustee—Income and corpus.

On a petition by a tenant for life for payment of the dividends of a fund paid into court under the Trustee Relief Act:

Held, that the costs of the trustee must be paid out of the income, and not out of the corpus.

This was a petition by the tenant for life of a fund which had been paid into court under the Trustee Relief Act, for payment of the income of the fund. The only question which arose was whether the costs of the trustee were to be paid out of the *corpus* or out of the income.

Lawson, for the petitioner, stated that there were conflicting decisions on this question; it had been held by Vice-Chancellor Malins in *Re Gordon's Trusts*, L. Rep. 6 Eq. 335, that trustee's costs of appearing on a petition for payment of dividends were payable out of the *corpus*, while it had been held by Vice-Chancellor James in *Re Whitton's Trusts*, L. Rep. 8 Eq. 352, that they were payable out of the income.

H. S. Leeson appeared for the respondents.

Lord ROMILLY.—I have always followed the rule as laid down by Vice-Chancellor James in *Re Whitton's Trusts* (*supra*); and the trustee's costs of appearing on this petition must therefore be paid out of the income of the fund.

Solicitor for petitioners, *W. H. Holland*.

Solicitors for the respondents, *Hensman and Nicholson*.

Company—Shares—Stock Exchange—Purchase of shares by person resident abroad—Refusal of vendor to execute transfer—Suit to enforce contract.

A broker purchased on the Stock Exchange, from J.'s broker, certain not fully paid-up shares in a joint-stock company, at a sum to be paid on the next settling day. The purchasing broker gave as his principal the name of G., a foreigner domiciled abroad; but J. refused to transfer the shares to G., on the ground that he was domiciled abroad, and had no property in this country to meet any liability which might accrue in respect of the shares.

On a bill by G. to enforce the transfer:

Held, that there was an implied contract between the brokers that the purchasing broker would furnish to the seller the name of a responsible transferee; that a foreigner domiciled abroad was not such a responsible transferee, and that, therefore, J. was not bound to execute a transfer of the shares to him.

Bill accordingly dismissed with costs.

This was a suit by one Goldschmidt, who was a foreigner, resident at Stuttgart, to compel a vendor to execute a transfer to him of certain shares which he had purchased, through his broker, on the Stock Exchange.

The shares in question were 100 shares in the Land Mortgage Bank of India (Limited), which the defendants, who were the executors of the will of Jenkin Jones deceased, sold through their brokers, Messrs. Bingham and Cullen, to Mr. A. Petre, the plaintiff's broker. They were 20½ shares, on which only 4½ had been paid. Before the settling day Bingham and Cullen informed the plaintiff's broker that the defendants objected to transfer the shares to the plaintiff, on the ground that he was resident abroad, and that he had no property in this country to meet any liability upon the shares.

The case was submitted to the committee of the Stock Exchange, who decided by a majority of thirteen to eight that the defendants were not, under the circumstances, bound to complete the contract.

The plaintiff thereupon filed the present bill to compel the defendants to execute the transfer, alleging that, by the custom of the Stock Exchange, they were not entitled to refuse to accept his name on the ground of his being resident abroad; and in support of the allegation, the evidence of the deputy chairman of the committee of the Stock Exchange was produced, who deposed that purchases of shares were often made by foreigners on the Stock Exchange, and that he had never known the objection raised in this case to be sanctioned by the committee before.

Sir Richard Baggallay, Q.C., and F. Harrison, for the plaintiff.

Jessel, Q.C., and Speed, for the defendants, were not called upon.

March 8.—Lord ROMILLY.—Mr. Jessel, I shall not call upon you; but I think it desirable that I should explain what I understand to be the principle involved in these cases, because they are cases of very considerable importance. In the first place, I have always considered that when persons go and buy or sell shares on the Stock Exchange, they enter into an implied contract to buy and sell according to the practice and custom of the Stock Exchange, and that accordingly they are bound by that practice and custom. I have always so held in former cases. The practice of the Stock Exchange, as is stated

here, and as has been stated on former occasions, amounts to this, that the seller's broker enters into a contract with the buyer's broker, and they do not disclose the names of the seller and buyer until the settling day, and either of the brokers is liable to complete the contract himself. Each of them enters into an implied contract with the other. The seller enters into an implied contract that he has got the shares to deliver upon a particular day, and the buyer enters into an implied contract that he has a proper and responsible name to give to the other at that time as the buyer of the shares. That I take to be the meaning of it. It is quite clear that that is necessarily implied. The only question is, what is to be considered a proper and responsible and *bonâ fide* name. It is quite clear that if the broker of the buyer gave in the name of the chief of an Indian tribe, the broker of the seller would not be bound to accept that; or if he gave him the name of a lunatic in a lunatic asylum, he would not be bound to accept that, or if he gave him the name of an infant in arms he would not be bound to accept that. The only question is, whether he is bound to accept the name of a gentleman residing abroad, having no property in this country; is he bound to accept the name of a foreigner domiciled abroad? For that purpose the nature and quality of the thing sold must be taken into consideration. If it were Consols, I take it he would be bound to accept such a name. For the person who sells the Consols incurs no species of liability or risk by transferring 1000*l.* consols, which he sells, into the name of the person who buys it. But the moment the shares dealt with are those of a joint-stock company with a liability the matter becomes very different. Take this particular case: the seller's broker sells 100 shares, of which the amount is 20*l.* upon each share; 4*l.* per share has been paid up, and therefore he is liable to 16*l.* per share, or 1600*l.* on the whole 100 shares, which he sells for 10*s.* a share. To be sure, this court, as all the Courts of Chancery usually do, in the cases which come before it, decides only upon the facts; but it is not a strange thing to urge in the Court of Chancery, that it is not unlikely that a shareholder may be called upon to contribute the full amount of his shares, particularly when the shares sell for something like 10*s.* a share. In the present case the sellers are executors. They are entitled to say, "We must be saved perfectly harmless, for what is our security?" Suppose that the company is wound-up and the old shareholders are called upon to pay, which they may be if the present shareholders are unable to pay the debts, what security is there to them? I should have thought that the security would have been very inadequate, and that the seller would have been entitled to call upon the purchaser to give him some better security than the mere transfer of the shares into his name. I hold this also, that the practice of the Stock Exchange is regulated, unquestionably, by their own rules, with this limitation, that, like every other custom and every other practice, they must be reasonable and such as would bear the examination of a court of common law. The committee of the Stock Exchange examined and considered this case, and they came to the conclusion confirmed by a subsequent meeting by a very considerable majority (13 to 8) that in this case the defendant, or rather the defendant's brokers, were not bound to accept the plaintiff as the name given by the plaintiff's brokers. I think that is a reasonable conclusion to come to. I do not go into the question which appears to me to be an unreasonable one, as far as it was stated to me, whether a man who wants to get security that he will not be called upon hereafter in respect of the shares which he sells, must enter into a special contract for some particular species of guarantee, the effect of which

would be to diminish the price paid for the shares in the market. Unquestionably the executors are bound to sell for the highest price they can get. They have no personal interest in the matter. I am of opinion that the person who buys shares from a broker enters into what, I repeat again, is an implied contract that there shall be a complete sale, which shall completely exonerate the vendor by giving him a name which will afford him that security. I do not think that in the case the purchaser's broker has done so, and therefore I cannot make any decree upon this bill. In one or two of the letters Mr. Petre is mentioned as the person who is liable. If I am right in my view of the case Mr. Petre is not at all liable, but he was bound to procure a name which should be a complete and undoubted security to the defendants. That he has not done. I regret also that this bill should have been filed, because I should have thought, as I mentioned to Mr. Harrison at the beginning of his argument, that the matter might have been simply cured by the plaintiff getting some responsible person in this country to join in a covenant with him to secure the vendors against any liability in respect of these shares. But as the matter stands, I am simply unable to make any decree, and therefore I must dismiss the bill with costs.

Solicitor for the plaintiff, *James Crowdy*.

Solicitors for the defendants, *West and King*.

V.C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.

Friday, July 2, 1869.

Re COLES' WILL.

Legacy duty—Legacy free of duty—"Clear income or sum."

*A testator gave his residuary personal estate to his executors upon trust out of a certain part thereof to set apart and appropriate so much as would produce the clear income or sum of 100*l.* a year, and pay such income or yearly sum to a named charity:*

Held, that the legacy was given free of legacy duty.

Banks v. Braithwaite, 32 L. J. 45, Ch., considered.

This was a petition under the Trustee Relief Act.

The Rev. Thomas Cole had by his will given his residuary personal estate to his executors upon trust out of part thereof to set apart and appropriate so much as would produce the clear income or sum of 100*l.* a year, and pay such income or yearly sum to the Widows and Orphans Society at Lincoln.

There was a dispute between two institutions as to who were entitled to this bequest, and there was a further question as to whether the legacy was given free of legacy duty.

Pearson, Q. C. and Everitt, for the petitioners, who were one of the claimant institutions, maintained that a gift of a "clear annuity" by will was the gift of an annuity free from legacy duty. They cited

Haynes v. Haynes, 3 De G. M. & G. 570.;
Morris v. Burton, 11 Sim. 161.

J. H. Palmer, Q. C. and Warmington for the other claimants.

Waley, for the executors, referred to
Banks v. Braithwaite, 32 L. J. 45, Ch.; 7 L. T. Rep. N. S. 149.

The VICE-CHANCELLOR.—It is settled by *Haynes v. Haynes* (*sup.*) that when a testator gives a clear annuity, that is to be construed as an annuity free

V.C. J.]

THE ATTORNEY-GENERAL v. THE MERCERS' COMPANY.

[V.C. J.]

from duty, and in this case the testator has in effect given a clear yearly sum of 100*l.* to this charity. In *Banks v. Braithwaite* (*sup.*) there was a direction to retain so much stock as should be sufficient to realise the clear yearly income of 150*l.*, and to pay, not an annuity, but the dividends of the stock. Here the direction is to pay such income or yearly sum, that is to say, the clear income or yearly sum of 100*l.* Whether *Banks v. Braithwaite* is consistent with *Haynes v. Haynes* (*sup.*), it is unnecessary for me to consider; I am bound to follow the latter, which is the decision of the Court of Appeal, and in the good sense of which, moreover, I entirely concur. I think that decision governs the present case, and I am therefore of opinion that this legacy was given free of duty.

Solicitors: *W. and H. P. Sharp; Eldred and Andrew; Cookson, Wainwright, and Co.*

V. C. JAMES'S COURT.

Reported by Hon. ROBERT BUTLER, Barrister-at-Law.

Feb. 10 and 11.

THE ATTORNEY GENERAL v. THE MERCERS COMPANY.

Charity—Saint Paul's School—Endowment of—Claim of trustees to be beneficial owners subject to endowment—Costs.

Where a charity had been in the undisputed enjoyment of property as beneficiaries for a long period of time, and during that time the persons in whom the legal estate was vested, by various acts and declarations, acknowledged the title of the charity as beneficial owners thereof:

Held, that the parties in whom the legal estate was vested were estopped from setting up a title in themselves as beneficial owners of the estates adverse to the charity.

In a suit against trustees to compel an exchange of charity lands, which they defended, not as trustees, but as beneficial owners thereof:

Held, that as they defended the suit as beneficial owners of the estates, they were not entitled to throw the costs of such suit on the charity estates, but that they (the trustees) were liable for the amount of the costs thereby incurred.

This suit was on the information of the Attorney-General, and was for the purpose of determining whether certain property held by the Mercers Company, and derived from Dean Colet, was held by them as trustees for St. Paul's school, or whether they were the owners of the estates subject to the charge of maintaining the school. The original instruments of the endowment of this charity were supposed to have perished in the great fire of London in the year 1665, but evidence of their contents was afforded by an ancient book in the defendant's possession, entitled "Evidences of Dean Colet's Lands," and having a preface, purporting to be written by Dean Colet, authenticating its contents. In this book was set forth the supplication of Dean Colet to King Henry VIII., praying him to grant a licence to some corporate body to hold lands for the endowment of St. Paul's school founded by him. The supplication, after stating the objects of the charity, proceeds to state that he (*Dean Colet*) "intendeth to geve and mortyse landies and tene-mentis of the clere yerely value of fifty and three poundis in the countie of Buk to som body corporat." Letters patent were granted to the Mercers Company to hold lands to the value of 53*l.* per annum to them and their successors.

Dean Colet, in pursuance of these letters patent

conveyed certain lands to the Mercers' Company, for the endowment of St. Paul's School. The first of these conveyances was dated 12th July 1511, whereby John Colet, D.D., and Dean of St. Paul's, granted and confirmed to the wardens and commonalty of the mystery of mercery of the city of London certain estates in the county of Bucks, amounting in the whole to 1995 acres of land, to hold to the said company and their successors for ever for the continuation of a certain school in the churchyard of the church of St. Paul, for the instructing of boys in the said school in good manners and literature, and for the sustentation of one master and one usher or two ushers of the same, and for other necessary things to be done therein, according to the ordinance by him the said John Colet, his heirs, or executors thereafter to be made.

It appeared from various records of the company that Dean Colet delivered possession to the company of the Buckinghamshire property comprised in the grant of the 12th July 1511, thereby constituting the company (as alleged) trustees for the school of that property; and from that time until the death of Dean Colet in 1519, he and the company jointly superintended the school and its accounts and property including certain property conveyed by Dean Colet to the company, subsequently to the above-mentioned grant.

The before-mentioned book sets forth a deed made between the Dean and Chapter of St. Paul's and the Mercers' Company, dated 6th Sept. 3rd Henry VIII., whereby the Dean and Chapter granted to the company a piece of vacant land at the east end of the chapel of St. Dunstan of the church of St. Paul, containing in length 21ft. of assize, and in breadth 9ft. of assize, to hold for ninety-nine years, at the rent of a red rose, renewable at the end of every ninety-nine years for ever. The defendants alleged that they did not know what had become of this property, but the information charged that the same was part of the school endowment, and that the company were bound to show what property now represented this piece of land, and that such property was now in their possession as trustees for the school, or else that they must account to the school for the value of it.

The next important conveyance made by Dean Colet to the company was of land, with certain buildings thereon, near the church of Stebunhith or Stepney, and certain other lands in the manor of Stepney, amounting altogether to seventy-five acres of land. These lands were surrendered to the lord of the manor of Stebunhith to the use of the Company of Mercers, for the endowment of St. Paul's School. This property was afterwards enfranchised by Lord Wentworth, the then lord of the manor of Stebunhith, and the land was conveyed to the company in fee-simple.

In the 8th year of Henry VIII., Dean Colet conveyed certain other estates in Cambridgeshire and Essex to the Mercers' Company for the benefit of the school.

Dean Colet, by his will dated 10th June 1514 devised to the Mercers' Company certain property in the city of London, "and also his grammar school and the chapel founded with the same, together with the house for the master and other offices of the same school lately built by him, lying near the wall of the churchyard of Saint Paul's, London, at the east part thereof, and all that his grammar house or messuage lately called Paul's school, and four shops under the same house, . . . to hold to the said company and their successors for ever for the continuation of the aforesaid grammar school in the churchyard of the said cathedral church of Saint Paul, constructed for boys, in the same school to be taught good manners and literature, and for the sustentation of one master and one usher or two

ushers of the said school, and for the other works, uses, and intentions contained and specified, or to be contained and specified, in certain indentures between the aforesaid wardens and commonalty of the one part, and him the aforesaid John Colet of the other part."

Dean Colet made certain ordinances containing directions as to the management of the school, the duties of the masters, and the instruction of the children. Under the title of "The Mercers' Charge," the ordinances provided that the Mercers' Company should have the care, charge, and governance of the school, and should choose out of their company two surveyors to take charge of the school for the year, and oversee and receive all the lands of the school, and see them repaired from time to time by their officers. After various other directions the ordinances proceed as follows:

And albe my mynde is that they shall have this surplussage for thentent abouesaide, yet neuthelasse I will the saide surplussage as much as shall be sparid of it above repacions and casuelties at any acompt be brought and put in a cofer of iren, geuyn of me to the Mercery, standing in theyr hall, and ther frome yere to yere remayne aparte by itself, that it may appere how the scole by ye owne self manteyneth itself and at length ou and above the owne lyvelod yf the saide scole shall grow to eny ferther charge to the Mercery that than also that may appere to the laude, and prayse, and merite of the said fellowship.

From the death of Dean Colet in 1519, down to the present time, the accounts of the school estates, and the records of all proceedings of the company relating thereto showed that the estates had always been dealt with as belonging exclusively to the charitable purpose declared by the founder, and that the company had never claimed (until 1860) any beneficial interest therein. The surplus on the whole account in each year was directed, by resolutions of the company, to be placed in the iron coffer or treasury of the school standing in the hall, "there to remain according to the ordinance of the founder."

Money was occasionally taken out of the school coffer by the company, but they always professed to restore it to the school.

In 1570 the copyhold lands in Stepney and Whitechapel, belonging to the charity were seized by Lord Wentworth, the lord of the manor, on the ground that a forfeiture had been incurred; afterwards Lord Wentworth agreed, in consideration of 200*l.*, to convey and enfranchise all the estates in question to the use of the school. Accordingly, by a deed of bargain and sale dated the 28th Nov. in the thirteenth year of Queen Elizabeth's reign, Lord Wentworth bargained and sold to Sir Thomas Graham and other members of the Mercers' Company, the above mentioned property in Stepney and Whitechapel, to hold the same to the intent, nevertheless that they should convey and assure the same to the wardens and commonalty of the Mystery of Mercers of the city of London, and their successors, for ever towards or for the maintenance and continuance of the said school for ever.

The conveyance to the company of the above-mentioned lands was executed on the 20th Dec. 1576, and the lands are still held by the company.

In 1580 informations were exhibited against the company for having in their possession lands supposed to have been forfeited to the Crown, under the Act for the dissolution of monasteries, but on payment of a sum of money the company obtained a re-grant of the lands from Queen Elizabeth, to hold the same unto the company in as full and ample manner and form as the same had been held by the company prior to the passing of the said Act.

In 1592 John Harrison, who was then the master of the school, and others, exhibited articles before the Archbishop of Canterbury, complaining of various abuses—among others, that whilst the rents of the estates had greatly increased, the salaries of

the masters had not been increased, and that the company claimed the surplus for their own. The company, by their answer, admitted that "such overplus as falleth out from time to time is kept in their hall in good safety, in which place the founder appointed it to be kept; and the same belongeth to the company by the special gift and appointment of the said founder." In 1598 a bill was filed in Chancery by John Harrison, high master, and Richard Smith and Francis Herring, submasters of St. Paul's School, "as well for and in the behalf of themselves as for the maintenance and benefit of the same school," against the warden and seven other members of the company. Amongst other charges they expressly charge that the company were trustees of the entire revenues, and of all surpluses accruing therefrom for the benefit of the school. The company, by their answer, admitted that they were trustees of the entire revenues of the school, and asserted that they had never derived any individual or private benefit therefrom; they also admitted that there was a very considerable surplus or "rest," which had accumulated out of the revenues of the school, and protested that whatever its amount it was kept safe, and was and should be always ready to be employed for the benefit of the school as occasion should require. An account was taken by the order of the court of the rents and profits which had come to the hands of the company and the surveyor of the school; and ultimately the bill was dismissed for want of prosecution.

On the 5th Feb. 1604 the surveyors and wardens and certain other members of the company, were appointed a committee, "forthwith to call to account the true estate of St. Paul's School, and with the 'rest' (or surplus), thereupon remaining, to found fellowships and scholarships, or employ the same, or the greatest part thereof, in exhibitions, to the poor scholars of the school, according to the true intent and meaning of the founders' statutes."

In 1631 a part of the accumulated surplus of the school property, was laid out in the purchase of an estate at Lurgershall, in the county of Bucks, which was conveyed to the company in trust for the school.

The school and the buildings connected with it were destroyed in the great fire of London, and were rebuilt by the company with moneys, which were repaid to them by and out of moneys and funds held in trust for the school.

The company purchased other lands with the surplus rents and profits of the charity estates, and these lands were conveyed to the company, or to persons nominated by them as trustees for the charity.

In the year 1745 there was a debt owing from the company to the school estate, of 34,637*l.* 15*s.*, incurred by the application of the surplus income of the trust estates, to the discharge of debts and annuities to which the company had become liable. With this debt the company charged themselves. In the year 1808 a sum of 5000*l.* was invested in the 3*l.* per cent. reduced annuities in part payment of this debt, and in Feb. 1804 it was resolved that on the 1st March and 21st Sept. in every year 1000*l.* should be invested in the funds, for the use of the school, till the whole debt should be liquidated.

In 1818 an Act of Parliament (58 Geo. 3, c. 22.) was passed intituled "An Act to enable the trustees of Saint Paul's School, in the city of London, to purchase buildings and land adjoining, or near to the said school, for the better accommodation of the scholars; and for other purposes."

By the report of the Charity Commissioners made in the year 1820, under the authority of Parliament, relating to St. Paul's School, the real and personal estate, of which the company was then

V.C. J.]

THE ATTORNEY-GENERAL v. THE MERCERS' COMPANY.

[V.C. J.]

seised and possessed in trust for the school, was described and set forth, and the company were described and returned as trustees of the estates for the school. The officers of the company were examined, and gave evidence under the commission, and the company did not on that occasion dispute that they were trustees of the estates and of the whole income thereof for the benefit of the school.

The report also stated that the school enjoyed a valuable benefaction for the establishment of exhibitions at the University of Cambridge, under the will of Viscount Campden. It also contained an account of the application of the income of the management of the estates and of the school, the number of the children to be taught, and the regulations respecting them.

In 1859 and 1860 negotiations took place between the company and Baron Rothschild with reference to a proposed exchange of some of the lands belonging to the charity in Buckinghamshire, being part of the original endowment of the school. Some correspondence took place with the Charity Commissioners in reference to the proposed exchange, and the company at first treated themselves as trustees of the estates for the school, but afterwards set up a claim to be entitled to the estates forming the charity property, not as trustees, but for the proper benefit of the company, subject to a yearly charge of 80*l.* 5*s.* only for the school.

On the 19th May, 1860, an information and bill was filed in the name of the Attorney-General at the relation of Baron Rothschild as plaintiff against the company and certain officers thereof for the purpose of having the proposed exchange carried out; and in the answer of the company they claimed to be absolutely entitled in their own right, and not as trustees, to all the income of the hereditaments conveyed to them by Dean Colet that was not required for the charges to be paid thereout, amounting to the yearly sum of 80*l.* 5*s.* This information and bill was dismissed without costs on the ground that the relator and plaintiff had been largely misled by the company in the matter of the contract for the proposed exchange, and particularly by the claim they set up by their answer as above-mentioned. The company claimed to charge the estates of the school with the whole of their costs of that suit, amounting to 4000*l.*; but the informant submitted that the charity would not properly be charged with the costs so incurred by the company.

The company have from time to time since 1804, down to the present time, under the provisions of several Acts of Parliament, and particularly under the Acts of 45 Geo. 3, c. 49, and 5 & 6 Vict. c. 75, obtained a return or allowance of income or property tax on the full amount of the rents and profits of the charity estates, on the ground that they were vested in the company as trustees of the school only.

The company, from the foundation of the charity down to the year 1860 (with the exception of a short interval), had always kept the accounts of the revenues of the charity estates separate and distinct from those of their general estates, and had regularly made returns to the Charity Commissioners of the whole rents and profits and revenues of the estates held in trust for the school, and they never refused or omitted to make such returns until 1860, when, in consequence of their having made the above-mentioned claim, they refused, and alleged that they were not liable to render any accounts to the Charity Commissioners.

The bill then prayed that the company might be declared to be merely trustees of the lands conveyed to them by Dean Colet and others, for the use and benefit of St. Paul's School. That an account should be taken of the property and revenues of the charity. That the charity should not be chargeable with

the costs of the suit with Baron Rothschild, and that a scheme should be directed for the future regulation of the school.

G. Jessel, Q. C., *J. Wickens*, and *F. V. Hawkins* appeared in support of the information.

R. Palmer appeared for *G. Palmer*, one of the defendants.

E. E. Kay, Q. C., *A. S. Eddis*, Q. C., and *G. N. Colt* appeared for the Mercers' Company, and contended that the company were the owners of the estates, subject only to a charge for the maintenance of the school. The company never admitted that they were trustees, and even if they had it was done through mistake as to their own real title, which could not now prejudice their rights as beneficial owners, subject to the before-mentioned charge. This was evident from certain negotiations which took place between Dean Colet and the company before he conveyed and demised the estates to them. There was also an arrangement between the company and the Dean in the following terms:—"Moreover, the said Master Dean showed unto the said company that for such labour and business as they and their successors should have in ordering of the said school, that they should have in this city of London, upon the payment of 44 marks by yere in rents." No trace of any conveyance of these lands could be found, therefore the assumption must be that the company were to have the surplus, arising from the rents and profits of the lands actually conveyed for their own use. The company did, not for the first time, in 1860, claim to be the beneficial owners and not merely the trustees of the estates. They claimed to be so entitled in 1519. The whole course of their dealings with the property was quite consistent with their being the beneficial owners of it.

Attorney-General v. Drapers' Company, 6 Beav. 383;

Attorney-General v. Grocers' Company, 6 Beav. 526;

Attorney-General v. Mayor of Bristol, 2 J. & W. 294.

Jessel, Q. C., was not heard in reply.

The VICE-CHANCELLOR said: This case has come before the court under circumstances which, so far as I know, are altogether unprecedented. This is not a case in which after a long course of dealing with trust property as if it were his own, a trustee has been called upon to account, and to have the trust enforced against him. On the contrary, the school of St. Paul has been in the undisputed enjoyment as beneficiaries of the property given by Dean Colet from 1520 until the present time, when the persons in whom the legal estate was vested came forward and said that they were entitled to the property, not as trustees, but as beneficial owners, subject to a charge in favour of the school. It would, indeed, be extraordinary if the lapse of nearly 350 years was not conclusive against the assertion of any such claim, and this court would be bound to assume that the long enjoyment by the school as beneficiaries was entirely opposed to it. In this case there has not only been enjoyment by the school for 350 years, but the company has during that time acknowledged the title of the school as beneficial owners of the property in a variety of ways. They did so in an application for an Act of Parliament. They did so in certain proceedings in Chancery in Queen Elizabeth's time; they did so in 1804, when being called upon to replace 84,000*l.* which had been taken by them in 1741, out of the revenues of the school property, they acknowledged that the money was

money of the school, and entered into an arrangement by which they were allowed to replace this sum by instalments. This was a most important fact in the case. Assuming that it was property of the school that had been taken, the school was entitled to recover it with interest from the trustees, and upon this footing of the property being the property of the school, the trustees did replace it with interest. After this it would be very difficult for them to say that all this was done in mistake, and that the property is their own and does not belong to the school. In addition to this, during the late war a remission was obtained from the income-tax commissioners on the grounds that the property on which the tax had been paid was all charity property. Again all accounts were made out on the footing of the property being property belonging to the school. Then there are the proceedings taken by Harrison the master first of all before the Archbishop of Canterbury, complaining of the insufficiency of the salaries of the masters and also of divers abuses in the administration of the revenues of the school. In what capacity the archbishop was invoked does not clearly appear, but probably as in some way exercising a visitorial jurisdiction. However this may have been the archbishop entertained the articles, and called upon the company to answer them. In their answer to the articles the company claimed the property as their own. The proceedings before the archbishop came to nothing, and then Harrison was minded to come to this court some two or three years later. By their answer to Harrison's suit the company having, as it seems, inadvertently claimed this property as their own in the proceedings before the archbishop, withdrew all claim to it in this court. In 1860 the question arose in a very singular way between the company and Baron Rothschild in the proceedings which resulted from an attempted exchange of lands between them. In the course of those proceedings the company claimed to be entitled to the Colet estates, not as trustees, but for their own benefit, subject to the charge of continuing and maintaining St. Paul's School. It has been argued on behalf of the company that reading the ordinances of Dean Colet by the light of some very modern cases, they were entitled to the surplus for their own benefit. Upon the face of the deeds, as contained in the ancient Book of Evidences, there was nothing indicating any intention to give a bounty to the company. The object for which the property was given was simply and solely "the continuation of a school in the churchyard of St. Paul's for the instructing of boys in the school in good manners and literature, and the sustentation of one master and one usher, or two ushers of the same, and for other necessary things to be done therein, according to the ordinance by him, the said John Colet thereafter to be made." It has been pressed upon me on the one hand, that the deeds are to be interpreted by the ordinances, and on the other that the ordinances do not and cannot affect the trusts of the deeds. Assuming, in favour of the defendants, that the ordinances are to be read as part of the original grant, one comes to these words: "The overplus of money, all charges doon, . . . I trooly geve to the fellowship of the mercery, to the mayntayning and supporting and repaying of all that longith to the scole from tyme to tyme." If the ordinance had stopped here, there would, no doubt, have been great ground for saying that the surplus was theirs. But then the ordinance went on to direct that, "albeit it was his mind that the company should have this surplus, as much as should be spared of it, above reparations and casualties, should be put into an iron coffer, and from year to year remain apart by itself." The terms of this direction entirely ex-

clude any notion of the Mercers' Company being able to put any part of that surplus into their own pockets. It was always to remain in the coffer for the purposes of the school. Upon the words of the ordinance, therefore, which must be the governing document in this case, I am satisfied that there is nothing that gives the surplus to the Mercers' Company. Looking at the evidence of contemporaneous acts which I have held to be admissible for the purpose of showing what was the intention of the founder, I have come to the conclusion that it is conclusive against the company. It was said, having regard to the record of the proceedings of the 23rd Sept. 1510, that Dean Colet had expressed his intention to give the company so much land "for such labours and business as they and their successors should have in ordering the said school." No such land was ever given to the company, and, therefore, according to the argument on behalf of the company the court is to assume that a new and distinct arrangement was substituted for it by which the surplus rents of the lands actually conveyed to them were intended to belong to the company for their own use and benefit. Of such an arrangement there is no evidence whatever, and it is too much for the court to assume (as it was asked to do by the company) the existence of an agreement of which there was no evidence, for the purpose of getting rid of the usage of 350 years. Upon the whole case, therefore, the Attorney-General has succeeded, and there must be a declaration as asked by the prayer of the information, with an inquiry as to what the trust property consists of. With respect to the 4000*l.* representing the costs of the suit between the company and Baron Rothschild, the company did not defend that suit in the character of trustees of the charity estates, but as owners subject to a charge. They were not representing the charity for any purposes of the suit, but were defending the information for the purpose of escaping the control and supervision of the Charity Commissioners, under which it was sought to bring them. They could not, therefore, be allowed to throw those costs on the estate, of which they are now declared to be trustees, and they must restore the 4000*l.* For the interests of the charity an inquiry must be directed as to whether it would be fit and proper that any application should be made to the Committee of the Council of Education, to the commissioners under the Endowed Schools Act (32 & 33 Vict. c. 86), or to Parliament, as this court has no power to direct a scheme with regard to St. Paul's School.

Solicitors: *Dawes and Sons; Sutton and Onmanney; C. Mott.*

Friday, Feb. 18.

CALDWELL v. FELLOWES.

Joint tenancy—Covenant to settle after acquired property—Severance.

Where a lady at the date of her marriage settlement was entitled as joint tenant in tail expectant on the life estate of her brother in real estate, and the settlement after reciting a will and a settlement under which she was entitled to other property, further recited that she might also under some other will or wills, settlement or settlements, or by descent, representation, or by other means, become entitled to some other property, and the settlement contained a covenant on the part of the husband "that all the estates and effects whatsoever, both real and personal, of which the said R. M. Abdy is now seised or possessed, or of which she shall hereafter become seised or possessed, either under the said settlement made on the marriage of her said father and mother, or under the will of the said

V.C. J.]

Re THE OXFORD AND CANTERBURY HALLS COMPANY.

[V.C. J.]

*James Gordon, her grandfather, including the residue of her said portion of the sum of 30,000*l.*, 5*l.* per cent annuities, or by any other will or settlement, or by descent, representation, or by any other means whatsoever, shall be assured and settled" upon certain trusts :*

Held, that the settlement was a severance in equity of the joint estate.

This was a special case for the purpose of ascertaining the opinion of the court as to whether a certain joint tenancy was severed by the settlements on the respective marriages of the joint tenants.

The following are the facts:—Ann Hector Cole, by her will dated 21st Dec. 1805, devised and bequeathed certain lands and tenements at Garboldsham, to her nephew Sir William Abdy, of Chobham, and his assigns for the term of his life without impeachment of waste. "And after the decease of the said Sir William Abdy, the testatrix gave, devised, and bequeathed the said messuages, lands, tenements, and hereditaments with their appurtenances, to the heirs of the body of the said Sir William Abdy, and for default of such issue, the testatrix gave, devised, and bequeathed the said messuages, lands, tenements, and hereditaments unto her three nieces, Katherine Abdy, Charlotte Abdy, and Harriet Abdy, the sisters of the said Sir William Abdy and their heirs as joint tenants."

The testatrix died in Dec. 1805, leaving Sir William Abdy and his three sisters her surviving. Sir William Abdy survived his three sisters, and died on the 15th April 1868, without having barred the estate tail limited to him by the above will, and without issue.

On the 9th Nov. 1813, Katherine Abdy was married to Captain Thomas Fellowes, and by a settlement executed on the day previous, after reciting that there were various sums of money to which Katherine Abdy was entitled or might become entitled proceeded thus:—

And she may also, under some other will or wills settlement, or settlements, or by descent, representation, or by other means become entitled to some other property as well real as personal. And whereas upon treaty for the intended marriage it was further agreed that the said sum or sums of money or other property, as well real as personal to which the said Katherine Mary Abdy is entitled and may be entitled by any means last aforesaid, should be settled for her sole and separate use during her life and afterwards for the benefit of the child or children of the said Katherine Mary Abdy by her said intended husband, and in default of such children to be at her absolute disposal. It was further agreed that the said Thomas Fellowes should enter into a covenant for settling the last mentioned real and personal property for the purposes last aforesaid."

And this indenture also witnesseth that in pursuance of the said recited agreement in this behalf and in consideration of the said intended marriage, and also in consideration of the settlement hereinbefore made of the said sum of 60000*l.* navy 5 per cent. bank annuities and 8000*l.* 4 per cent. annuities, the said Thomas Fellowes, for himself, his heirs, executors, and administrators, hereby covenants and agrees with the said Sir William Abdy, Lindsey Merick, Peter Burrell, and John Fallowfield (Scott, their executors, administrators, and assigns, that all the estate and effects whatsoever, both real and personal of which the said Katherine Mary Abdy is now seised or possessed, or of which she shall hereafter become seised or possessed either under the said settlement made on the marriage of her said father and mother, or under the will of the said James Gordon, her grandfather, including the residue of her said portion of the sum of 30,000*l.* 5*l.* per cent. annuities, or by any other will or settlement, or by descent, representation, or by any other means whatsoever, shall be assured and settled, and that the said Thomas Fellowes will do and execute, or concur in doing and executing all such acts and deeds whatsoever as the said Sir William Abdy, Lindsey Merick, Peter Burrell, and John Fallowfield Scott, or the survivors or survivor of them, his heirs, executors, or administrators, or their or any of their counsel shall reasonably advise and require for assuring and settling the same and every part thereof upon the trusts and for the interests and purposes, and under and subject to the provisoes and agreements hereafter expressed and contained concerning the same.

The trusts thereafter expressed were in substance for the said Katherine Mary Fellowes, for her sole and separate use independently of any husband, and

after her death for the benefit of all or any one of her children, grandchildren, or other issue to be born in the lifetime of her and her husband, or of one of them as she and her husband, and the survivor of them, should appoint, and in default of appointment among the children equally.

Thomas Fellowes did not make any settlement in pursuance of the covenant contained in the settlement of the 8th Nov. 1813.

Katherine Mary Fellowes died on the 18th Oct. 1817, without executing any deed of appointment, and Thomas Fellowes died on the 12th April 1853.

On the respective marriages of Charlotte Ann Fellowes and Harriett Fellowes, settlements were made to all intents similar to that made on the marriage of Katherine Mary Fellowes.

The three joint tenants died in the lifetime of the tenant for life of the estates.

The question submitted for the opinion of the court was whether the joint tenancy in the estates in Norfolk devised by Anne Hester Cole to her three nieces, Katherine Mary Fellowes, Charlotte Ann Caldwell, and Harriot Caldwell, and their heirs as joint tenants, was severed by the settlements made upon their respective marriages, or any of such settlements.

Joshua Williams, Q.C., and E. Macnaghten, for the plaintiff, submitted that this property not being included in the recitals, and the covenant which followed being only on the part of the husband, the joint tenancy was not severed.

Patriche v. Powlet, 2 Atk. 54;

Hammond v. Hammond, 19 Beav. 29 ;

Young v. Smith, 35 Beav. 87.

J. Wickens, C. Hall, and E. R. Cook appeared for the defendants, and contended that the property, although not specified, was included in the settlement, which was apparent from the whole construction of the settlement.

The VICE-CHANCELLOR was of opinion that the whole construction of the settlement was opposed to the view taken of it by the counsel for the plaintiff. After reading the recitals the Vice-Chancellor observed that at the time of making the settlement the lady was beyond all doubt entitled to the property in remainder, and therefore she was within the literal meaning of the words of the settlement. That recital was followed by a covenant on the part of the husband, which sufficiently indicated the intention of all the parties; he was therefore of opinion that the joint tenancy was severed, and there was a declaration to that effect.

Solicitors, Cookson, Wainwright, Pennington, and Wainwright.

Monday, March 7.

Re THE OXFORD AND CANTERBURY HALLS COMPANY (LIMITED).

After a company had gone into liquidation, mortgagees for 11,000*l.* of the company's real estate, consisting of two music halls, contracted to sell one of them to a purchaser for 8500*l.*; and a deposit of 1000*l.* was paid. The mortgagees then sent in a claim under the winding-up for their full debt and costs. The residue of the purchase-money not being forthcoming, in June 1869 a new contract was entered into for the sale of the same music hall to a substituted purchaser for 9300*l.*, of which the 1000*l.* already paid was to be considered part payment, and the residue was to be paid on the 1st April 1870, with interest in the mean time. It was highly improbable that the purchase-money would be forthcoming on the 1st April 1870 :

*Held, that the mortgagees were entitled to prove for the whole amount of their debt (11,652*l.* 8*s.*) less the*

V.C. J.]

Re THE OXFORD AND CANTERBURY HALLS COMPANY (LIMITED).

[V.C. J.]

price (9300l.) mentioned in the contract; but without prejudice to the right of either party to increase or diminish the proof, if the property should ultimately realise less or more than the contract price; and without prejudice to the right of the mortgagees to add to their proof in respect of costs, charges, and expenses properly incurred.

By an indenture of mortgage dated the 3rd July 1867, and made between the Oxford and Canterbury Hall Company (Limited) of the one part, and the trustees of the London and County Joint-Stock Banking Company (Limited), of the other part, the property of the company, consisting of the Oxford Music Hall and premises in Oxford-street, and the Canterbury Hall and premises in Lambeth, which were comprised in three leases for fifty years each from Lady-day 1860, were mortgaged to the trustees of the bank to secure 11,000l. and interest.

On the 7th May 1868 the Hall Company was ordered to be wound-up. On the 23rd June following the official liquidator was appointed, and on the 30th the advertisement was issued requiring creditors to send in their claims on or before the 17th of July 1868.

On the 9th Jan. 1869 Morris Roberts Syers signed an agreement, whereby he declared himself the purchaser from the mortgagees of the company's property at the price of 8500l. He paid 1000l. deposit, and it was agreed that the purchase was to be completed on or before the 4th March following.

On the 12th Jan. 1869 the solicitors of the bank wrote to the official liquidator informing him of the fact that the above contract had been entered into.

Upon the 4th March the purchase-money was not forthcoming, and the contract was not completed.

On the 24th March 1869, for the first time, a claim was sent in by the solicitors of the bank to the official liquidator informing him that the company was indebted to them at the date of the winding-up order in the sum of 11,652l. 8s., for which sum they claimed to be admitted as creditors. The liquidator replied that he could not at present admit the claim, but if the solicitors would send the details, he would have it looked into, and, if necessary, give them notice to prove in the ordinary way.

On the 30th March the solicitors wrote to say the claim of the bank consisted of 11,000l. for principal and 652l. 8s. for interest. Notice to prove the claim was subsequently given, and an affidavit in support was filed on the 26th April.

By an agreement dated the 29th June 1869, and made between the trustees of the bank as vendors of the first part, George Augustus Frederic Syers (who, though not so stated in the deed, was the son of Morris R. Syers), and Edwin Taylor as purchasers of the second part, after reciting the former contract of the 9th Jan. 1869, and that it had been agreed between the vendors and purchasers with the consent and approbation of Morris Syers, that the said agreement should be considered cancelled, and that in lieu thereof the vendors and purchasers should enter into the present agreement, it was agreed that the vendors should sell and the purchasers should purchase the property at the price of 9025l.; that the 1000l. paid by Morris Syers should with his consent be retained as part payment of the purchase money; that the purchasers on being let into possession should pay to the vendors certain sums paid or to be paid by them for insurance and rent, and within six months lay out 1500l. in repairs, and pay 8025l., being the remainder of the purchase-money, on the 1st April 1870, with interest at six per cent. on such sum from the 4th March, by four instalments: the first, on being let into possession; the second, on the 29th Sept. 1869; the third, on the 24th Dec. 1869; and the fourth, on the 1st April 1870.

The mortgagees were let into possession in July 1869.

On the 31st July last, the claim of the bank was adjourned out of chambers into court, and after argument,—

The VICE-CHANCELLOR said:—I am of opinion that this case is not governed by that of *Barned's Bank*, L. Rep. 3 Ch. 769. The principle is quite clear, and capable of being applied rightly to this case, that the proper time to ascertain the amount for which proof is to be made is the time when the claim is sent in. The question then is, what is the debt which at law legally and equitably was due at the time the claim was sent in? I am of opinion that if a mortgagee had sold part of the property, or contracted to sell it (which comes to the same thing), before his claim was sent in, his debt was equitably discharged and satisfied to the extent of the property of the mortgagor, which he had taken himself in part satisfaction of his debt. The case then stands for all purposes exactly in the same manner as if on the day when he had contracted to sell that property to the purchaser, the mortgagor had for the first time handed him over the property on a contract that he should take it at a valuation in part satisfaction of his debt. It is utterly impossible that a man under a contract such as that, or under the original contract, who had had goods and chattels in part satisfaction of the debt, could say the whole debt was due, and that this court would allow him to sue for the whole amount of that debt, he having taken goods and chattels, not as a pledge, but absolutely for the purpose of satisfying that debt. He did by the contract convert those goods of the mortgagor as he lawfully might. He, under the authority of the mortgagor, took possession of the goods, converted them from a pledge into an absolute property of his, and, having done that, I say the debt was to that extent satisfied in the contemplation of this court; and it is no answer to that to say that at that time the money was not actually received, because that was his own choice, just the same as if he had taken payment in bills of exchange or promissory notes. It was like a man saying "I take the goods in payment, and I take the payment in a promissory note," and then saying "I will sue for the whole amount, and get payment of the whole bill." There is no doubt the court would not permit that. He probably might be remitted in some way or other to his original rights, but as long as that contract was in force, and as long as he had taken and exercised his powers of sale, he could not consider himself as being the creditor for the whole amount. And I say that what took place with regard to the change of the contract has in no way altered the position of things. He had exercised his power of sale—he could not, as between himself and the mortgagor for whom he was a trustee, rescind that contract for sale capriciously, or at his own will and pleasure. What was really done was this: it was he and the person entitled under the other contract who, in performance of that contract, and giving effect to the rights of that contract, agreed to transfer it to somebody else, and to substitute somebody else as a purchaser. That was in continuation of the right given under the original contract. I am of opinion therefore that that was a mere form which took place on the transfer of that contract as between him and the mortgagor, and that, therefore, the proof must stand for the amount of the original debt, minus that which was produced by the property which the mortgagee elected to take in payment of his debt. It will be the net proceeds only. All parties will have their costs out of the estate. Upon that the bank, in chambers, claimed to deduct

V.C. J.]

DU BOULAY v. DU BOULAY.

[Priv. Co.]

only 1000*l.*, and to be allowed to prove for the rest. The official liquidator, on the other hand, claimed to be entitled to deduct 9025*l.* (less 500*l.* for estimated costs, charges, and expenses), and another sum, leaving the bank's claim to be proved for only 1877*l.* 9*s.* 11*d.*

A summons was then taken out by the official liquidator that the bank trustees might be directed, within four days, to bring in an account of their costs, charges, and expenses properly incurred as mortgagees, mentioned in the order of the 31st July 1869, and in default, that their claim might be allowed for 1877*l.* 19*s.* 11*d.* only, and a certificate taken for that amount.

Eddis, Q. C., and *Higgins*, for the official liquidator.—One difficulty is, that until this claim is certified, the assets cannot be distributed. The mortgagees have elected to exercise their remedy by sale.

Kay, Q. C., and *Waller*, for the bank.—If this proof be certified, the official liquidator will be in a position to tender us the 1877*l.* 19*s.* 11*d.*, and then to redeem the Canterbury Hall, which is a very valuable security. Meanwhile, we may never get our 9300*l.*; indeed we have every reason to believe default will be made on the 1st April next. We may then have to rescind and resell, and we cannot say what our costs, charges, and expenses may be.

Eddis, Q. C., in reply, referred to *Lockhart v. Hardy*, 9 Beav. 349.

The VICE-CHANCELLOR.—It appears to me that there is great difficulty in doing what is right in this case; but I think it would be right that the proof should now be entered, and that the chief clerk should find the proof on the footing that the sum is to be deducted under the last contract; that the proof be for that amount without prejudice to the right on either side either to alter or diminish the proof, if the property should ultimately produce more or less than the amount of that contract, and without prejudice to the mortgagee's right of further proving in respect of the costs and expenses he may be put to. I do not mean to prejudice that question at all, and I certainly do not mean, upon this occasion, to determine on a contract of this kind that mortgagees are bound to guarantee that it will produce so much money.

Eddis, Q. C., asked the court to put a valuation on the security.

The VICE-CHANCELLOR said he had no jurisdiction to do so. The official liquidator might file his bill to redeem. But at present he was dealing only with the question of what the proof was to be; and the proof must be for the amount less the price mentioned in the last contract, without prejudice to either party's right to increase or diminish it, if the property should ultimately realise more or less, and without prejudice to the mortgagees adding to their proof in respect of costs, charges, and expenses properly incurred.

Solicitors; *Mercer and Mercer*; *Stevens, Wilkinson, and Harris*.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Feb. 8 and March 15, 1869.

(Present: The Right Hon. Lord CHELMSFORD, Sir JAMES W. COLVILE, Sir R. J. PHILLIMORE, Lord Justice SELWYN, and Lord Justice GIFFARD.)

DU BOULAY v. DU BOULAY.

St. Lucia—Suit for usurpation of name—Old French law—Ordinance of 1555—Decree of 1803—Colony, on conquest, how far governed by the law of the mother country—*Laches*.

A female slave, manumitted in *St. Lucia*, went to *Martinique*, and there assumed the name of *Du Boulay*, that of her former master. An illegitimate son (the respondent) was afterwards born to her, in whose acte de naissance, both mother and son were mentioned by their Christian names only. The son assumed the name *Du Boulay* when he was about sixteen, was entered under that name in the public registers of *Martinique*, and subsequently, having removed to *St. Lucia*, carried on business there under the above name for ten years, without objection from the *Du Boulay* family (the appellants) who had been long settled in the island.

The appellants instituted a suit in the Royal Court of *St. Lucia* asking a decree that the name *Du Boulay* belonged to the appellants, with a prohibition to the respondent to bear or sign that name in future, and an order for the erasure of the name in deeds, registers, &c., wherein the respondent was so mentioned:

Held (affirming the decision of the Court of Appeal for the Windward Islands, and reversing that of the Royal Court of *St. Lucia*): First, That an unregistered ordinance of 1555, by which the change of name and arms was forbidden under a penalty unless by royal permission, though probably law in France, was not shown to have become law in *St. Lucia*.

Secondly. That a law promulgated in France on April 10 1803, by which change of name was to be made under the authority of government in a prescribed mode, was probably not law in *St. Lucia*, since it was passed so shortly before *St. Lucia* passed under British dominion, and considering the character of the law, and the then critical position of the French West India Colonies, it was not likely that care was taken to transmit the law from France to *St. Lucia* before the conquest of the latter.

Thirdly. That it was extremely doubtful whether, by the old French law, independent of the ordinance of 1555 and the decree of 1803, the assumption of a name by a person who had originally no right to call himself by it, was the subject of any proceeding, penal or civil; and,

Fourthly. That, therefore, the appellants had failed to prove that the existing law of *St. Lucia* entitled them to maintain this action.

Supposing such an action to be maintainable, there must be some reasonable limit within which a family ought to be bound to proceed, and the appellants having for ten years been aware that the respondent was carrying on business under the name of *Du Boulay*, that he was recognised by that name in public acts, and that he had acquired the name by reputation, were barred from action by their long acquiescence.

This was an appeal from a judgment of the Court of Appeal for the Windward Islands, delivered Aug. 27, 1866, whereby a decree of the Royal Court of *St. Lucia* was reversed.

The point at issue was the right of the respondent to take and use the name of *Du Boulay*. (The name assumed by herself and son appears to have been

PRIV. CO.]

DU BOULAY v. DU BOULAY.

[PRIV. CO.]

written "Duboulay," but this point does not seem to have been raised.)

The facts were these:—

The appellants were a father and brothers, members of the family Du Boulay, for a long time past settled and of repute in the Island of St. Lucia. The mother of the respondent, a mulatto woman named Rose, had been a slave belonging to the Du Boulay family, but was manumitted in 1831. On obtaining her freedom she went to Martinique, of which she was a native, and began business as a dealer, but in 1850 she returned to St. Lucia and died there in 1854. From her manumission till her death, she was publicly known and called by the name of "Rose Du Boulay."

The respondent, the illegitimate son of Rose Du Boulay, was born at Martinique in 1835. The *acte de naissance*, dated March 26, 1835, and entered in the public registers, mentioned the mother as "Demoiselle Rose," and the son as "Jules René Herménégilde," no surname being given in either case. The respondent went to school in Martinique, every year paying short visits to his mother in St. Lucia. On one of these occasions in 1844, being then nine years old, he stood godfather to a child, and his name was entered in the registers of baptism as "Jules René" only, though the other sponsor's christian and surname were both given. A short time after, however, he assumed the name of Du Boulay, by which he was known and called at school. When he attained the age of sixteen he became liable, according to the laws of Martinique, to pay a personal capitation tax, and on paying it he was supplied by the municipal authorities of St. Pierre (the place where his birth had been recorded) with a passport for the interior, wherein he was named as "Mr. Du Boulay, Jules René Herménégilde," and in that name he was entered in the census books, and subscribed the receipts given to him. In 1855, after his mother's death, the respondent left Martinique and came to St. Lucia, announcing in the newspapers of the island that the house of Rose Du Boulay would continue to do business under the name of Du Boulay, Brothers, and Co. In 1856 the firm was dissolved by consent, and the respondent advertised in the newspapers his intention to carry on business in his own name. On the death of his brother in 1856, the respondent was appointed by the court to assume the charge, and direct the settlement of the affairs of the succession, and such appointment was advertised by three insertions in the official *Gazette* of St. Lucia in the following words:—"Notice is hereby given, that on application to the Royal Court, Mr. Jules René Herménégilde Duboulay, *alias* Hermann Du Boulay, has been named and appointed administrator of the succession of Mr. Jules Lovinsky Du Boulay." The respondent continued to bear the name Du Boulay, and without objection on the part of the appellants, till 1864. On July 16 in that year, however, an advertisement appeared in the *St. Lucian* newspaper to the effect that the house of Bourgeois Brothers was dissolved, and would be superseded by the firm of Belmar, Du Boulay, and Claustre, and on July 20 the respondent received a letter, written by the appellants' authority, informing him that the appellants could not allow him to bear their name, especially as a business was about to be established in the island by one of their family, and legal proceedings were threatened in case respondent should refuse to relinquish the name of Du Boulay. In reply, the respondent said he claimed no relationship with the appellants' family, and refused to abandon a name he had publicly borne so long.

The appellants then filed a bill of complaint in the Royal Court of St. Lucia, praying the court to "order and decide that the name of Du Boulay belongs to the plaintiffs and family with defence

and prohibition to him the said Jules René Herménégilde, *alias* Hermann Du Boulay, to take, bear, and sign in future the said name of Du Boulay under all the pains and penalties of the law; and to order and direct that the said name of Du Boulay shall be erased from all deeds, registers, and other documents, both public and private, signed by the said defendant, or wherein he figures as Du Boulay, such erasure to be made by the parties under whose care and custody the said deeds, registers, and documents are placed and kept, on pain of being adjudged and condemned for contempt; and to authorise the plaintiffs to cause the decree of the court to be published in the official *Gazette* and newspapers of the island at the expense of the defendant, and to order the defendant to pay the costs of the action."

The Chief Justice of St. Lucia gave judgment for the plaintiffs (the present appellants) on July 20th, 1865, and an order was made thereon, following the prayer of the petition.

Against this decision there was an appeal by the present respondents to the Court of Appeal of the Windward Islands, and a majority of that court (the Chief Justices of Tobago and Grenada, the Chief Justice of St. Lucia dissenting) gave judgment on Aug. 27, 1866, reversing the decree of the court below. The grounds of the judgment were:—(1) That the ordinance of April 11th, 1803, by which the power to change names without any solemnity was in France restricted, is not in force in St. Lucia; for, "no ordinance in France was supposed to be in force in her colonies unless registered there, or extended to the colonies by the order of the parent state. The *Coutume de Paris* was the law of the French colonies, because the 33rd *arrêt* of the *Conseil d'Etat du Roi* of May 1664, establishing the West India Company, expressly declares its obligatory effect in the West Indian colonies, as it had been established in the French colonies in the East. . . . It does not appear that the ordinance of April 1803 was extended by its terms or by any other edict of the French Government, to its colonies, and it has not been registered in St. Lucia. The history of St. Lucia throws some further light on this subject. About two months after the passing of the ordinance of April 1803, that is to say, on June 23, 1803, St. Lucia capitulated—(but see the proclamation of that date, *Laws of St. Lucia*, p. 25, given below)—to the British arms, under General Grinfield, and it has remained a British colony ever since. Now, regard being had to the unsettled condition of France, in its state of transition at the time of the passing of this ordinance; to the existence of war, by which the irregularity in the communication then existing between Europe and the Antilles was necessarily increased; to the length of time consumed in a voyage across the Atlantic in those days; and to the slowness that attends all government action, it is not too much to presume, in the absence of any evidence to the contrary, that this edict was unheard of in St. Lucia at the time of its conquest in 1803." (2) That to treat a name as property that may wrongfully be taken from another would lead to the paradox, that one might take from another his surname, the latter yet remaining in the possession and enjoyment of it.

The grounds on which the Chief Justice of St. Lucia dissented were: (1) That Duboulay was the family or patronymic name of the present appellants; (2) that a family or patronymic name is the subject of property, and hereditary, for "the name of a family is a real right constituted for the benefit and advantage of that family, and having for its conclusive end to prevent confusion between strangers and that family;" (3) that the family name of another can never be taken by persons who have no right to it either by descent or inheritance, "a general rule which is still adopted and followed by

PRIV. CO.]

DU BOULAY v. DU BOULAY.

[PRIV. CO.]

both the ancient and modern legislations of France, and which must *ex necessitate* be applied by the Court of St. Lucia, which is governed by the ancient laws of France in all matters of property and inheritance;" (4) that the ordinance of April 11, 1803, is in force in St. Lucia; (5) that the son of a slave cannot add to his name that of the late master of his mother (see Merlin, word "Esclavage"), and therefore the respondent's mother, being incapacitated to take the name of her master, could not, *à fortiori*, have passed it to her descendants; (6) that the respondent's long possession of the name could not operate as a bar to the appellants' claiming their name by way of *revendication*; (7) that the respondent, having been christened under the name of Jules René Herménégilde, and having had for a period of sixteen years a status in conformity with his *acte de naissance*, could not by law change his name without authority of government; (8) that the delay of the appellants in proceeding against the respondent was explained by the fact that for many years previously to 1864 the head of the appellants' family was afflicted with a chronic disease, and the other members of the family were then absent in Europe.

From the above judgment the present appeal was brought.

(It will be convenient here to note that it was assumed in the judgment of the committee that the present case depended on the French law as it prevailed in the then French colony of St. Lucia, prior to June 23, 1803, and the precise date was material as bearing on the question whether the ordinance of April 1803 ever prevailed as law in the island. The above date, June 23, 1803, is that of a proclamation issued by General Grinfield and Commodore Hood, who had taken St. Lucia by assault on the previous day (see Annual Register, vol. 45, p. 533). Now the terms of the proclamation are incorrectly stated in the judgment of the committee, following the wording in the judgment of the Chief Justice of St. Lucia, to have "assured and guaranteed to the inhabitants the full enjoyment of their property under the laws which existed in the island at the time immediately prior to the last session." The proclamation runs as follows:—"Quoique ladite île ait été prise d'assaut et sans aucune capitulation ou stipulation quelconques, néanmoins, pour tranquilliser les habitants et les propriétaires sur leur état actuel jusqu'à ce que la détermination de sa Majesté soit définitivement prononcée, leurs excellences leur assurent pleine et entière jouissance de toutes leurs propriétés, sous les lois qui existaient dans la colonie à l'époque immédiatement antérieure à la dernière cession." Laws of St. Lucia, p. 25. "Cession" must mean either the last cession of the island made to France by England under the Treaty of Amiens, March 25, 1802, or the former cession by France to England on May 25, 1796. (Annual Register, vol. 38, p. 74). Clark (Colonial Law, 300, 304) is an authority for the former date, and the latter seems favoured on a consideration of the history of the island; but, whichever be accepted, the ordinance of April 1803 would have to be excluded, as a law not existing in the island at the time specified by the proclamation.

Whether the proper date should not be that of the actual conquest rather than that fixed for the proclamation is another question.)

Field, Q. C. (Angelo J. Lewis with him) argued *ex parte* for the appellants. The law governing the present case is the old French law as it existed and prevailed in St. Lucia on 22nd June 1803, on which day the island was taken by the English. This law chiefly consisted of the *Coutume de Paris*, of ordinances of the French kings, and of local regulations made by colonial authorities. The authorities show

that according to the old French law the name of Du Boulay, is, as between the appellants and the respondent, the property of the former, and ought to be protected from usurpation. The law on this matter is to be found in Merlin's "Répertoire de Jurisprudence," titles "Nom," and "Promesse de changer de nom," and in Dalloz's *Jurisprudence Générale*, title "Nom, Prénom." These authorities show that a property in a family name long-borne was recognised, that there was a remedy both civil and penal against one who assumed a name to which he had no right, and that no change in a name could be made without the authority of the Government. (See, too, *Dictionnaire du Notariat*, s. 3, title "De la propriété des noms," quoted in the judgment of the Judicial Committee below.) And the right to prevent the usurpation of one's name has been recognised by the courts. Thus, a case reported by M. Bourdet, avocat, in the *Bulletin Judiciaire de Paris*, 1859, is as follows:—"De Lacarelle v. Jean-Marie Durieu de Lacarelle. Usurpation de nom. M. Durieu, assigné devant le tribunal de Villafranche, par le vrai De Lacarelle, prétend que son adversaire n'a aucun intérêt à ce qu'au lieu d'un seul Lacarelle, il y en ait deux; à quoi le tribunal a répondu péremptoirement d'une manière concise et vraie: 'On a toujours intérêt à empêcher l'usurpation de son nom, soit à cause des souvenirs d'affection, d'honneur, ou autres qui s'y rattachent, soit pour prévenir des méprises qui peuvent entraîner la violation du secret des lettres, ou avoir autres conséquences non moins fâcheuses; soit en effet et n'y aurait il que ce seul motif, qu'un nom étant une véritable propriété, celui qui a le droit de le porter a incontestablement celui d'empêcher qu'un autre ne l'usurpe, sans être obligé de rendre compte à qui se soit des motifs qui le font agir.'" And the *Moniteur de la Martinique* for 1860 contains a report of the case of *Lawless v. Pierre, falsely called Lawless*. This was a suit before the Tribunal of First Instance in Martinique, by Mr. William Lawless, the British consul in that island, against the defendant, for having usurped his name. The defendant, who had been a slave, pleaded, among other things, that the name of Lawless was granted to him in his act of manumission by the governor of Martinique; that the said name belonged to him, for, having been in possession of it since the day of his birth, he had acquired it by prescription, and consequently by taking and signing it he had committed no act of usurpation. The court gave judgment on Feb. 14, 1860, deciding that the defendant had no right to bear the name of Lawless, forbidding him to take or use it for the future, and ordering that the name should be erased in all deeds and registers where the defendant's name appeared, and the plaintiff was authorised to publish the judgment in the journals of the colony at the expense of the defendant, and the defendant was condemned in costs. This judgment was appealed from to the Imperial Court of Martinique, which on June 19, 1860, affirmed the judgment of the court below.

And according to the old law of France, no person could change or add to his name without an express authority from Government to do so. An ordinance of Henry II. made in 1555 forbade under a penalty the change of names or arms, unless letters of permission were first obtained from the king (cited in the judgment of the committee below; Merlin's *Répertoire de Jurisprudence*, title "Nom.") And though that ordinance not having been registered was little executed, Merlin is probably wrong in the opinion that for want of registration by Parliament, the ordinance was not recognised as law: (*Rép. Juris.* title "Promesse de changer de nom," vol. xiii., p. 456, edit. 1828.) Dalloz thinks that the ordinance became law, and says that it was considered

PRIV. CO.]

Du BOULAY v. Du BOULAY.

[PRIV. CO.]

“comme consacrant un principe qui n’a pas été aboli par la loi du 6 Fruct. an. 2.” (Jurisp. Gén., title “Nom, Prénom,” vol. xxxii. pp. 506, 519, edit. 1855.) In the time of the Revolution, a decree of the National Convention, 6 Fruct. an. 2 (Aug. 23, 1794) forbade citizens to bear any name other than those given in their *actes de naissance*. And under the consular government a law was promulgated, on 21 Germ. an. 11 (10th April, 1803), with respect to changes of name. as follows: “Tit. 2. Des changements de noms. (4.) Toute personne qui aura quelque raison de changer de nom, en adressera la demande motivée au gouvernement. (5.) Le gouvernement prononcera dans la forme prescrite pour les règlements d’administration publique. (6.) S’il admet la demande, il autorisera le changement de nom, par un arrêté rendu dans la même forme, mais qui n’aura son exécution qu’après la révolution d’une année, à compter du jour de son insertion au Bulletin des lois. (7.) Pendant le cours de cette année, toute personne y ayant droit sera admise à présenter requête au gouvernement pour obtenir la révocation de l’arrêté autorisant le changement de nom; et cette révocation sera prononcée par le gouvernement, s’il juge l’opposition fondée. (8.) S’il n’y a pas eu d’oppositions, ou si celles qui ont été faites n’ont point été admises, l’arrêté autorisant le changement de nom aura son plein et entier effet à l’expiration de l’année. (9.) Il n’est rien innové par la présente loi aux dispositions des lois existantes relatives aux questions d’état entraînant changements de noms, qui continueront à se poursuivre devant les tribunaux dans les formes ordinaires.” The Chief Justice was right in the opinion that the above became law in St. Lucia. Further, according to the law of France prior to the date aforesaid, coloured persons, free or manumitted, were forbidden to take the surnames either of their reputed fathers or their masters of white complexion, or of any white man inhabiting the French islands. See Le Code Noir, art. 6; Merlin’s Rép. Jurisp. title “Esclavage,” sect. 2. The delay by the appellants in resisting the usurpation of their name is explained by the illness of the head of the family and the absence in Europe of the other appellants; nor could this delay, whatever its duration, act as a bar to the right to claim their name by way of *revendication*. See Troplong’s Commentaire de la Prescription, vol. 1, p. 401, sect. 248, where it is observed that “Quoiqu’on ait porté pendant un temps indéfini un nom autre que celui qu’on a dans son acte de naissance, la possession en est inutile, parceque les lois défendent de changer de nom sans l’autorisation du gouvernement.” See too Dictionnaire du Notariat, sect. 2, “De la Propriété des Noms.”

Cur. adv. vult.

March 15.—Judgment was delivered by Lord CHELMSFORD:—This is an appeal from a decree of the Court of Appeal from the Windward Islands, reversing a decree of the Royal Court of St. Lucia in favour of the appellant. The suit was instituted in the Royal Court of St. Lucia, for the purpose of having it ordered and decided that the name of Du Boulay belongs to the appellants and their family, with defence and prohibition to the respondent to take, bear, and sign in future the said name of Du Boulay. The question to be determined upon this appeal is whether an action of this description is maintainable under the French law, which at the present time is the governing law in the Island of St. Lucia. When a judge is called upon to decide a question depending upon foreign law, there is always some danger of his being influenced by notions derived from that law which he is in the daily habit of administering. In this country we do not recognise

the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or at least of an invasion of another’s right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name, which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause for annoyance it may be to the family, is a grievance of which our law affords no redress. The appellants, however, say that by the French law, which is in force in St. Lucia, they have a right to maintain a civil action against the respondent for assuming their family name of Du Boulay. The following are the facts admitted in the case: The name of Du Boulay had been the family name of the appellants for a very long period. The respondent is the illegitimate son of an emancipated female slave, named Rose, and was born at Martinique on the 17th Feb. 1835. Before his birth, his mother had assumed the name of Du Boulay, and was so called in a judicial proceeding of the Tribunal of First Instance of St. Pierre, Martinique, on the 20th Aug. 1831. In 1840 she left Martinique and took up her abode in St. Lucia, where she was publicly called and known by the name of Rose Du Boulay down to the time of her death in 1854. The respondent continued in Martinique till after the death of his mother, when he removed to St. Lucia, being at that time about the age of nineteen. It does not appear when he first took the name of Du Boulay. He certainly had not done so in the early part of the year 1844, for on the 22nd Feb. in that year (though only nine years old), he stood godfather to a child, and signed the register by the name of Jules René. In the year 1852, he had a passport granted to him and registered in the registry of passports for the interior of the Island of Martinique, in which he is described as “Mr. Du Boulay. Jules René Herménegilde, seventeen years old.” In the year 1855, having then fixed his residence in St. Lucia, he advertised in an island newspaper his intention to commence business under the firm of Du Boulay Brothers and Co., and in the following year he advertised the dissolution of this firm, and his intention to continue the business in his own name. In 1856 the respondent’s brother died, and he was nominated administrator of his brother’s succession. Public notice of this nomination was given by the Royal Court by advertisement in the official gazette, in which the respondent was called Jules René Herménegilde Du Boulay *alias* Hermann Du Boulay. From the time of his use of the name of Du Boulay, in St. Lucia, down to the time of the institution of the suit by the appellants on the 21st April 1865, his right to use it was never questioned. During this period he carried on business publicly and notoriously under the name of Du Boulay, and the fact must have been well known to all the Du Boulay family resident in St. Lucia. The appellants describe themselves in their plaint as dwelling in the Quarter of Souffrière, in the Second District of the island. The reason given by their advocate for their not having proceeded against the respondent sooner, as stated by him upon their authority, is, “that during the period mentioned by the respondent, those of the members of the Du Boulay family who could have protected their family name were in Europe for their education, or for other purposes.” And “the head of the family, Mr. Belisle Du Boulay, was then affected with a chronic disease which deterred him from attend-

PRIV. CO.]

DU BOULAY v. DU BOULAY.

[PRIV. CO.]

ing to any kind of business." It was necessary for the appellants in order to establish their case against the respondent to show—first, that the existing law of St. Lucia entitled them to maintain their action; and, secondly, that delay in asserting their right, or acquiescence in the use of the name of Du Boulay, by the respondent, did not prevent their proceeding against him. Upon the first question, the learned counsel for the appellant undertook to prove that by the old French law which prevails in St. Lucia, a family had a property in their patronymic, and might prevent any person calling himself by their name who had no right or title to do so. For this purpose he quoted a modern work, *Dictionnaire du Notariat*, s. 3, title, "De la Propriété des Noms," where it is said, "Le nom que chaque individu porte est pour lui une propriété. Il a le droit de s'opposer à ce qu'il soit pris par un autre. L'usurpation d'un nom donne lieu à une action devant les tribunaux. Cette action est purement civile." The learned counsel, upon being pressed for some instance of an action of this description having been brought under the old French law, confessed that he had no early precedent to produce. The only cases which he mentioned were two, which are to be found in the record of the proceedings. One of them is the case of *De Lacarelle v. Durieu de Lacarelle* before the Tribunal of Villefranche, in the year 1859, respecting which nothing is stated except the opinion of the Tribunal, that a person who has the right to bear a name is entitled to prevent another from usurping it, without being compelled to account for the motive of his proceeding; and the other, *Lawless v. Pierre, falsely called Lawless*, before the tribunals of Martinique, in the year 1860, which, like the present, was the case of the assumption of a name after emancipation from slavery. It is extremely doubtful whether, prior to the ordinance of 1555 (to be presently mentioned), the assumption of a name by a person who had originally no right to call himself by it, was the subject of any proceeding, penal or civil. Merlin, in his *Répertoire de Jurisprudence*, title "Nom," s. 3, after stating that by the Roman law changes of names were absolutely free, says, "Il fut un temps en France où conformément à cette loi on changeait de nom sans aucune solennité." He then gives a variety of instances prior to 1555, in which changes of name had been made without authority, and without any solemnity. He then proceeds, "Mais comme cette licence de changer ainsi de nom et d'armes produisait les plus grands abus, le Roi Henry II y remédia par une ordonnance donnée à Amboise le 26 mars, avant Pâques, 1555, art. 9." The right, therefore, to bring a civil action in St. Lucia, for the usurpation of a family name must be founded either upon this ordinance of 1555, or upon some law subsequently passed and introduced into the island. The ordinance of 1555 gives no right of civil action for an unauthorised change of name; and according to Merlin, in the passages just cited, such an action could hardly have been previously maintained. The ordinance subjects the person changing his name without authority to penal consequences only. It says, "Pour éviter la supposition des noms et des armes, défenses sont faites à toutes personnes de changer leurs noms, et leurs armes, sans avoir obtenu des lettres de dispense et permission, à peine de 1000 livres d'amende, d'être punis comme faussaires et d'être exautorés et privés de tout degré et privilège de noblesse." There seems to be great doubt whether this ordinance of 1555 ever had any practical operation, even in France. Merlin, in his *Répertoire*, title "Promesse de changer de Nom," says, the ordinance not having been registered, never became law in France. But Dalloz, in his *Dictionnaire*, title "Nom et Prénom," after mentioning this opinion of Merlin, says,

"Mais la jurisprudence est contraire à cette opinion." At all events, it is not shown that this unregistered ordinance ever formed part of the law of St. Lucia. It is to be observed that the Chief Justice of St. Lucia founds his judgment in favour of the appellants upon a different ordinance, never referring to the ordinance of 1555 as having any existence, or at least, as having any bearing upon his decision. He says, "In France, under the law *De Mutatione Nominis*, names were changed according to the whim or caprice of individuals without any solemnity or formality, but such an unrestrained license brought forth great confusion; names of living families were arbitrarily taken, and towards the commencement of the nineteenth century, to wit on the 10th April 1803, a law was made to check that dangerous system." And he adds, "It is not amiss to observe that that law is not only still in force in this colony, but has been retained entire by the modern legislators of France, and now forms part of the existing laws of that country." Notwithstanding the opinion of the Chief Justice that the ordinance of 1803 (which will be found in the argument above) is in force in St. Lucia, it may fairly be questioned whether it ever became part of the law of the island before it was taken by this country, on the 23rd June, 1803. On that day a proclamation was issued which "assured and guaranteed to the inhabitants the full enjoyment of their property under the laws which existed in the island at the time immediately prior to the last session." (These are the words of the judgment of the Chief Justice of St. Lucia and not of the proclamation. The latter reads "cession;" and see note above, preceding the argument.) It is not very probable that the ordinance of 1803 was one of these laws. It was passed in France a little more than two months before St. Lucia was brought under British dominion, and not being of any peculiar local importance, it was not likely in the critical position of the French West Indian colonies at this juncture that any care would be taken to transmit it, in order that it might form part of the law of the island. If the Chief Justice is right in saying that this law was made to prevent persons arbitrarily taking the names of living families, it would seem to show that before 1803 no civil action could be brought, or at all events, that none was ever brought to protect a family name from usurpation. If the law of 1803 is out of the question, it is difficult to see upon what other foundation the appellants can rest their right to maintain the action. The old French law on which their learned counsel mainly relied has already been considered. The ordinance of 1555, or one of a similar description made in 1629, was the only law upon the subject of changes of name at the time of the French Revolution. That ordinance fell with the kingly authority. In 1794, during the Revolutionary Government, an ordinance was passed which absolutely prohibited any change of name, but the learned counsel was unable to show that this ordinance, any more than that of 1803, ever had the force of law in St. Lucia. He failed altogether in his endeavour to prove that the existing law of the island entitled the appellants to maintain their action, whether he relied upon the old French law independently of the ordinances, or upon proof that the ordinances ever formed part of the law of St. Lucia, or even if they did, that they gave a family a right to proceed by civil action against a person calling himself by the family name without authority, and to compel him to discontinue to use it. Their Lordships are unwilling to dispose of the case without adverting to the question arising from the delay of the appellants in instituting their suit. Supposing an action of this kind to be maintainable, there must be some reasonable limit within which a family ought to be bound to pro-

C. P.]

GRANT v. GRANT.

[C. P.]

ceed. In the present case the family of Du Boulay, resident in St. Lucia, could not have been ignorant that for ten years the respondent had been carrying on business openly under the name of Du Boulay, that he had been recognised by that name in public acts, and that he had undoubtedly acquired the name by reputation. At what time some of the appellants were absent from St. Lucia, and when they returned, is left in uncertainty; but the head of the family appears to have been continually resident in the island, and no sufficient reason is assigned for his not taking earlier steps to protect the family name from the respondent's alleged unauthorised assumption of it. Under these circumstances, whether any other member of the family might have questioned the title of the respondent to call himself by the family name, is unnecessary to be considered, but all the appellants have placed themselves under a personal exception by standing by (as it is called) and permitting the respondent to become known to the world by the name of Du Boulay. After their long acquiescence, it would be unreasonable and unjust to sanction the attempt of the appellants to deprive the respondent of his right to use a name which he had acquired by reputation, and by which alone he had been known in the island during the whole period of his residence there. Their Lordships will recommend to Her Majesty that the decree appealed from be affirmed.

Decree affirmed.

Solicitors for the appellants, *Wordsworth, Blake, and Harris.*

Common Law Courts.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING,
Esqrs., Barristers-at-Law.

Jan. 17 and Feb. 23.

GRANT v. GRANT.

Construction of will—Nephew—Wife's nephew.

A testator devised real estate to "my nephew, Joseph Grant;" a son of his brother, and a son of his wife's brother, the latter of whom the testator frequently spoke of as his nephew, each bore this name, and claimed to be the devisee:

Held, that the word "nephew" has no definite legal signification limiting its application to the son of a brother or sister; and that, therefore, extrinsic evidence was admissible to show to which claimant the testator intended to devise his estate.

Held also, that the testator's intention being clear, the wife's nephew was the devisee.

This was an action of ejectment commenced on the 6th May 1868, by a writ addressed to the defendant, and all persons entitled to defend the possession of one messuage, one dwelling-house, five warehouses, ten outbuildings, three hovels, three barns, three stables, two brewhouses, one yard, ten outhouses, four cottages, ten pigsties, ten animal sties, with the appurtenances, situate and being in the parish of Rugby, in the county of Warwick.

The following case was stated for the opinion of the court by consent and by order.

John Grant, the testator in the will and testament and the codicil thereto hereinafter mentioned, before and at the time of the making thereof, and up to and at the time of his decease, was seised in fee simple of a messuage, dwelling-house, outbuildings, and premises situate and being in the parish of Rugby, in the county of Warwick (being the premises in the said writ mentioned), wherein before and at the time of his making of the said will and

testament and codicil, he resided and continued to reside up to and at the time of his death, and which by the said will are expressed to be devised under the words, "I devise to my said nephew, Joseph Grant, his heirs and assigns, the said house and premises where I now live."

The said John Grant, the testator, on the 18th Feb. 1868, duly made and published his last will and testament, and on the 21st Feb. 1868 duly made and published a certain codicil thereto, which said will and testament and the said codicil were respectively duly executed and attested according to law, and were respectively in the words and figures following, that is to say,

This is the last will and testament of me, John Grant, of Rugby, in the county of Warwick, dealer in marine stores, as follows: I direct the payment of my just debts, funeral and testamentary expenses; I bequeath to my niece, Ann Liggins, the sum of 300*l.* free of legacy duty, and I devise to my said niece, Ann Liggins, her heirs and assigns, my house in Pennington-street, in Rugby aforesaid, in the occupation of — Hudson; and my house in Riley's-court, and my three houses in Gas-street, Rugby, I devise to my niece Mary Pettifer, her heirs and assigns; my five houses in New Bilton I devise to my niece Emma Bench, her heirs and assigns; I bequeath to my nephew Joseph Grant the sum of 500*l.* and all the stock and household effects in the house where I now live; and I devise to my said nephew Joseph Grant, his heirs and assigns, the said house and premises where I now live; I devise to my nephew James Grant, his heirs and assigns, the house and premises in the Lawford-road, in the occupation of Lessimer, the miller; I devise all other my real estate, if any, unto my said nephew Joseph Grant, his heirs and assigns; I bequeath all the residue of my personal estate unto my said nephew Joseph Grant absolutely. I appoint my said nephew, Joseph Grant, executor of this my will.

This is a codicil to the last will and testament of me, John Grant, of Rugby, in the county of Warwick, dealer in marine stores, dated the 18th Feb. 1868. I appoint my nephew, James Grant, an executor of my said will in conjunction with my nephew Joseph Grant. And I devise all estates in me as trustee or mortgagee unto the said Joseph Grant and James Grant, their heirs and assigns, subject to the equities affecting the same.

The said testator died on the 22nd Feb. 1868, without having revoked or altered the said will and testament or codicil respectively, save so far as relates to the said will and testament by the said codicil.

The said testator's eldest brother, William Grant, survived the testator, and was and is his heir-at-law.

The claimant, Joseph Grant, the plaintiff in this action, is a son of the said testator's said brother William Grant, and before and at the time of the making of the said will and testament and codicil, and at the time of the said testator's death the plaintiff was and is a lawful nephew of the said testator.

The said Ann Liggins, Mary Pettifer, and Emma Bench, by the said testator respectively described as nieces in and by the said will, are the daughters of the said testator's brother, Thomas Grant, and are respectively married.

The said James Grant, in the said will and testament and codicil respectively described by the said testator as his nephew, is a son of the said testator's brother, Thomas Grant, and brother of the said Ann Liggins, Mary Pettifer, and Emma Bench.

No brother or sister of the said testator (except the said brother, William Grant) had a child named Joseph Grant.

The said testator at the time of the making of the said will and testament and codicil, and up to and at the time of his death had neither child, grandchildren, nor other lineal descendants.

[The said testator, in or about the year 1838, married Jane Scott, widow, formerly Jane Grant, spinster, who was his first cousin, and the defendant, Joseph Grant, is the son of Joseph Grant, a brother of the testator's said wife.

The last mentioned Joseph Grant, the father of the defendant, died about twenty-two years ago,

C. P.]

GRANT v. GRANT.

[C. P.]

leaving a widow and his said son, the defendant, then a boy of three years old. The widow died about fifteen years ago, whereupon the testator took the defendant into his own house and brought him up, and he lived as an inmate of the testator's house till the death of the testator, and assisted him in the management of his business of a marine store dealer.

The testator's said brother William the father of the plaintiff has a large family, of which the plaintiff is one of the younger children, and the testator had not been on good terms with or visited his said brother, who lived about twelve miles from testator, for many years before his death; he did not know how many children his said brother had, and at the time he made his will did not know of the plaintiff's name or existence.

The testator was in the habit of calling the defendant his nephew, both to the other members of the family and to persons not related to him, and the testator on several occasions expressed his intention of leaving his house and business to the defendant, and also on several occasions expressed his intention that neither his brother William nor the family of his brother William should have any of his property.

The will was prepared by Mr. Fuller, a solicitor at Rugby, who took his instructions from testator on his death bed, and who did not know any of the testator's relations, except the Joseph Grant who lived with him, and in giving him instructions to prepare the will, the testator said that, it was his intention that neither his brother William nor any of his family should have anything, as he had lent both him and his elder sons money, which had not been repaid, and he considered they had their share of his property in that way. He also told Mr. Fuller that he wished to give his nephew Joe, the house in which the testator lived, his stock in trade, and 500*l.* to enable him to continue carrying on the business, and wished him to be his executor. Mr. Fuller asked the testator if by his nephew Joe he meant the person who lived with him and helped him in his business, and he said "Yes, I mean him downstairs," and he wished to give him the house and business, as he had lived so long with him and helped him so much in his business. Mr. Fuller asked the testator if the person he called Joe was his nephew, and the testator replied that he was.]

The defendant, Joseph Grant, is in the possession of the messuage, dwelling house, and premises, the subject of this action of ejectment.

The court is to be at liberty to draw inferences of fact which a jury ought to draw, and the facts stated in the parenthesis [] are so stated after protest by the plaintiff, that they should not have been inserted herein, and the question of the admissibility of the whole or any part of the facts in such paragraphs contained is reserved for the decision of the court.

The question for the opinion of the court is whether the said Joseph Grant, the plaintiff, is entitled to the said messuage, dwelling-house, and premises under the above devise.

If the court shall be of opinion that the plaintiff is so entitled, then judgment shall be entered up for the plaintiff for the recovery of the whole of the premises claimed in the writ with costs to be taxed immediately after the decision of the case or otherwise as the court may think fit.

If the court shall be of opinion that the plaintiff is not so entitled, then a judgment of *non pros* shall be entered up for the defendant, with costs to be taxed immediately after the decision of the case or otherwise as the court may think fit.

Grove Chapman (with him Quain, Q.C.) argued for the plaintiff, and contended that the word "nephew" could mean only the son of a brother

or sister, or at all events only a blood relation, and that there was only one nephew, Joseph Grant, the plaintiff, who answered that description. He cited: Wigram's Treatise on Extrinsic Evidence of Wills; Johnson's Dictionary, "Nephew;" English Version of the Bible; *Miller, v. Travers*, 8 Bing. 244; *Hiscocks v. Hiscocks*, 5 M. & W. 363; *Richardson v. Watson*, 1 N. & M. 575; 4 B. & Ad. 799.

Field, Q. C. (with him A. Wills), for the defendant, relied upon the judgment of Lord Penzance with regard to the personalty devised by this same will (*Grant v. Grant*, Weekly Notes, P. & M. Dec. 25, 1869), and cited passages in which "nephew" bears other meanings than that of a blood relation, from Shakespeare (*Much Ado about Nothing*, act 5, sc. 1; "*Richard II.*," act 1, sc. 1, and act 5, sc. 3; "*Richard III.*," act 4, sc. 4). That the law does not apply to the word the limited signification contended for by the other side is clear from the fact that it is not used in the Legacy or Succession Duty Acts, nor in the prohibited degrees of matrimony in the Prayer-book, nor in any law dictionary.

Chapman in reply.

Cur. adv. vult.

Feb. 23.—BOVILL, C. J., delivered the judgment of himself, M. Smith, and Brett, JJ.—The question raised in this case has already been decided by Lord Penzance in the Probate Court in favour of the defendant; but there is an appeal against his judgment, and the plaintiff has required the decision of this court in the present action of ejectment, which affects the title to the real estate. The determination of the question really depends upon the admissibility of, and the effect to be given to the parol evidence; and this evidence is of two kinds: one class of evidence being offered for the purpose of showing that there is in the will a latent ambiguity, and the other class for the purpose of explaining and removing it. The devise of the testator was to "my nephew, Joseph Grant;" and the point at issue is whether these words apply to the plaintiff or to the defendant. The language of the will itself is clear, and free from ambiguity on the face of it; but as in most cases of wills parol evidence is necessary, and therefore admissible to identify the party intended to be described just in the same way as such evidence is admissible to identify and to show what was the subject matter devised. The parol evidence to prove that the plaintiff was the son of a deceased brother of the testator, and therefore answered the description in the will, was clearly admissible, and it is equally competent for the defendant to endeavour to prove that the words of the will may also apply to him, and this can only be done by parol evidence, which is therefore admissible for that purpose. In each case this kind of parol evidence is not admissible for the purpose of controlling, varying, or altering the written will of the testator, but is admitted simply for the purpose of enabling the court to understand it, and to declare the intention of the testator according to the words in which that intention is expressed. If such evidence establishes that the description in the will may apply to each of two or more persons, then a latent ambiguity is exposed, and rather than that the devise should fail altogether for uncertainty, the law allows the ambiguity, which is exposed by the parol evidence, to be cleared up and removed by similar evidence, provided such parol evidence is sufficient to enable the court to ascertain the sense in which the testator employed the particular expression upon which the ambiguity arises. If the parol evidence, after exposing the latent ambiguity, fails to solve it, the court cannot give effect to that part of the will.

C. P.]

GRANT v. GRANT.

[C. P.]

Thus in *Thomas v. Thomas*, 6 T. R. 671, where the particular devise was "to my granddaughter Mary Thomas, of Llechlloyd, in Merthyr parish," evidence was given that the testator had a granddaughter of the name of Elinor Evans, who lived at Llechlloyd in Merthyr parish, and a great granddaughter named Mary Thomas, who lived in the parish of Llangain, some miles from Merthyr parish. No other evidence being given, it was held that, although an ambiguity was raised it was not solved, and therefore that the court could not apply the devise, that it consequently failed, and that the subject-matter of the devise went to the heir-at-law. The plaintiff's evidence in the present case clearly brought him within the description in the will. The defendant's evidence proved that he was the son of a brother of the testator's wife, and the testator having married his first cousin of the same name as himself, the defendant's name was the same as that of the plaintiff. Does then the defendant by this evidence show that the description will apply to him? It is quite true that a son of a brother or a sister is generally called and known as a nephew, and this term therefore would no doubt apply to the plaintiff, but the word nephew has no definite legal signification; and there is not anything to limit its application to the precise relationship above described; on the contrary, there are many authorities to show that it has been and may be used in a much wider sense, extending to persons in a different degree of relationship; and in its ordinary and popular sense it is frequently and commonly applied to other persons—for instance, it is commonly applied by a husband to the son of his wife's brother or sister, or by a wife to the son of her husband's brother or sister; the son of either of such brothers or sisters would commonly call the husband and wife his uncle and aunt; nor could it be said that in popular and ordinary language such a description would be unusual or inappropriate. It is the court which has to be satisfied that the description may apply to the defendant, and if it rested on this evidence alone we should be of opinion that the defendant had brought himself within the description of the will so as to create a latent ambiguity, and to let in further parol evidence as to which of the two parties was intended to be described. It is not necessary that the description in the will should be in all respects accurate or perfect, but it is sufficient if it satisfies the mind of the judge that there is a sufficient description with legal certainty. See Wigram, V.C.'s Treatise on Extrinsic Evidence, prop. 7, p. 186. For example, where a testator devises to Mary, Elizabeth, and Ann, the three daughters of Mary Beynon, and at the date of the will Mary Beynon had two legitimate daughters and one illegitimate daughter, Elizabeth, parol evidence was admitted to show that Mary Beynon had formerly had a legitimate daughter, Elizabeth, who died an infant, and, although it was considered that the legitimate daughter was *prima facie* the person intended, the other facts and circumstances were left to the jury to say which of the two Elizabeths was the person intended to be described: (*Doe dem. Thomas v. Beynon*, 12 A. & E. 431.) The present case is also somewhat similar in principle to *Bennett v. Marshall*, 2 Kay & John. 740, where a devise being to "my second cousin William Marshall," and the testator had no second cousin of that name, but had a first cousin named William Marshall, and a first cousin named William John Robert Blandford Marshall, it was considered by the present Lord Chancellor that as it was a common practice where a person has several christian names to call him by the first of those names only, a sufficient case of ambiguity was made out to call for parol evidence in order to ascer-

tain which of the two parties was intended. Upon such evidence the decision in that case was in favour of the cousin with the several names, the Vice-Chancellor remarking that if the evidence had been perfectly balanced the cousin named William only would have been entitled to the preference. So here if the parol evidence were equally balanced, we might probably hold that the plaintiff would be entitled in preference to the defendant, but this cannot affect the question of the admissibility of the evidence. Another instance of effect being given to what was considered popular language used by a testator occurs in the case of *Doe d. Gains v. Rouse*, 5 C. B. 422, where a married man devised to "my dear wife Caroline;" and it was held that this was sufficient description in a popular sense of a person of the name of Caroline, with whom the testator cohabited, though in that case there was a person of another name who claimed to come within the description of his wife. But there is another ground upon which it appears to us that the defendant may endeavour to bring himself within the description in the will, namely, that the testator was in the habit of calling him his nephew Joseph Grant. In all cases of wills the surrounding circumstances as they existed at the time of the will, including the state of the testator's family, and the nature of his property may generally be proved in order to place the court as nearly as possible in the same condition as the testator, so that they may understand the language of his will and apply it in the same sense in which he used it; we are of opinion that evidence may be given of a testator having been in the habit of using expressions in a particular sense; though whether such evidence will affect the will or its application will depend upon the particular circumstances and the language of the devise in each case; and it would not generally be admissible to alter the natural meaning and legal effect and construction of the words, where they have a definite and clear meaning. In *Richardson v. Watson*, 4 B. & Ad. at p. 799, where a question arose as to what was intended under a devise of "the close in K." Lord Wensleydale said:—"Generally speaking evidence might be given to show that the testator used the word *close* in the sense which it bore in the country where the property was situate, as denoting a farm;" though in the particular case it was held that such evidence was not admissible, because the other parts of the will showed that the testator had used the expression in its ordinary sense, as denoting an inclosure only. This subject was much considered by the Court of Exchequer in the case of *Doe v. Hiscocks*, 5 M. and W. 363, and the following passage occurs in the judgment at p. 368:—"Again, the testator may have habitually called certain persons or things by peculiar names by which they were not commonly known. If these names should occur in his will they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will." In *Crosthwaite v. Dean*, L. Rep. 5 Eq. 245, where a devise was to Charlotte Lee, evidence was admitted by the present Lord Chancellor to show that a person who originally bore that name, but had married a person of the name of Antrim (from whom she afterwards separated) was habitually called by the testator by her maiden name of Lee. In *Goodwyn v. Goodwyn*, 1 Ves. Sen., 226, where the devise was to certain poor relations, evidence was admitted of the testator having poor relations in Salop and that he knew thereof, and Lord Hardwick thus referred to another case, "As where the testator described a legatee by a wrong name which he never bore, parol evidence was allowed by the

C. P.]

SYKES AND ANOTHER (Executors) v. SYKES AND ANOTHER.

[C. P.]

Master of the Rolls, to show that the testator knew such a person, and used to call her by a nickname." In *Beachcroft v. Beachcroft*, 1 Mad. 430, the case thus referred to is said to be the case of *Beaumont v. Pell*, 2 P. Wms., 140, where the bequest was to Catharine Earnley, and a person named Gertrude Yardley claimed to be the person described. Evidence was admitted to show that the testator usually called Gertrude Gatty, and that whilst giving instructions for his will he spoke in so feeble a voice that the attorney's clerk might easily have mistaken the names. In *Beachcroft v. Beachcroft*, the bequest was "to my children the sum of pounds sterling 5000*l.* each." It was contended that this could apply only to legitimate children, and that as the testator died unmarried the legacy did not take effect. But evidence was admitted that the testator had illegitimate children born in India previous to the making of the will, that he was much attached to them, and had sent them to England to be educated. Upon this the Vice Chancellor decreed that the legacies applied to them. He says "If there is a latent ambiguity, evidence is admissible to show who the testator was in the habit of considering in the character described in the will." Where it appeared on the face of the will itself that in some parts of it the testatrix had used the term "nieces" to describe her great nieces, a similar construction was placed upon the words nephews and nieces in another part of the same will, so as to include great nephews and nieces, though in that case it did not depend upon extrinsic evidence: (*James v. Smith*, 14 Sim. 214.) If, then, this head of evidence be admissible, as we think it is, it distinctly appears from the case that the testator here was in the habit of calling the defendant his nephew, and, as his name was Joseph Grant, he would, in this view also, answer the description in the testator's will of "My nephew, Joseph Grant." The defendant has thus, as it seems to us, satisfactorily shown that the words of the will may apply either to him or to the plaintiff; and then, as there is nothing in the will itself, or upon the evidence to which we have hitherto adverted, to show which of those was the person intended to be described, and to whom the testator intended the words to apply, the further parol evidence as to the testator's knowledge and other circumstances became admissible; and upon such of that evidence as was properly admissible it is not disputed that the defendant was in fact the person intended to be described by the testator. Under these circumstances, the parol evidence being admissible for the purposes and in the manner which we have pointed out, we think it exposed a latent ambiguity and equally removed it; and it enables us to understand the language of the will, and to apply it as the testator is clearly shown to have intended, viz., in favour of the defendant. This view is in accordance with the decision of Lord Penzance, and we give our judgment for the defendant.

Judgment for defendant.

Attorneys for plaintiff, *Dubois and Maynard.*

Attorneys for defendant, *Shephard and Skipwith.*

Feb. 5 and 7.

SYKES AND ANOTHER (EXECUTORS) v. SYKES AND ANOTHER.

Executor—Probate—Executor de son tort.

The executors of A., before proving the will, appointed B. to hold and manage the estate of A., as their agent.

Held, that B. could not be sued as executor de son tort of A.

This was an action brought by the executors of Ellen Sykes, deceased, against Sir T. Sykes, the sheriff of the West Riding of Yorkshire, and Love, an execution-creditor, for a wrongful execution levied on the goods of the testatrix. The declaration was in trover and trespass.

The defendant, Sir T. Sykes, pleaded the general issue and a justification under a *fi. fa.*

At the trial before Cleasby, B., at the last summer assizes at Leeds, it appeared that the plaintiffs were the executors of Ellen Sykes, deceased. Ellen Sykes had carried on the business of a manufacturing chemist in the West Riding of Yorkshire, and had died in March 1868. Her brother, J. H. Shaw, had managed the business during her lifetime, and at her death the executors, without proving the will, continued him in the management.

Under these circumstances, the defendant Love sued J. H. Shaw, as executor of Ellen Sykes, upon a bill of exchange. J. H. Shaw suffered judgment by default. A writ of *fi. fu.* was thereupon sued out by Love against J. H. Shaw, as executor of Ellen Sykes, and the defendant Sykes, as sheriff of the county, executed the writ, through his office, by seizure and sale of part of the goods of the late Ellen Sykes in the chemical factory. The plaintiffs then, after the sale, proved the will as executor and executrix of Ellen Sykes, and brought this action.

On these facts Cleasby, B. directed a verdict for the defendant Love, and as regarded the defendant Sykes, left it to the jury to say whether J. H. Shaw had been acting as the agent of the plaintiffs, or whether he had interfered in the management of the personal estate of Ellen Sykes without authority. The jury found that J. H. Shaw had acted as the agent of the executor and executrix, and the damages being assessed at 100*l.*, the learned judge directed a verdict to that amount to be entered against the defendant Sykes, reserving to him leave to move.

Field, Q.C., accordingly, on the part of the defendant Sykes, obtained a rule *nisi* calling on the plaintiffs to show cause why the verdict for them should not be set aside, and a nonsuit or verdict for the defendant Sykes be entered.

Kemplay showed cause.—The question upon which the determination of this case turns, is whether, when the executor named and appointed in the will, without taking out probate, puts the goods of the testator into the hands of an agent to hold for him, that agent becomes an executor *de son tort*, so that the goods are liable to be taken in execution, at any time before the executor proves the will, on a judgment against the agent as executor. [*Field, Q. C.*—If the executors named in the will had proved the will, I could not possibly contend that J. H. Shaw was executor *de son tort*.] An executor *de son tort*, is defined by Swinburne as "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the court to administer:" (Williams on Executors, 6th edit. 247, note a.) The executor named in the will may do many things before taking out probate,

C. P.]

SYKES AND ANOTHER (Executors) v. SYKES AND ANOTHER.

[C. P.]

and amongst other things he may appoint an agent to take care of and deal with the testator's property. If he can do so, then J. H. Shaw was not an executor *de son tort*. In *Hall v. Elliot*, 1 Peake, N. P. C. 119, Lord Kenyon, C. J. held, that a man who possesses himself of the effects of the deceased under the authority of and as agent for the rightful executor, cannot be charged as executor *de son tort*. In *Hooper v. Summersett*, Wight. 16, the wife was appointed executrix, and for some time before she took out probate the husband intermeddled with and managed the testator's goods. He was held to be executor *de son tort*, but then he had been acting of his own authority; if it had been found that he was acting as agent of his wife, the case would have been decided the other way. In *Sharland v. Mildon*, 5 Hare, 468; 15 L. J., N. S., 434, Ch., the Vice-Chancellor was wrong in considering an executor *de son tort* as a tortfeasor, and besides, that case does not apply, as the person under whose authority Hewish acted never was executor at all. *Cottle v. Aldrich*, 4 M. & S. 175, shows that Cleasby, B. was quite right in the directions he gave to the jury. [BOVILL, C. J.—That case seems decisive of the question.] He cited also

Paul v. Simpson, 9 Q. B. 365;

Webster v. Webster, 10 Ves. 93;

Padget v. Priest, 2 T. R. 97;

Hill v. Curtis, 13 L. T. Rep. N. S. 585; 35 L. J. 133, Ch.

Field, Q.C. and *Forbes*, in support of the rule, relied mainly on the fact that the goods of the deceased were in the apparent possession of J. H. Shaw, who, according to the plaintiff's case, was acting as uncontrolled owner of them by their permission. Under these circumstances, against whom had creditors a remedy if not against Shaw? If that were not so, *Sharland v. Mildon* and *Webster v. Webster*, (*ubi sup.*) were clearly authorities to show that, in point of law, J. H. Shaw was executor *de son tort*.

BOVILL, C. J.—In the original action the defendant Love entered up judgment against J. H. Shaw, as executor to Ellen Sykes. Love issued execution, and the writ directed the sheriff to levy on the goods of Ellen Sykes in the hands of J. H. Shaw as executor. The sheriff accordingly seized and sold the goods in question. The goods were undoubtedly part of the estate of the late Ellen Sykes, and they were in the possession of J. H. Shaw. The question for us to decide is, whether, at the time of the seizure, they were in his hands to be administered by him as executor. The late Ellen Sykes had appointed the plaintiffs executor and executrix, and they had acted as such; but they did not prove the will until after the acts complained of had been done. The question left to the jury was whether, at the time of the seizure and sale, the goods of Ellen Sykes were in the hands of J. H. Shaw as agent of the plaintiffs, it being the contention of the plaintiffs that they were so, or whether he had possessed himself of them without authority, so as to make himself liable as executor *de son tort*. The evidence was conflicting, but the jury found in favour of the plaintiffs' contention. We must take their verdict as conclusive of that question. I am of opinion that this was the proper question to be left to the jury, according to the decision of the court of King's Bench in *Cottle v. Aldrich* (*ubi sup.*) The question there was almost identical with that which arises in the present case, whether or no the defendant had been acting as the agent of an executor who had not proved the will. The jury found that he had voluntarily interfered as executor without authority. But, notwithstanding the verdict of the jury in the present case, Mr. Field has argued that, as Shaw was in possession of the

goods, he was executor *de son tort*, and must be treated as such. The question therefore arises, whether Shaw was in possession in that capacity. The jury have found as a fact that he was in possession as agent to the executors. If Shaw were the plaintiff in this action, he would be estopped from denying that he was executor, as he has suffered judgment in that character. No doubt, if he had acted without the authority of the plaintiffs, the defendant would have been justified in seizing the goods of Ellen Sykes in his possession. But the finding of the jury is against such a supposition. The defendant, in order to succeed, must show that the plaintiffs, before taking out probate, were wrongdoers in dealing with the goods of the deceased. If they can show that, then, as the relation of principal and agent cannot subsist between wrongdoers, J. H. Shaw was also a wrongdoer, and was consequently executor *de son tort*, so that the sheriff was justified. This depends then on what is the position of executors before probate. Executors obtain their title from the will, whereas administrators gain theirs from the ordinary. Executors have exactly the same powers before as after probate. Their title is just as good, and in short they have precisely the same powers in every respect, except in certain matters regarding suits, when probate is required as evidence of their title. If acts done by executors before probate are lawful acts, acts done by their agents are equally lawful. It is true that when the will is proved, a stranger, who intermeddles with the estate, cannot be charged as executor *de son tort*, and that if he so intermeddles before probate, he may be charged. The reason, however, is clear. If persons act as executors before probate, they cannot afterwards deny the fact of their being executors. When an executor is sued before probate he is not called executor *de son tort* in the writ, but he is at the trial estopped from denying that he is executor, and is called executor *de son tort*. But it does not follow from that, that either he or his agent is a wrongdoer. In point of fact, neither is. If his acts are lawful, the acts of his agent are equally so, if they are acts authorised by him, and such as he himself might have done. If the executor prove the will, and employ an agent to meddle with the estate, the agent cannot be treated as executor *de son tort*. Moreover, if a person be appointed executor in a will, he has a legal title, and can appoint an agent to act for him, and when the agent has so acted he cannot be treated as executor *de son tort*. In *Hooper v. Summersett* (*ubi sup.*) it was not pretended that the husband was acting as the agent of his wife. He was acting as of his own authority, and consequently was held executor *de son tort*. If it had been shown that he was acting as the agent of his wife, the executrix, then, although the wife did not prove the will till afterwards, the case would have been decided the other way, as appears by the case of *Cottle v. Aldrich* (*ubi sup.*) The question in the latter case was whether the defendant, who, prior to the death of J. A. (an executor who had proved) had acted as agent of J. A. in meddling with the testator's estate, and who after the death of J. A., continued to meddle with the estate, was acting after the death of J. A. of his own authority or as the agent of one Denton, another executor, who had not proved the will, but who after the death of J. A. was the rightful representative of the testator. In *Hall v. Elliot* (*ubi sup.*), it was held, that a man who possessed himself of the goods of a testator by the authority of the rightful executor, cannot be charged as executor *de son tort*. Where a person intermeddles in the affairs of a deceased, and his servant, by his orders and direction, sells part of the goods of the deceased, and pays over the proceeds to the

C. P.]

SYKES AND ANOTHER (Executors) v. SYKES AND ANOTHER.

[C. P.]

master, not only the master but the servant also is liable to be charged as executor *de son tort*. That was decided in *Padget v. Priest* (*ubi sup.*) That rule is, however, subject to the qualification stated by the present Lord Chancellor, in *Hill v. Curtis* (*ubi sup.*), that, if an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity for an account. In that case, in answer to a bill for an account filed against him as executor *de son tort*, the defendant pleaded that he had acted as agent for the rightful administratrix, and had subsequently fully accounted to her. There Wood, V.C. said: "Here the agency did exist, supposing that the lady at that time were acting wrongfully. She was acting wrongfully, and therefore at that time there could be no agency; but the moment she acquired a rightful title, the title related back to all her intermediate acts. And why not to the appointment of agent as well as to her other acts?" It is not necessary now to inquire into what may be the rule as to the employment of an agent by one of the next of kin, before taking out letters of administration; suffice it to say that, if the rule laid down by the Lord Chancellor be correct, the agent of an executor before probate would *a fortiori* be justified. Mr. Field has relied mainly on the case of *Sharland v. Mildon* (*ubi sup.*) There a widow, intending to take out letters of administration to her late husband, began to collect his assets before taking out administration, and employed one Hewish to collect her husband's debts. The widow died shortly after, without ever having obtained administration. Wigram, V.C. treated the widow, and consequently Hewish, as a tortfeasor. That, however, is not the case here. The executors are not proved to have been tortfeasors at all. If that had been proved, Shaw would undoubtedly have been a tortfeasor. *Sharland v. Mildon* was decided on the authority of *Padget v. Priest* (*ubi sup.*) The latter case, however, was one of intestacy, and both Porter and Priest were clearly wrongdoers. Here, however, Shaw was appointed manager by the persons named as executors in the will. *Sharland v. Mildon* is spoken of by the Lord Chancellor as rightly decided, but he applied the doctrine of trusts to the case of an agent acting for a person, before he has obtained administration. On these grounds, I am of opinion that the executors before probate can lawfully appoint an agent to carry on their business, and that this rule must be discharged.

M. SMITH, J.—I am of the same opinion. The defendant Love entered up judgment by default against J. H. Shaw, as executor of Ellen Sykes, and then issued execution. The writ of *fi. fa.*, which in terms followed the judgment, directed the sheriff to seize and sell the goods of the late Ellen Sykes in the hands of Shaw. This the sheriff did. There can be no doubt that Shaw was bound by the judgment, and if he were the plaintiff in the present action, he would be estopped from denying that he was the executor of Ellen Sykes, and that the goods in question were in his hands as executor. The present plaintiffs, however, are the real executors of Ellen Sykes, and they say that the goods, on which the sheriff levied, are their goods as such executors, and that they were in possession of J. H. Shaw as their agent, and that J. H. Shaw was in no sense an executor. The question for our determination is whether the goods in question were in possession of J. H. Shaw as executor, so as to render them liable to be seized by the sheriff under a judgment against him as executor. The jury found that the plaintiffs employed Shaw as their agent to manage the business, and that the goods were in his possession as such agent. It is, however, contended on behalf of the sheriff that, notwith-

standing this circumstance, the goods were liable to be seized, because the executors had not at that time proved the will, so that they could not appoint an agent, and J. H. Shaw was consequently executor *de son tort*. There is no doubt that he was in possession of the goods, not as a *tortfeasor*, but under the authority of the executors named in the will; and unless the mere fact of executors acting before proving the will makes them *tortfeasors*, and consequently makes Shaw executor *de son tort*, the sheriff does not make good his defence. Now executors have the same power to act before as after taking out probate. Probate is only the evidence of their title, not the title itself. For instance, executors may issue a writ, and proceed with an action before taking out probate. It is quite sufficient, so long as they take out probate before the trial. It therefore follows that executors can properly dispose of property before probate. If they can do that, they can appoint agents to do it in their stead. This act of theirs cannot be treated as wrongful, nor does it make them wrongdoers. Doubts seem to have arisen as to the position of an executor before probate, and some people seem to have thought that, because an executor before probate may be treated as an executor *de son tort*, he must, therefore, have been a wrongdoer in possessing himself of the testator's goods. Where an executor, named in the will, is, on account of his having intermeddled with the testator's property, sued before probate as executor, he is estopped from denying his executorship. It seems to me that in such a case it would be more proper to term him executor by estoppel than executor *de son tort*. I think the whole misapprehension has arisen from regarding such an executor as a wrongdoer. The term executor *de son tort* ought not to be applied to an executor named in the will. On these grounds, I think that these goods were not in the hands of J. H. Shaw as executor, and, consequently, that this verdict must stand.

BRETT, J.—It has been contended that J. H. Shaw must be regarded as executor *de son tort*, rather than as the agent of the executors named in the will, because the executors, when they purported to delegate their authority to him, were wrongdoers, not having proved the will. Further it is argued that the executors must be treated as wrongdoers until they have proved the will. I am, however, of opinion that executors appointed in the will can never be treated as wrongdoers. Mr. Field was obliged to contend that the case of *Cottle v. Aldrich*, in which the question was left to the jury whether the defendant voluntarily interfered with the goods of C. A. without any authority, or acted merely as the agent of the executor who had not proved, was wrongly decided. In *Sharland v. Mildon* the conclusion was arrived at that Hewish had acted as the servant of the testator's widow. He was held to be executor *de son tort*; but there the widow was not executrix. That is perfectly intelligible, and perfectly consistent with *Cottle v. Aldrich*. Besides, there are reasons why a court of equity would decide that such a person must remain a party to the suit. On these grounds, I am of opinion that the rule must be discharged.

Rule discharged.

Attorney for plaintiff, H. Waters.

Attorneys for defendant Sir T. Sykes, Bell, Brodrick, and Gray.

Ex. Ch.]

THE COMMISSIONERS OF INLAND REVENUE (apps.) v. DE LANCEY (resp.)

[Ex. Ch.]

EXCHEQUER CHAMBER.

Reported by H. LEIGH, Esq., Barrister-at-Law.

APPEAL FROM THE COURT OF EXCHEQUER.

Tuesday, Feb. 8.

(Before BOVILL, C. J., and MELLOR, M. SMITH, LUSH, HANNEN, and BRETT, JJ.)

THE COMMISSIONERS OF INLAND REVENUE (apps.) v. DE LANCEY (resp.)

Revenue—Legacy or succession duty—Bequest of money to be laid out on land—What duty payable thereon—Equitable conversion—Doctrine of not applicable to purposes of revenue—Legacy Duty Act (36 Geo. 3, c. 52), ss. 2, 7, 19—Succession Duty Act 1853 (16 & 17 Vict. c. 51), ss. 2, 18, 30—Construction.

By will, in 1799, a testator bequeathed a sum of money to trustees, upon trust therewith to purchase land, to be settled to the use of his elder son Charles for life, with remainder to the first and other sons successively of Charles, in tail male; and in default of such issue to the use of his son James for life, with remainder to the first and other sons of James successively in tail male; and in default of such issue then to his own right heirs for ever." The testator died in 1800, leaving two sons, Charles, his heir-at-law, and James. Charles died in 1840, and James in 1857, each of them dying a bachelor and intestate. The money was never laid out in land, but the dividends arising therefrom were duly paid to Charles and James successively during their respective lives. At James's death the only surviving lineal descendant of the testator was the testator's daughter, Susan, who then became absolutely entitled to the fund in question, and who died a spinster and intestate in 1866, having always refused to receive any part of either the dividends or principal of the said fund. In an administration suit, after her death, the following facts were found and certified: that at the testator's death his heir-at-law was his eldest son, Charles; that the person now entitled to any real estate, of which the testator might have died intestate, was the respondent, a grandson of a deceased brother of the testator; that at Charles's death his heir-at-law was James; and that at James's death his heir-at-law was Susan; and that at Susan's death her heir-at-law was the respondent, who was the heir-at-law of Charles, James, and Susan respectively, and the person now entitled to any real estate of which they respectively might have died intestate; and that none of the persons who would for the time being have been entitled to any real estate of which the testator had died intestate did, while so entitled, any act with reference to the said real estate fund, amounting to, or having the effect of, an election to take it as money or land, or which might have the effect of constituting such person a new root of descent, with regard to such fund.

The Commissioners of Inland Revenue having assessed the respondent in succession duty at 5 per cent. on the real estate fund as "a succession to him derived from Susan the predecessor (of a brother of the father of whom he was a descendant)," the respondent appealed to the Court of Exchequer against the assessment, on the grounds—first, that, not succession duty but, legacy duty only at 2½ per cent. by virtue of the 36 Geo. 3, c. 52, was payable by him, as a descendant of a brother of the testator who died in 1800; or, secondly, that if succession duty was payable, it was payable at 3 per cent. as upon a succession from the testator, and not from Susan. The Court of Exchequer held that the assessment made by the commissioners under the Succession Duty Act was void, inasmuch as the fund, not having been laid out in land, was liable to legacy duty under sect. 19 of the Legacy Duty Act (36 Geo. 3, c. 52), and succession duty did not attach, and therefore they gave judgment for the respondent.

And now, upon appeal by the commissioners from that decision, it was

Held, by the Court of Exchequer Chamber (affirming the decision of the court below), that the assessment of the respondent in succession duty could not be supported. The respondent, at the time he became entitled to the fund in question was "a person entitled to an estate of inheritance in possession of the real estate to be purchased therewith," if the fund had been so laid out, and so came within both the words and the spirit of sect. 19 of the 36 Geo. 3, c. 52, and was therefore chargeable with legacy duty on the amount of the fund, under that section.

The doctrine of equity, that personalty directed to be laid out in land is to be treated as land applies as between the parties, and for the purpose of giving effect to their intention and executing the trusts, but the Crown is not entitled to avail itself of such doctrine for purposes of revenue. The explanation and application of that doctrine by Lord Langdale, M.R., in *Watson v. Swift*, 8 Beav. 368; 14 L. J., N. S., 354, and by Wigram, V.C. in *Custance v. Bradshaw*, 4 Hare 315; 14 L. J., N. S., 358, Ch., commented on and approved.

The Attorney-General v. Brunning, in the House of Lords, 8 H. of L. Cas. 243; 3 L. T. Rep. N. S. 36; 30 L. J. 379, Ex., discussed and distinguished.

This was an appeal from a decision of the Court of Exchequer, setting aside an assessment of succession duty made by the appellants upon the respondent, whereby the respondent was charged with duty at five per cent., and under section 59 of the Crown Suits Act 1865 (28 & 29 Vict. c. 104), the following case has been stated by the parties for the opinion of the Court of Exchequer Chamber.

1. James De Lancey, by his will dated 15th Nov. 1799, gave and bequeathed unto trustees, and to the survivors and survivor of them, his heirs, executors, administrators, and assigns, the capital sum of 1000*l.*, Three per Cent. Consolidated Bank Annuities, and also all such several sum or sums of money which might be due to him at the time of his decease in Exchequer Bills, Navy Bills, India Bonds, or any other public floating securities, upon trust that they his said trustees, and the survivors and survivor of them, his executors, administrators, or assigns, should lay out and invest both principal and interest moneys therefrom arising in the purchase of lands, tenements, and hereditaments situate, lying, and being in that part of Great Britain called England, the same to be of the nature of freehold or copyhold, convenient to be held therewith, and of no other estate or tenure whatsoever, and convey, settle, and assure the said lands, tenements, and hereditaments so to be purchased as aforesaid, or cause and procure the same to be conveyed, settled, and assured, to the uses and subject to the provisos following, that is to say, to the use of his eldest son Charles Stephen De Lancey and his assigns for life, without impeachment of waste, remainder to his said trustees and their heirs, to preserve contingent remainders, remainder to the first and other sons of the said Charles Stephen De Lancey, and the heirs male of his and their body and bodies lawfully to be begotten, successively in tail male, and in default of such issue, to the use of testator's son, James De Lancey, and his assigns for life, without impeachment of waste, remainder to his said trustees and their heirs, to preserve contingent remainders, remainder to the first and other sons of the said James De Lancey, and the heirs male of his and their body and bodies lawfully to be begotten, successively in tail male, and in default of such issue then to his own right heirs for ever.

2. The testator died on the 8th April 1800, without having revoked or altered his will, which was

EX. CH.]

THE COMMISSIONERS OF INLAND REVENUE (apps.) v. DE LANCEY (resp.)

[EX. CH.]

shortly afterwards proved in the Prerogative Court of the Archbishop of Canterbury.

3. The testator left two sons, the elder of whom was Charles Stephen De Lancey, his heir-at-law, and the younger was James De Lancey.

4. The sum of 10,000*l.* Consols and the other securities directed to be laid out in the purchase of real estate (represented by 3047*l.* 8*s.* 1*d.* Consols) were never so laid out.

5. Charles Stephen De Lancey died a bachelor and intestate on the 6th May 1840. The dividends on the two sums of 10,000*l.* and 3047*l.* 8*s.* 1*d.*, representing the real estate fund in the will mentioned, were paid to him during his life.

6. James De Lancey, who survived his elder brother, died a bachelor and intestate, on the 26th May, 1857. The dividends on the real estate fund were paid to him during his life.

7. At the death of James De Lancey (the son), the only surviving lineal descendant of the testator was his daughter Susan De Lancey.

8. Susan De Lancey died on the 7th April 1866, a spinster and intestate.

9. Susan De Lancey did not receive, but on the contrary refused to receive either the dividends or the principal of the real estate fund.

10. Shortly after Susan De Lancey's death, the two sums representing the real estate fund, and also the dividends thereon from the death of James De Lancey the son (including the dividend of July 1857, being the next dividend which accrued after his death), to the death of Susan De Lancey (including the dividend of Jan. 1866, being the last dividend which accrued before her death) were, along with other property derived from the testator, paid into the Court of Chancery, and in certain suits instituted for the purpose of administering the said funds and property the following facts were proved, and were certified by the chief clerk of his Lordship the Master of the Rolls.

11. The heir-at-law of the testator, at the time of his death was Charles Stephen De Lancey, his elder son. The person now such heir-at-law and entitled to any real estate of which the testator might have died intestate was the respondent, who is a grandson of John Peter De Lancey, a brother of the testator. The heir-at-law of Charles Stephen De Lancey at the time of his death was his brother James De Lancey. The heir-at-law of James De Lancey at the time of his death was his sister Susan De Lancey. The heir-at-law of Susan De Lancey at the time of her death was and is the respondent. The person now entitled to any real estate of which Charles Stephen De Lancey, James De Lancey (the son), and Susan De Lancey respectively might have died intestate, and the heir-at-law of them respectively was the respondent. None of the persons who would for the time being have been entitled to any real estate of which the testator had died intestate did, while so entitled, any act with reference to either or any part of the two sums of 10,000*l.* and 3047*l.* 8*s.* 1*d.* Consols, representing the real estate fund by the testator's will directed to be laid out in the purchase of land, which might amount to or have the effect of an election to take such several sums or any part thereof as money or as land, or which might have the effect of constituting such person or persons a new root or new roots of descent with regard to the several sums or any part thereof.

12. It was afterwards ordered by the Court of Chancery that the two sums of 10,000*l.* and 3047*l.* 8*s.* 1*d.* which represented the real estate fund should (subject to duty) be transferred to the respondent, and that the dividends thereon since the death of Susan De Lancey should be paid to him, the dividends thereon from the death of the said James De Lancey the son, up to the death of Susan

De Lancey, being ordered to be paid to her legal personal representative.

13. On the 3rd Aug. 1868, the Commissioners of Inland Revenue made an assessment upon the respondent, whereby he was required to pay succession duty at 5 per cent. on the aggregate sum of 13,047*l.* 8*s.* 1*d.* Consols, together with the dividends thereon, since the death of Susan De Lancey as aforesaid, on the ground of the same being a succession derived by him from Susan De Lancey (the predecessor) of the brother of the father of whom the respondent was a descendant.

14. The respondent being dissatisfied with the assessment, delivered to the Commissioners of Inland Revenue due notice of his intention to appeal to the Court of Exchequer against the assessment, and also delivered the following statement of the grounds of his appeal:—

First, that legacy duty, and not succession duty, was payable by him in respect of the said 13,047*l.* 8*s.* 1*d.* Consols and the said dividends, and that such legacy duty was payable by him at the rate of 2½ per cent. by virtue of the Act 36 Geo. 3, c. 52, as a descendant of a brother of the testator, who died in the year 1800; or, secondly, that if succession duty and not legacy duty was payable by the respondent in respect of the said 13,047*l.* 8*s.* 1*d.* Consols and the said dividends, such succession duty was payable by him at the rate of 3 per cent., and not at the rate of 5 per cent., as upon a succession derived by him from the testator, and not from Susan De Lancey.

15. The Court of Exchequer, on the 2nd July 1869, gave judgment for the respondent, and by an order of that date declared that the assessment made upon the respondent on the 3rd Aug. 1868 by the appellants under the Succession Duty Act 1853, was void, and directed that the costs of the respondent should be paid to him by the appellants.

16. The question for the court is, whether the judgment of the Court of Exchequer is right. If this question be answered in the negative, the court shall give such judgment as ought to have been given by the Court of Exchequer. If this question be answered in the affirmative, the judgment of the Court of Exchequer shall be affirmed.

The Acts of Parliament, and the various sections of them upon which the questions in the case hinged, and which were cited and referred to in the arguments and judgment, are the Legacy Duty Act of 1796 (36 Geo. 3, c. 52), ss. 2, 7, and 19; and the Succession Duty Act 1853 (16 & 17 Vict. c. 51), ss. 2, 18, and 30, and which, so far as they are material to this report, are as follows:

The Legacy Duty Act (36 Geo. 3, c. 52), s. 2, imposed upon every legacy of 20*l.* or more given by any will of any person out of his personal estate; and upon the clear residue of the personal estate of every person dying testate or intestate, of the value of 100*l.*, after payment of debts, &c., whether the title to such residue should accrue by virtue of any testamentary disposition or upon intestacy, the duties therein specified; *e.g.*, where such legacy or residue should leave to a brother or sister of the deceased, or their descendants, a duty of 2*l.* per cent.; to a brother or sister of the father or mother of the deceased and their descendants, 8*l.* per cent.; and so on, specifying different rates of charge for persons in other degrees of relationship to the deceased.

Sect. 7:

That any gift by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such will or testamentary instrument, have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this Act, whether the same shall be given by way of annuity or in any other form, and

whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall take effect as a *donatio mortis causa* shall also be deemed a legacy within the intent and meaning of this Act.

Sect. 19:

That any sum of money, or personal estate directed to be applied in the purchase of real estate shall be charged and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate for so much as shall have been so applied. *Provided, nevertheless, that, in case before the same, or some part thereof, shall be so applied any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase.*

The Succession Duty Act 1853 (16 & 17 Vict. c. 51.) By sect. 2:

Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after an interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every *devolution by law* of any beneficial interest in property, or the income thereof, upon the death of any person dying, &c., &c., to any other person in possession or expectancy, shall be deemed to have conferred, or confer, on the person entitled by reason of any such disposition or devolution, or "succession"; and the term "succession" shall denote the person so entitled; and the term "predecessor" shall denote the settlor, disposer, testator, obligor, ancestor, or other person from whom the interest of the "successor" is or shall be derived.

By sect. 18 (the exemption clause):

No person charged with the duties on legacies and shares of personal estate, under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act, in respect of the same acquisition of the same property.

Sect. 30:

The interest of any succession in personal property, subject to any trusts for the investments thereof in the purchase of real property to which the successor would be absolutely entitled, shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts be chargeable with duty under this Act as personal property; and personal property subject to any trust for the investments thereof in the purchase of real property to which the successor would not be absolutely entitled, shall, so far as the same shall not be chargeable with duty under the Legacy Duty Acts be chargeable with duty under this Act as real property; and for the purposes of this Act each successor's interest therein shall be considered to be of the value of an annuity payable during his life, or for any less period during which he shall be entitled, equal in amount to the annual produce of the actual trust property at the time of his becoming entitled in possession, whether the same shall be the real property directed to be purchased, or any intermediate investment of the personal property directed to be invested in such purchase.

The case is reported below 21 L. T. Rep. N. S. 58; 38 L. J. 193, Ex.; L. Rep. 3 Ex. 345.

Crompton Hutton (with whom were the *Attorney-General*, Sir R. P. Collier, Q. C., and the *Solicitor-General*, Sir J. D. Coleridge, Q. C.) argued the case on the part of the appellants, the Commissioners of Inland Revenue. In the court below, the Lord Chief Baron and Channell, B., held that the petitioner (the respondent) was liable to be assessed to legacy duty, whilst Bramwell and Cleasby, BB., were of opinion that the duty payable by the petitioner was that which the commissioners contended for, viz., succession duty at 5 per cent. The court being thus equally divided, Cleasby, B., the junior baron, withdrew, and judgment passed against the

commissioners, who thereupon brought the present appeal. The important enactments bearing on the case were sects. 7 and 19 of the Legacy Duty Act of 1796 (36 Geo. 3, c. 52) and sect. 30 of the Succession Duty Act 1853 (16 & 17 Vict. c. 51). The first-mentioned Act, which was the Legacy Duty Act in operation at the testator's death in 1799, imposed no duty on devolutions or gifts in the direct line from parent to child; but in subsequent Acts a duty of 1 per cent. on such gifts and devolutions was imposed, and the duty on the same, as between brothers and sisters and their descendants, was raised from 2½ to 3 per cent. The fund here was not a legacy under the will within either sects. 2 or 7 of the Act of Geo. 3, inasmuch as it was not such a gift as could "by virtue of such will have effect (or be satisfied out of the personal estate of such person so dying," &c. (sect. 7). The will was exhausted immediately upon the ultimate remainder first vesting, and the subsequent takers have taken as heirs-at-law. The question before the court arises upon the ultimate limitation "in default of such issue, then to his own right heirs for ever." Being a gift of money, it would not go to the heir *quâ* heir, but to the person who at the testator's death filled that capacity, viz., his eldest son Charles, in whom it instantly vested, subject to be divested on either Charles or James having children capable of taking under the gift of the estate tail. It was then satisfied once and for ever, and had no further effect as part of the will. Charles might have sold or willed this away, subject to its being divested as before mentioned. In the event which happened, it went to James as Charles's heir, and not as heir of the testator; and at James's death it went to Susan in like manner as James's heir. Secondly, there was a conversion "out and out," but for which, on the failure of heirs of Charles and James, it would have become money again. But being directed to be laid out on land, equity, holding what is agreed to be done as done, treats it as land and not as money. By virtue of that equitable spell it continues as land until some one breaks the charm by electing to take it as money. [BOVILL, C. J.—It is not the character of the property, but rather the nature of the title to it, that is altered by the doctrine of the court of equity.] Paragraph 12 of the case shows that equity so regards it, by decreeing the dividends, from James's death to Susan's death, to be paid to her personal representatives, but the whole of the fund and the dividends subsequent to her death to be transferred to the respondent. [BOVILL, C. J.—Is it, in fact, anything more than that the Court of Chancery directs that the money shall be paid to the persons to whom it would have gone had it been laid out in land, according to the equitable rule you have already referred to?] Sect. 19 of the Legacy Duty Act of the 36 Geo. 3, bears out the argument on the part of the Crown. [BOVILL, C. J.—If your proposition be a true one generally, then that section was unnecessary.] That I contend is in the appellants' favour. That section and the proviso apply only to bequests of money to be laid out in land *by virtue of a will*; the words there used, "given" and "bequest" "by virtue of any bequest thereof as such," imply that. [BOVILL, C. J.—The substance and scheme of the Act is that until it is laid out in land it shall, for revenue purposes, be dealt with as personalty. By sect. 2 duties are imposed on personal property passing by will or intestacy; and sect. 19 merely declares what shall be personal estate.] But a duty cannot be imposed on a subject by equitable construction or implication. The respondent is in the position of an heir taking by descent. [M. SMITH, J.—Taking by descent from Susan, who took by descent from James, who took by descent from Charles. Was not sect. 19 intended to prevent

EX. CH.]

THE COMMISSIONERS OF INLAND REVENUE (apps.) v. DE LANCY (resp.)

[EX. CH.]

persons' so taking from escaping duty?] If so, then *quod voluit non dixit*. Had the Legacy Duty Act used language as clear and explicit as sect. 30 of the Succession Duty Act, which enacts that the interest of any successor in personal property, subject to any trusts for investment in the purchase of real property, shall be chargeable with duty as personal property, there would have been no doubt. [BOVILL, C. J.—The language there used was necessary with reference to other sections in that Act; but that is not so with regard to the Legacy Duty Act.] The respondent takes this as Susan's heir, and as land; and the court must recognise the equitable doctrine that for every purpose this is land. If Susan had died in debt, all this estate fund would have been chargeable with her debts; and had she left husband he would have been tenant by the curtesy of the dividends, or, if land, out of the rents. [MELLOR, J.—At the date of this Act land escaped taxation, and the Legislature were doubtless aware that money to be laid out in land escaped it also, as land, and so they determined that, as long as it was money in fact, though deemed for purposes of devolution to be land, it should pay duty as personalty.] Yes, no doubt, so long as it passed under the will. [BRETT, J.—Is not the second part of sect. 19 wrongly called a *proviso*? It is not a limitation, but rather an enlargement of the first part of the section, and should be read rather as "and further." LUSH, J.—Do you admit that if the case is governed by sect. 19, the legacy duty is only 2½ per cent.?] Certainly not. The learned barons, Bramwell and Cleasby, thought 5 per cent. was the duty payable. [He cited *Doe d. Pilkington v. Spratt*, 5 B. & Ad. 731; 3 L. J., N. S., 53, K. B., quoted in 2 Jarm. Wills, p. 77, 3rd edit., where also other cases are collected, showing that the death of the testator or ancestor is the moment or period at which the heir is to be ascertained, and the gift or remainder to him is to vest.]

Sir J. B. Karlake, Q. C. (with him was W. H. Townsend, of the Chancery Bar), *contra*, for the respondent. The case comes strictly within sect. 19 of the Legacy Duty Act of 1796, and succession duty is not payable under sect. 30 of the Succession Duty Act. It is said, on the part of the Crown, that the will was exhausted, and that everything and everybody passed and took by descent. But the will was still in operation, there was a trust still subsisting, and trustees still liable and bound to invest this money if called on by the respondent so to do. But for sect. 19 this money, being personalty, would have paid legacy duty within sects. 2 and 7. The scheme of the Act, as regards legacies, should be considered. [He read sect. 7.] If it were necessary to the argument, it would not be difficult to argue that the trustees here have (the executors assenting) a sum of money handed over to them as part of the personalty for the benefit of the legatees. It cannot be supposed when the Legislature were providing expressly for the payment of duty on personal estate, and when they were well aware of the equitable doctrine which has been referred to, as to equitable conversion exempting such property from duty, that they should have intended that such money land should go on as personalty from generation to generation, and yet escape duty altogether. The argument on the part of the appellants in the court below was that as soon as the fund "came home," or reached a person absolutely entitled to it in specie, the will was exhausted, and that was the view taken by Cleasby, B. But, as the Lord Chief Baron observed, to make that good it was necessary to interpolate words in the 19th section. That section does not say the *first* person, but *any* person who shall "become entitled to an estate of inheri-

tance in possession," &c., shall be chargeable with the same duty, and, as his Lordship said, the plaintiff is such a person, and why, when two persons successively have become entitled to such an estate of inheritance, should "either of the two more than the other be exempted from liability to this duty?" Giving the plain meaning to the words of the section which they naturally import, the argument of the appellant on this part of the case fails utterly. It is solely by virtue of the will still existing that the respondent takes; nothing having been done to alter the nature of the property, it remains a fund impressed under the will with the trust for investment. Upon the 2nd, 7th, and 19th sections of the Act of Geo. 3, the case depends, and the respondent contends that it clearly falls within sect. 19. With regard to the second point, as to the liability to succession duty. [BOVILL, C. J.—We need not trouble you, Sir Jahn, upon that.]

C. Hutton, in reply.—The question is, does sect. 19 of the Legacy Duty Act include land taken by a person as heir? As to sect. 7 of that Act it is impossible to make out, if this really be real property, that this section could attach to it, and sect. 19 clearly does not apply. The Crown, therefore, is entitled to succession duty as assessed by the commissioners.

BOVILL, C. J.—It is not disputed in this case that, if the property in question is not liable to legacy duty, it is liable to succession duty; and equally that if it is liable to legacy duty, it is not liable to succession duty. The question, therefore, really depends upon whether the property was liable to legacy duty, and whether the respondent was liable or not to be assessed to that duty. If he was, then the commissioners having assessed him to succession duty, have assessed him wrongly, and the assessment cannot be supported, and the appeal must be dismissed. The fund in question is a fund still existing as personalty in the hands of the trustees of the testator's will. It was personalty at the time of his death, and it has continued to be personalty from that time to the present; and at the date at which it is contended on the part of the Crown that duty was payable, it was, and at this moment is, personalty in the hands of the trustees of the will, and liable to the trusts therein contained. Under these circumstances, the argument on the part of the Crown has proceeded upon the ground that by reason of the provisions of the will, and the still existing trusts which required the fund to be laid out in land, it is by an equitable construction to be treated as land for all purposes, including the liability to succession duty, which duty it is contended by the Crown will attach to it as land, though it should not be liable to legacy duty. Now it seems to me that the argument with regard to property of this kind, which is directed to be laid out in land, being treated as land, has been pressed far beyond its legitimate and proper limits. It has been said that the Court of Chancery treats personalty which is directed to be laid out in land as land for all purposes; and in one sense that is true. But the language which is thus employed is simply figurative and metaphorical. That was explained very clearly by Lord Langdale, M.R., in the case of *Matson v. Swift*, 8 Beav. 368; 14 L. J., N. S., 354, Ch., which was before him in 1845. It is a case which is the more important on the present occasion, because it arose upon the question whether or not probate duty was payable upon moneys arising from the sale of estates, which had been conveyed by the owner to trustees upon trust for sale, to pay off certain incumbrances upon them, and to pay the residue of such moneys to the owner, his executors, administrators, and assigns, "without any claim or equity

EX. CH.]

THE COMMISSIONERS OF INLAND REVENUE (apps.) v. DE LANCEY (resp.)

[EX. CH.]

thereon in favour of his heir or real representatives, notwithstanding that the trust estates should remain unconverted at his death." That case was rather the converse of the present case, because the property there existed as land at the owner's death, no part of it having, at that time, been sold; and the Crown claimed probate duty on the purchase-moneys arising from the subsequent sale of the estates, upon the ground that by the operation of the trust deed, and the established doctrine of equity, the real estates conveyed by such deed were converted out and out into personal estate, and ought to be treated as such for all purposes; and that, if the attributes of personalty for some purposes were given to real estate, there was no sufficient reason for not making it subject to *all the* incidents of personal estate, and, among others, to the liability to probate duty. Now Lord Langdale, in his judgment in that case, very clearly explained the principle upon which the Court of Chancery acts in matters of that kind. It was argued there, on the same principle as it has been argued here to-day, that the estates directed to be sold had been converted "*out and out*" into personal estate, and therefore were subject to, amongst other incidents of personalty, the liability to probate duty; but Lord Langdale explained that where property, which is either real or personal, is directed to be converted, or where there is a contract which would change its nature, that may have the effect of inducing the court to apply to the property, in whatever state it may be found, the rules of distribution which are commonly applicable to its converted condition, and his Lordship said: "In the cases where this is done, the owner is, in figurative or metaphorical language, said to have impressed upon his real estate the character of personalty, or to have converted, out and out, the realty into personalty. This language is used, and the court has occasion to apply the rules of distribution, in the manner I have noticed, only in cases where there has been no actual conversion by the owner; and it is important to observe that such application of these rules of distribution is and can be effected only by executing the trusts, expressed or implied, which the court enforces against all persons having any legal estate interfering with the apparent intention of the owner of the property, or opposed to the rights which he meant to confer." Lord Langdale then proceeded to say that "what is meant is, that, for purposes plainly contemplated by the owner, or for purposes necessary to the accomplishment of his apparent intention, and to give effect to the rights which he, expressly or by implication, meant to confer, the court will declare, or at least will impute, trusts, and under the execution of such trusts will distribute the property as if it were personalty." And in a later part of his judgment in the same case, his Lordship said: "In cases of this sort an ambiguity may have arisen from the figurative or metaphorical language in which the equitable doctrine is expressed." That being the doctrine of the Court of Chancery, and which applies in the enforcement of trusts, expressed or implied, the court was there asked by the Crown to apply that doctrine for the payment of Probate duty in the particular case. But Lord Langdale said: "We may reasonably ask the question whether, after a conveyance of land in trust to sell, or after valid contracts for the sale of land, and the death of the legal owners, the Crown can be entitled, for its own purposes only, to enforce the equities between the parties? If the parties should release each other, could the Crown, for purposes merely fiscal, not in the contemplation of any party, and not required to fulfil the intention of any party, be entitled to the benefit of trusts which are declared or acted upon only for the purpose of giving effect

to the intention of the parties?" The court, in that case, was of opinion that the probate duty was not payable upon the purchase-money—that it was subject to trusts in equity, which would be enforced as if it were personalty, but that the Crown was not entitled to the benefit of any such doctrine for the purposes of revenue. That case having been so decided in Chancery, the question came some years afterwards, before the Court of Exchequer in the case of *The Attorney-General v. Brunning*, 4 H. & N. 94, and 28 L. J. 125 Ex., which was a case in which a question arose as to the effect of a contract by a deceased individual to sell certain land, and in which an attempt was made to enforce the Crown's claim for probate duty upon the amount of the purchase money. In giving their judgment the Court of Exchequer concurred with the view stated by Lord Langdale as to the conversion, that the Crown could not treat the property as personalty or claim probate duty in respect of the purchase money; no doubt that decision was afterwards reversed by the House of Lords on appeal: (See 8 H. L. Cas. 243; 3 L.T. Rep. N. S. 36; 30 L. J. 379, Ex.), but the observations and opinions expressed by the learned lords in reversing the decision of the Court of Exchequer do not at all interfere with the explanation and view of the doctrine of the equitable conversion as stated by Lord Langdale, in *Matson v. Swift*, and approved of by the Court of Exchequer in *The Attorney-General v. Brunning*, for which view and doctrine alone I have cited the case in question. The ground upon which the decision in the case of *The Attorney-General v. Brunning* was overruled in the House of Lords, was, that the money had been actually received after the death of the testator, and that it could only have been received as personal property, and that, therefore, probate duty attached. I find that, in the course of the judgment in that case, Lord Cranworth says, "the cases relied on, before Lord Langdale and Sir James Wigram, are clearly distinguishable from the present case. In *Matson v. Swift*, before Lord Langdale, the estate remained real estate at the death of the testator, and was only convertible into personalty by virtue of his direction; a direction it is true, declared, not by his will, but by a previous deed, but which he might have revoked or varied by his will, if he had thought fit, and the conversion into personalty, therefore, may truly be treated as having depended on his will. In *Custance v. Bradshaw* 4 Hare 315; 14 L. J., N. S., 358, Ch., Sir James Wigram proceeded on the same ground, namely, that at the death of the testator, the property in question was real estate, and that, if it was ever to lose that quality, it would be by some act to be done after the testator's death, and which might never become necessary." These cases, both in the court below and in the House of Lords, are authorities for showing that Mr. Crompton Hutton, in his argument, has carried to too great a length the doctrine of the Court of Chancery as to treating personalty which is directed to be laid out upon land as land. The principle, and its proper application and limitation, are so clearly stated by Lord Langdale that I cannot suppose that any court would interfere with it. Now the distinction is made by Lord Cranworth in the case before the House of Lords that in the particular circumstances the property remained as it was at the death of the testator. That observation applies exactly to the case which is now before us; because here this personalty never has been converted into realty; it was personalty at the death of the testator, it has ever since remained, and is at this moment, personalty in the hands of the trustees, and clothed with a trust for investment in land. The whole argument on the part of the Crown rests upon the foundation of its still remaining personalty clothed with such a trust, and therefore the Crown contends that it must be

Ex. Ch.]

THE JOHN BELLAMY.

[ADM.]

treated as land. Then comes the question, whether the Legacy Duty Act has imposed upon that personalty any liability to duty? If the 19th section of the 36 Geo. 3 had not been enacted, it would have been very difficult for this personal property to have escaped the duty imposed by that Act. The duty is imposed not only upon legacies, but upon property passing upon intestacy; and whether it passed by a bequest or by intestacy if it was personalty it was equally chargeable with legacy duty by the 2nd section of the Act. When we come to deal with the 19th section, we find the first part of it very general in its terms. Its whole scope and object seem to be to define what shall be deemed personal property so as to be brought within sect. 2 which imposes the duty. It says in express terms that "any sum of money or personal estate directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate." It may well be that it was thought right to introduce this clause in order to prevent the application of this doctrine of the Court of Chancery to the exemption from legacy duty of property of this nature. But it is said that the trusts of the will were satisfied at the time when the respondent came into possession of this property. How can that be when the trustees still hold the property by virtue of the will, and upon the trusts which it contains? And, in reality, the Court of Chancery was asked to deal with this property, and to decide the rights of the parties, upon the ground, first, that this fund *did* remain in the hands of trustees, and that it so remained clothed with these trusts, and was, at the time when the aid of the Court of Chancery was sought, money in the hands of the trustees directed to be laid out in land. Then, with regard to the succeeding portion of the 19th section, which, undoubtedly down to the "proviso," seems to refer to different persons in succession taking the money directed to be laid out in land, that would properly apply to Charles De Lancey, James De Lancey, and Susan De Lancey. Then comes the last portion of the section, which, although it is introduced by way of "proviso," yet, in reality, is no limitation, but, on the contrary, appears rather to enlarge the preceding provisions of the section; at least, to the extent of showing what was the intention of the language in the earlier part of it. It provides that "in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase." Now, at the time when the present respondent became entitled to this fund, he would, if the property had been laid out in the purchase of real estate, "have been entitled to an estate of inheritance in possession" in that real estate, and therefore he is chargeable with duty thereon under that section, "as if he had become entitled thereto as personal estate by virtue of a bequest thereof as such." The case comes therefore within the very words as well as the spirit of this section of the Legacy Duty Act. An attempt was made by Mr. Crompton Hutton, in argument, to establish that, because in the latter part of this proviso the words, "by virtue of any bequest" occur, therefore the operation and effect of the section were to be limited to the cases of property derived or passing under a gift in a will, and that the section did not extend to the case of property passing by descent. But it

is clear that these words are part of a sentence having a totally different meaning, and having no application to the earlier portion of the section. They are a part of and must be read in connection with the words immediately preceding them, where it is said that the person "becoming entitled to an estate of inheritance in possession in the real estate to be purchased," shall pay "the same duty which ought to be paid by such person if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such." This being the view which I entertain of the 19th section, and also of the application of the Act of 36 Geo. 3 generally, I am of opinion that this assessment of the respondent to succession duty was wrong, and that the present appeal must be dismissed.

MELLOR, J.—I am entirely of the same opinion. I have looked with attention at the case in the House of Lords, to which my Lord has referred, and I find that the judgment there carefully abstains from interfering with the view of the doctrine of equitable conversion, in cases of money directed to be laid out in land, which was taken and laid down by Lord Langdale and Sir James Wigram, in the cases before them which have been referred to. The decision of the House of Lords is put upon a ground which is quite intelligible, and shows the error into which the Court of Exchequer had fallen. It certainly does not at all touch the present case, or the ground on which the Lord Chief Justice cited the cases in equity, or the general principle on which we decide the present case.

M. SMITH, LUSH, HANNEN, and BRETT, JJ. concurred.

Judgment for the respondent, affirming the decision of the court below.

Attorney for the appellants, the Solicitor of Inland Revenue, Somerset House, W.C.

Attorneys for the respondent, Townsend, Lee, and Houseman, 3, Princes-street, Westminster, S.W.

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister at-Law

March 15 and 29.

THE JOHN BELLAMY.

Damage—Evidence—Suit by underwriters on cargo.

A vessel was held solely to blame in certain causes of damage. Plaintiffs in the cause were underwriters on the cargo who had paid for a total loss to the shippers, and who produced in support of their claim the policies of insurance, the bills of lading, the invoice, and a copy of the manifest.

Held, this evidence was insufficient, that the defendant was entitled to require evidence of a discharge from the original owners before the underwriters could enter upon the question of the amount of compensation for which he was liable.

Quære, whether the insurance of goods is within the ordinary scope of the agency of the shipper for the owner.

The ship *John Bellamy* was pronounced solely to blame in certain causes of damage instituted against her in this court, and was condemned in damages and costs, the usual reference being made to the registrar, assisted by merchants. It appeared that one of these causes had been instituted "on behalf of Richard Rhod Swan and others, owners of cargo now or lately laden on board the brigantine or vessel *Eureka*." But these plaintiffs turned out to be, not the owners of the cargo at the time of shipping it, but underwriters upon the cargo who had for a total loss upon it previously to the insti-

ADM.]

Ex parte BETTS; Re FIGULS.

[BANK.]

tution of the suit. They produced the policies of insurance, which had been given up to them, and the bills of lading, and also the invoice, and a copy of the manifest, though these latter documents were not filed in court. Some questions of law arising upon these facts were referred to the court from the registrar, in a special case, in which the respective contentions of the litigants were thus stated:—"The defendants contend that "the plaintiffs should prove who were the true owners, and to whom, and on what account, the insurance moneys were paid, and should procure a discharge from the original owners of the cargo, viz., from those persons on whose behalf the same was shipped, before the registrar reports that the respective amounts allowed in respect of the cargo are due to the plaintiffs; and they further contend that, until this is done, they are unable to investigate and settle the proper value of the cargo sought to be charged as against the ship." The plaintiffs contend that "they are, by operation of law—having paid a total loss, and the cargo having been abandoned to them—and also as holders of the bills of lading of the cargo, the absolute owners thereof, and, as such, the only proper persons to give a discharge; and that they cannot be compelled to discover the true owners of the cargo at the time of shipment otherwise than as appears by the bills of lading, nor to show that the insurance moneys were paid to them, or on their account, further than is shown by the delivery up of the policies and bills of lading, and that the plaintiffs are not bound to obtain their discharge."

Dr. Deane, Q.C. and Clarkson for plaintiffs.

Butt, Q.C. and Cohen for defendants.

The case of *Dickenson v. Jardine*, L. Rep. 3 C. P. 639; 37 L. J. 321, C. P.; 18 L. T. Rep. N. S. 717, was referred to on the part of defendants. The arguments are stated in the following judgment.

March 29.--Sir R. J. PHILLIMORE.—That the underwriters must sue in the name of the owner in this court is a position admitted by the counsel on both sides. It is an equally incontrovertible position that where, as in this case, an abandonment by the shippers to the underwriters is proved, all that the shippers can give is passed to the underwriters. The question is, have the shippers given such a title to the underwriters as enables them to claim from the defendant the damages and costs due to the owners of cargo on board the *Eureka*; or, in other words, have the shippers proved that they were, or that they represent, the owners of the cargo, who are to be indemnified by the party condemned in these damages. The defendants, the *obligati ex delicto*, have certainly a right to be secured against the liability of a future demand from the possessors of a better title than that which has been furnished by the shippers to the underwriters. The defendants contend that they would not have this security if they paid the compensation awarded to the underwriters on the present evidence, and that they are entitled to insist on the production of a discharge from the original owners, which the underwriters cannot or will not obtain from the shippers. The underwriters maintain that they have produced all the requisite evidence; they rely on the fact of the shipment of these goods by the shippers, proved by the bills of lading, on the fact of the insurance of these goods by the shippers proved by the return of the policies, and receipt for the money paid upon the insurances, and upon the proposition of law, that the shipper is the agent of the owner so as to bind him in this matter, and to secure the defendant against any future demand from him. I have to consider whether this evidence of title to the property be adequate, and such as the defendant must

accept. First, as to the bill of lading. This instrument is not *per se* incontrovertible evidence that the property specified in it has passed to the holders. A bill of lading is a contract of carriage, disclosing the names of shipper and consignee only, and does not prove that the shipper is the owner. These bills are usually drawn out in triplicate; in the present instance I observe that the bill of lading has these words—"In witness whereof the master or purser of the ship has affirmed to four bills of lading, all of this tenour and date, the one of which bills being accomplished, the other three to stand void." It may be that one of those bills of lading has been delivered at an earlier date to some person other than the underwriter, which other person would, on the ground of his earlier possession of the bill of lading, have a prior title to the goods—(*Barber and others v. Myerstein*, House of Lords, Feb. 22, 1870; *Concurrier and others v. Hartie and others*, 5 House of Lords' Rep. 673.) With respect to the fact of insuring, the insured may have insured as agent, or have had an insurable interest of his own in the goods, distinguishable from property in them. With respect to the receipt of the money paid on the insurance, the insurer is only concerned in ascertaining that the money is paid to the person who insured, who is not necessarily the owner of the goods. With respect to the contention that the shipper is the agent of the owner, and would bind him by his act in the matter, and therefore secure the defendant from future liability, no authority has been cited which satisfies me that this proposition of law is sound. The shipper is the agent of the owner to put the goods on board; but I am not satisfied that the insurance of the goods is within the ordinary scope of his agency, and no special circumstance is suggested in the case before me. It has also been contended by the counsel for defendant that he is entitled to the best evidence as to the value of the goods on which he is to pay. The underwriters, of course, do not know the value of the goods, and the invoice does not necessarily, furnish it. The real value may be, and often is, from various causes, not represented in the invoice; and it is urged that, if the owners were disclosed the defendant would have a means of ascertaining the true value, of which he is now deprived, and that the underwriters ought not to be allowed to stand in a more favourable position than the owner whom he represents. After some consideration, I am of opinion that the defendant is entitled to require evidence of a discharge from the original owners before the underwriter can enter upon the investigation of the amount of compensation for which he is liable. I do not mean, however, to decide that sufficient evidence of the value of the goods may not be obtained without a personal examination of the owners, and incurring the expense which such an examination, in the case of foreign owners, must entail. No order as to costs.

Solicitors for plaintiffs, *Lowless and Nelson*;
Solicitors for defendants, *Westall and Roberts*.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

Friday, March 18.

(Before the CHIEF JUDGE.)

Ex parte BETTS; Re FIGULS.

Absconding debtor—Receiver—Mortgagee—Injunction.

The court will, upon the motion of the receiver under a petition for adjudication, restrain an action of ejectment brought against him since the presentation of the petition with the view of saving expense to the estate.

BANK.]

Re LAWRENCE.

[BANK.]

Under certain circumstances the court will deal with claims between a legal mortgagee and the receiver; as where the debtor, having mortgaged all his property, absconded with the money, the court ordered the property to be sold, and after payment of the principal, interest, and costs due to the mortgagee, and the costs of sale, the residue of the purchase-money to be paid into court.

The debtor carried on business as a Spanish and general foreign warehouseman in London, and in the commencement of the present year, being in want of money, he applied to a Mr. Baughan to make him an advance, which he agreed to do upon being properly secured, and accordingly on the 19th Feb. Mr. Baughan advanced to the debtor the sum of 150*l.*, taking as security a mortgage of the lease of his premises in Baker-street, Portman-square, and a bill of sale over his furniture and effects then upon the premises. Both deeds were dated the 19th Feb. 1870, the day the money was advanced. Upon the same day the debtor went to the Bank of England and changed the notes, which he received from Mr. Baughan, into cash, and absconded with the money. He subsequently wrote from Madrid to his principal creditor, a Mr. Betts, to whom he sent the key of his premises, with an intimation that he might at once take possession of the same. Mr. Betts did so, and immediately filed a petition for adjudication of bankruptcy against the debtor, and was appointed the receiver under such petition. Mr. Baughan then commenced an action of ejectment against Mr. Betts, the receiver, under his mortgage security. The bill of sale was not registered until after the presentation of the petition for adjudication.

R. Griffiths now moved on behalf of Mr. Betts, to restrain Mr. Baughan from further prosecuting his action of ejectment.

Reed appeared for Mr. Baughan.

The CHIEF JUDGE expressed his entire satisfaction with the *bona fides* of the transaction between Mr. Baughan and the debtor, and made an order that the receiver, with the concurrence of the mortgagee, should be empowered to sell the house, furniture, fixtures, stock, &c., and after payment of Mr. Baughan's claim of 150*l.* and costs, and the expenses incurred in the sale, to pay the balance of the purchase-money into court.

Order accordingly.

Solicitors: *Lowther and Mullins; Maynard.*

Tuesday, March 22.

(Before the CHIEF JUDGE.)

Re LAWRENCE.

Public examination of bankrupt—Duties of trustees.

It is the duty of the trustee prior to the public examination of the bankrupt to examine into the accounts, and require the production of his books and all such information as may be necessary for the explanation of the bankrupt's affairs.

Public examination. The bankrupt who was a jeweller carrying on business in Pimlico and Putney, came up to pass his public examination pursuant to the 19th section of the Bankruptcy Act 1869.

Reed appeared for the trustee, and asked that the bankrupt might be ordered to file additional accounts, that is to say, a cash account for twelve months prior to his bankruptcy, and a stock account. The adjudication had been made upon the petition of the bankrupt's father, who claimed to be a creditor for 1000*l.*, the act of bankruptcy being a

declaration of insolvency. Another relative, his mother-in-law, was returned as a creditor for 516*l.*; and a brother-in-law, and former partner, for 300*l.* The bankrupt had two places of business, and the creditors wished to know how the stock had been disposed of. [The CHIEF JUDGE.—Who is the trustee?] Mr. Stevens, a gentleman in the same trade as the bankrupt. The bankrupt's books were handed over to him, but they were in such a loose and imperfect condition as to be quite unintelligible. [The CHIEF JUDGE.—We must guard against the practice which prevailed under the old system of only asking for additional accounts when the bankrupt came up to pass his last examination, and which led to needless expense and difficulty. I take it that it is the duty of the trustee to call upon the bankrupt for all the explanation he requires, so that, when the bankrupt comes up for his examination, it may not be a mere form, but the trustee may be prepared either to approve or disapprove the accounts. This does not seem to have been done here.]

Griffiths appeared for the bankrupt.—The accounts were in the form prescribed by the rules and orders. [The CHIEF JUDGE.—A bare compliance with those forms is not sufficient; the bankrupt is bound to give all the information required by the 19th section of the Act. This is a mere skeleton account; but it seems that the trustee has not exercised the power he possesses of requiring further accounts.]

Mr. Stevens stated that he had required a twelve-months' account, but that his solicitor had told him it was unnecessary.

The CHIEF JUDGE.—One main object of the Act of 1869 was to place in the hands of creditors, represented by their trustee, all the powers that can properly be exercised with regard to accounts before the bankrupt passes his examination. It is the duty of the trustee in such a case to send for the bankrupt, desire the production of his books, and require him to explain whatever is obscure, or to make up the books if necessary, so that when he comes up for his examination the trustee may be able to state whether or not his doubts and scruples have been satisfied. If anything then remain to be explained it will be the subject of a special order by the court. We should commit great mischief if we were to go back to the old system. The trustee representing the creditors has all the power which the court had formerly. He may require accounts, and if the bankrupt do not furnish them, the court may properly be applied to. There can be no difficulty in the working of this part of the Act if it be properly attended to, and there will be an end of the expense which was formerly incurred by a bankrupt furnishing accounts in the dark without knowing what was required of him, thus leading to protracted examinations, and wasting the money of creditors in a way which could not be justified. It is my bounden duty to prevent trustees from wasting estates. Formerly the court was obliged to listen to the demand of assignees for additional accounts without any perfect knowledge whether the application was a reasonable one or not. Now when a man is adjudicated a bankrupt, he is bound to give to the trustee the fullest information he may require. He cannot do this till the trustee requires it; but the trustee can summon him at any time, and ask for information as to the state of his affairs. All that ought to be done, and was intended to be done, before the last examination comes on. If the information be not satisfactory, then there arises a question for the court between the trustee and the bankrupt. But it is a mistake to suppose that the trustee is to remain supine, and throw upon the bankrupt the peril of placing before the court such accounts as he thinks fit. This case must go back, and be

BANK.] *Re* ROBINSON.—*Ex parte* M. G.; *Re* A PETITION FOR ARRANGEMENT—SMITH *v.* ATKINS. [PROB.

made complete in the way suggested, the particulars of the securities and the time when they were given being stated. The trustee must satisfy himself of the truth of the bankrupt's statements either by the books or otherwise. Therefore, without making any explicit order as to additional accounts, I will adjourn this sitting, giving the bankrupt leave to amend his accounts; and I expect the trustee to assist him by pointing out what information he requires. I have no doubt that this part of the Act will work well if it be properly administered. The trustee represents the creditors; all their interests are under his protection just the same as his own are. It is his duty to require from the bankrupt an explanation of all he wishes to know about his affairs. If his books are imperfect they must be made as perfect as possible. The trustee must be satisfied that the account is a true one, or he must come to the court and state what is not correct.

Adjourned accordingly.

Solicitors: *Harcourt and McArthur; Lewis and Sons.*

Thursday, March 24.

(Before the CHIEF JUDGE.)

Re ROBINSON.

Injunction—Receiver must be appointed.

Before the court will grant an injunction in any matter a receiver must be appointed.

Doria applied on behalf of the debtor, who had presented a petition for arrangement under the 125th section of the Bankruptcy Act 1869 for an injunction to restrain the sheriff from parting with moneys in his hands, the proceeds of a sale under an execution levied upon the goods of the debtor until after the first meeting. The facts were set out in the affidavit filed in support of the application. [The CHIEF JUDGE.—Has a receiver been appointed?] No; it is not considered necessary under the circumstances that a receiver should be appointed, the money being in the hands of the sheriff.

The CHIEF JUDGE.—I cannot grant an injunction until a receiver has been appointed. In every case a receiver must be appointed before the court will grant an injunction. So soon as a receiver is appointed you may have your order. Let the application stand over.

Solicitor, *Cooke.*

Friday, March 25.

(Before the CHIEF JUDGE.)

Ex parte M. G.; *Re* A PETITION FOR ARRANGEMENT.

Injunction—Affidavit in support of should state nature of debts.

Where an injunction is sought to restrain proceedings in actions brought against the debtor who has presented a petition for arrangement, the nature of the debts in the actions sought to be restrained must be set out in the affidavit filed in support of the application.

This was an application for an injunction to restrain the further prosecution of certain actions brought against the debtor, who had filed a petition for liquidation by arrangement, under the 125th sect. of the Bankruptcy Act 1869. In the affidavit filed in support of the motion it was stated generally that several actions had been brought against the debtor by creditors, naming them, for different amounts, and that such actions were then pending; but the nature of the debts for which the actions were brought was omitted to be stated.

Gover (solicitor) appeared in support of the motion.

The CHIEF JUDGE expressed his opinion that the affidavit was insufficient, and refused the injunction. The affidavit should state the precise nature of the debts over which it was proposed that the injunction should extend.

Injunction refused

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Jan. 27 and Feb. 1.

SMITH *v.* ATKINS.

Testamentary suit—Probate—Rule for new trial discharged—Appeal—Probate Act, sect. 35.

The plaintiff appealed from a decree granting probate of a will, but excluding from it the residuary clause in which she was appointed residuary legatee. A rule for new trial was obtained, which was discharged after argument, and the plaintiff applied for leave to appeal against this.

The court refused leave on the ground that the discharge of the rule, being an interlocutory order, was included in the appeal against the final decree.

The plaintiff as executrix propounded the will of Miss Atkins deceased, which, after bequeathing a few inconsiderable legacies, constituted her sole residuary legatee. The defendant, one of the next of kin, opposed the will and pleaded undue execution, incapacity, undue influence, fraud, and that the deceased did not know and approve of the contents of the will. At the trial the defendant obtained leave to amend her pleas, by pleading that the residuary clause only was obtained by undue influence. The case was tried before Lord Penzance and a special jury, and the jury found that the residuary clause was obtained by undue influence of the plaintiff. Whereupon the court decreed probate of the will, and excluded the residuary clause from probate.

A rule for a new trial was obtained, which was argued before Lord Penzance, sitting with Channell, B. and Hannen, J., and discharged.

The plaintiff appealed to the House of Lords against the decree, and now asked leave to appeal against the discharge of the rule for a new trial. The other circumstances of the case will be found stated with sufficient fulness in the judgment.

The Solicitor-General, Dr. Spinks, Q. C., C. Russell, Searle, and Barclay, for the plaintiff.

Ballantine, Serjt., H. James, Q. C., and Dr. Tristram for the defendant.

Cur. adv. vult.

Feb. 1.—Lord PENZANCE.—In this case an application was made to appeal against a rule for a new trial discharged by the court. I think that leave ought not to be given, for the simple reason that I find on looking at the section of the Act that if parties have any such right of appeal against the discharge of a rule, it exists, under the terms of the Act as soon as the parties appeal against the final order of the court, and there is nothing now to prevent the court making its decree final. This is the section: "Any person feeling himself aggrieved by any final or interlocutory decree or order of the Court of Probate may appeal therefrom to the House of Lords; provided always that no appeal from any interlocutory order of the Court of Probate shall be made without leave of the court first obtained, but on the hearing of an appeal from any final decree, all interlocutory orders complained of shall be con-

PROB.]

HILLSTROM v. GIBSON AND CLARK.

[SCOTLAND.]

sidered as under appeal, as well as the final decree.' Now, on looking at the registrar's minutes of what took place at the trial, I find that there was this order entered. "Whereupon the judge, on the application of counsel for the defendants by the final decree pronounced for the force and validity of the last will and testament, excepting the residuary clause of the said Eleanor Jane Atkins, the deceased in this cause, being the script bearing date July 30, 1868, now remaining in the registry of this court, and propounded in this court on behalf of the plaintiff, the sole executrix therein named. And on the further application of counsel for the defendants, we now condemn the said Emma Smith in the costs incurred or to be incurred in this cause on behalf of the defendants. And the judge directed that the said residuary clause be excluded from the probate, and further that the said probate be not delivered out of the registry before July the 14th inst." So that what the court did apparently was to pronounce for the force and validity of the will. But in order to enable the plaintiff to move the court for a new trial, it declared further that the probate should not be delivered out of the registry, that the parties might go on getting the papers in order in the registry. It could not possibly be granted until after July 13th, and on July 13th an application was made to extend the time granted. Then came the rule and then the argument before the court, and finally the discharge of the rule. All that remains now for the court to do is to remove that restriction that probate may not be delivered out. So that to-day the court orders that restriction to be removed, and that the plaintiff be at liberty, if she be so disposed, to take out probate. And if she does not so take it out within a fortnight, the defendants may be at liberty to apply to the court. Of course it is possible that she may not desire to take out probate, and it might be contended that if she did she would in some way be hampered in her appeal, which the court does not desire should take place. But at the same time, if she does not take probate the defendants ought to be entitled to go on in order to get the estate administered. However, I will not anticipate what may be said on that, but I will merely say that if she does not take out probate within a fortnight, the defendants will be at liberty to apply to the court. With regard to costs, I see, on looking at the shorthand-writers' notes, that at the time of the trial an application was made to condemn the plaintiff in costs, and the court acceded to that application. No suggestion was made as to the plaintiff being entitled to any costs as executrix for proving the will. Now, if she proves the will—quite independently of any costs she might have personally to pay to the other side by reason of the order of this court—she would be entitled by the ordinary practice to take her own costs out of the estate for proving the will in solemn form. And that there may be no difficulty upon that I should make it part of this order that on taking probate the plaintiff be at liberty to take out of the estate her costs of proving the will in solemn form. She will be placed in the same position as she would have been then.

Dr. Spinks.—As your Lordship has mentioned it, will you allow me to call attention to one point, namely, this, that all costs were incurred before the issue was put on the record on which the other side succeeded. The whole costs were incurred by the pleas against the will of incapacity, undue influence, and fraud; and it was not until all these costs had been incurred, and all the counsel in court, and all the briefs delivered, and all the witnesses in court, that the other side amended their pleas and put that plea on the record, which if it had been on the

record originally, *non constat* there would have been no costs at all incurred. I mean that the whole of the costs were incurred by the plaintiff, as executrix, by the default of the other side in not putting the plea on the record on which they succeeded.

Lord PENZANCE.—The defendant pleaded originally that the whole will was obtained by undue influence, and then when the case came for trial, she intimated her desire to plead something less, that only the residuary clause was so obtained, that not the whole, but only a part, of the will was obtained by undue influence. If the plaintiff had been put to any additional costs by reason of the issues being thus narrowed, undoubtedly she ought to have these costs; but I cannot see how that can be. The plea upon which, as thus narrowed, the defendant ultimately succeeded, involved the whole history of the case, and the whole evidence which was necessary after the plea was thus narrowed, would have been necessary under any view of the case. If it can be shown in any form by way of detail that any such additional costs were so incurred, there is no objection to an application being made to the court that such costs should be allowed out of the estate. But in my present view of the case I cannot see that any such costs were incurred. If there were, the plaintiff ought certainly not to suffer by it.

Solicitor for plaintiff, *Mossop*.

Solicitor for defendant, *Rhodes*.

COURT OF SESSION, SCOTLAND—FIRST DIVISION.

Wednesday, Feb. 2.

HILLSTROM v. GIBSON AND CLARK.

Charter-party—"So near thereunto as she may safely get"—Custom of port.

By charter-party it was provided that a vessel should "proceed to a safe port, or as near thereunto as she may safely get, and lay afloat at all times of tide." The master was directed to go to Glasgow, but on arriving at the Tail of the Bank, off Greenock, it was found that the vessel drew more water than she could get in Glasgow harbour at all times of the tide. The reference to the custom of the port was deleted in the charter-party:

Held, reversing the decision of the court below (diss. Lord Deas), that the master was bound to allow the consignees to lighten the vessel at the Tail of the Bank, this being reasonable and customary.

This case will be found reported in the court below in 21 L. T. Rep. N. S. 302, where all the facts are stated.

Millar, Q. C. and Campbell appeared for the appellants.

Shand and Orphoot for the respondents.

The following were the judgments delivered.

Lord PRESIDENT.—The vessel arrived at the Tail of the Bank on the 25th Nov., and the question then arose—Was the master bound to carry the vessel farther, or might he remain at the Tail of the Bank and deliver the cargo there, although there was no quay suitable for the purpose there? The answer to this question depends upon the construction to be put upon the charter-party. The charter-party is of the ordinary kind; but there is one peculiarity in it arising from the deletion of the words "according to the custom of the port." It is admitted if the vessel had gone to Glasgow with a full cargo on board that she could not have

SCOTLAND.]

HILLSTROM v. GIBSON AND CLARK.

[SCOTLAND.]

lain in safety at low water. Her draught of water was 17ft. 9in. at the Tail of the Bank; but at Glasgow, the water being fresh, she would have drawn 18ft. 1in. And as at Glasgow she could only have got about 16ft. of water at low tide, it is certain that laden as she was she could not with safety have come up to Glasgow. Now it is shown that the general custom in such cases is to lighten the vessel sufficiently to allow of her coming up to Glasgow. The words "according to the custom of the port," however, were deleted from the charter-party. If they had not been deleted the pursuer would have been bound to have allowed his vessel to be lightened, and then to have gone on to Glasgow. But, as it is, we must hold that the master was not bound by any custom of the port of Glasgow. He therefore refused to go up to Glasgow, or to have the vessel lightened at the Tail of the Bank. He said, if his vessel was lightened of part of the cargo there, it was giving him two ports of discharge. Now at the Tail of the Bank, where the ship was lying, there is no quay or accommodation for unloading. Large vessels lie at anchor there, and the cargoes of some vessels are unloaded there in the way the master of the *Frey* wished. But these cargoes are shipped into smaller vessels, which go by the Union Canal to Grangemouth. Now the Tail of the Bank is not a natural place for a ship to discharge her cargo. With a sudden gale arising there would be great risk of disaster to the ship and cargo. There is therefore nothing in the way of custom and propriety to be said in favour of the *Frey* delivering her cargo at the Tail of the Bank. I am not aware of any rule of law settling this case; and no case has been cited ruling the one before us. The solution of the question, therefore, is simply what is reasonable under the circumstances. It is the ordinary construction of a charter-party, a point of no difficulty. The contention of the master—that putting out some of the cargo at Greenock was giving the vessel two ports of discharge—is not worth much consideration. What took place was only unloading or lightening the vessel to the extent of one-fifth. Now custom is excluded. But if we see that it is customary to unload in part at the Tail of the Bank, we cannot exclude it from our consideration. I therefore think that it was reasonable that the shippers should have been allowed, at their own expense, to unload in part, in order that the vessel might be able to get up to Glasgow.

Lord DEAS.—This a case of novelty and difficulty; and I am disposed to come to a different conclusion from what your Lordship has arrived at. I do not see how we can come to a different conclusion from the words of the charter-party. The words are—"shall therewith proceed to a safe port, or as near thereunto as she may safely get, and lay afloat at all times of tide, and deliver the same, and so end the voyage." It is not immaterial that the words "according to the custom of the port" are struck out; and we must assume that it was purposely done. It was not unreasonable that a foreign master going to what might be a port he knew nothing about should insist on their being struck out. It is admitted when he came to the Tail of the Bank he had come as near to Glasgow as where he could lie afloat safely at all times of the tide. And it is plain he was not bound to go up in respect that it was shown to be the custom of the port to lighten vessels of part of their cargo there. But the result of your Lordship's judgment is to hold the master bound by the custom of the port to do the thing that, by deletion of the words, he was freed from the necessity of doing. The question is, was the voyage ended when he had gone as near Glasgow as he could? Your Lordship seems to

attach the words "end the voyage" to the delivery of the cargo. But the delivery of the cargo takes place when the voyage is ended. The delivery does not constitute the end of the voyage, but follows it. And therefore the voyage is not to be held as not ended simply because the place happens not to be the most suitable for discharging the cargo. Your Lordship seems to hold that the charter-party is to be adhered to only so far as reasonable, and therefore that the master was bound to let his vessel be unloaded in part if he had no interest injured thereby. But his interest was injured. The voyage was lengthened, and other points were mentioned in the argument showing how materially his interest was injured. It would have been reasonable that the defenders should have complied with the pursuer's request, and paid him the 45% in respect of the difference it would have made to him in coming up to Glasgow. If it had been proved that it was the custom at all other river ports to lighten in part at the mouth of the river in order to allow the vessel to come up, then it would have been reasonable for the defenders to argue that, though this clause had been deleted from the charter-party, it should be given effect to. But this is not proved, and I do not think it is said to be the case. It is therefore presumable that it is not the case. And therefore it seems to show that it is not reasonable to hold the master so bound. Upon the whole matter I agree with the interlocutors and the very able and explicit notes of the sheriffs, and feel it therefore unnecessary to go further into the question. I have come to this result not without difficulty, but I agree with the sheriffs in the view that they hold.

Lord ARDMILLAN.—The questions raised in this case are of great importance, and of some difficulty; and we have the benefit of most able and elaborate notes from the learned sheriffs, who have very carefully considered the case, and fully appreciated the difficulties which it presented. We have also had ample and ingenious argument from counsel. I have arrived at the same conclusion as your Lordship in the chair, and am of opinion that the defenders are entitled to absolvitor. The ship *Frey*, of which the pursuer is master, was chartered at Alexandria to carry a cargo of beans to Falmouth "for orders." The charter-party is dated "Alexandria, 15th Aug. 1863." The defenders, Gibson and Clark, purchased the cargo at Falmouth, and gave the "orders" for Glasgow. She proceeded to the Clyde accordingly, under the order to Glasgow. She reached the Tail of the Bank, an open roadstead about twenty-two miles from Glasgow, on or about 26th Dec. 1863, with her full cargo; and the master there ascertained that she drew so much water that, with her full cargo, she could not lie afloat in Glasgow harbour at all times of tide. With reference to this position of matters, it is necessary to attend to the provisions of the charter-party under which the ship left Alexandria, and according to which she was bound to proceed, under such orders as she might receive at Falmouth. The right construction of the charter-party is the first step towards a right decision of the case. [Reads and explains charter-party.] I do this very briefly, as I agree with your Lordship in your explanations. The ship must go to the safe road, or so near as she may safely get and lay afloat at all times of tide, and "deliver the same"—that is the cargo—the whole cargo which she carries. In this charter-party two ports are mentioned—(1) Alexandria, the port of lading, where the lading or receiving is to be "according to the custom of this port," viz., Alexandria; and (2) the port to be named in the orders to be received at Falmouth, if a safe port, or as near as she could safely get and lay afloat, where delivery is to be "according to the custom of

SCOTLAND.]

HILLSTROM v. GIBSON AND CLARK.

[SCOTLAND.]

that port." The "custom" is thus mentioned with reference to the two ports, the one of lading, and the custom relating to lading, and the other the port of discharge or delivery, and the custom relating to delivery. In this instance, the second of these references to the custom, that at the port of discharge, was struck out by consent. I hold it as not here, and as intentionally omitted. In so far as any rule in regard to the mode, time, and place of delivery of the cargo, rests on any specialty in the custom of the port of Glasgow, I am of opinion that we cannot consider it. I discard it altogether. But, on a fair construction of the charter-party, with reference to the facts of the case, I am of opinion that, apart altogether from local custom of port in regard to delivery, the master was bound to consent to any moderate and reasonable lightening of the ship, which would admit of his going to Glasgow safely. If the ship as loaded could safely go to Glasgow, the master was bound to take her. A charter-party is a mercantile or maritime contract, to which the principles of equity are pre-eminently applicable. When the master took orders to go to Glasgow as the port of discharge, he, knowing what water his ship drew with her full cargo, and knowing what water could be had in Glasgow harbour, was bound to go to Glasgow and deliver there if he could do so with safety. No fair reading of the charter-party can exempt him from that obligation. The lightening the ship of one-fifth of her cargo was intended to facilitate the voyage, and undoubtedly enabled him to proceed safely, and to float at all times of tide in the harbour of Glasgow. If he had thrown, as by jettison, part of his cargo overboard, thus lightening the ship, or if by arrangement he had delivered a part at some place before entering the Clyde, so that, when he reached the Tail of the Bank the ship could have safely proceeded to Glasgow, and would have found water to float at all times of tide, then I do not think it could be seriously doubted that, being lightened so as to be safe, he was bound to proceed to Glasgow. I do not think that under this charter-party there are two or more ports of discharge. Nor do I think that the charterers or consignees could compel partial delivery or division of cargo for their own interest or convenience. But if, by a moderate and reasonable amount of lightening at the expense of the consignee, the safety of the passage to Glasgow harbour could be secured, and the great bulk of the cargo could be delivered according to contract, then I think it would be contrary to equity to permit the master to refuse to lighten, or to refuse to proceed to Glasgow after lightening. The lightening is just a mode of enabling the master safely to fulfil his contract; and the true object and meaning of the provisions for the contingency of being unable to reach the port in safety were just to secure the ship from peril. The safety of the ship was protected by the stipulations and, in point of fact, the ship was kept safe. That was secured by the lightening her of part of her cargo. Extreme cases have been put in argument. But the question is to some extent a question of degree, because it is a question of equitable obligation, and of reasonable conduct. I do not say that four-fifths of the cargo could have been

out of the ship at the Tail of the Bank, or even one-half of the cargo, and then that the ship could have been required to proceed with the remainder; we must in dealing with an equitable contract consider the fairness and reasonableness of the proceeding. I speak not of custom of the port, but of the reason of the thing, when I say that delivery of the whole of this cargo in the open Firth at the Tail of the Bank, twenty-two miles from Glasgow, and where there is no quay, could not have been reasonably forced by the master upon the consignees; and, on the other hand, I think that the lightening

of the ship of one-fifth of the cargo, and the proceeding in safety to Glasgow with the remainder, would have been fair and reasonable on the part of the master. It would have been fulfilment of the contract according to its just and fair meaning. I so construe this charter-party as to permit and support this fair, reasonable, and equitable procedure. I have examined the decisions and authorities quoted, and I have arrived at the conclusion that there is no authority, in point of law, to the contrary of what I have explained as the equity of this contract, and of this case. There is no decision and no institutional authority to support the proposition, that the shipowner can escape from his contract by refusing to lighten the ship to the moderate extent of one-fifth of the cargo, so as to be enabled safely to deliver the four-fifths that remain.

Lord KINLOCH.—The substantial question raised in this case is, whether the pursuer, the master of the ship *Frey*, was entitled to insist on delivering his cargo at the Tail of the Bank; or whether he was bound to do at first that which he did at last (although reserving all questions of right), namely, to allow his ship to be lightened by discharge of part of the cargo, so as to be enabled to lie afloat at all times of the tide in Glasgow harbour, and there to make full delivery. It was admitted at the bar, on the part of the master, that if he was legally bound to allow the ship to be lightened and to proceed with her so lightened to Glasgow, no demurrage is due, there remaining enough of running days after the demand made on him to that effect. In the opposite view, a calculation of the running and lay days would become indispensable. By the charter-party executed at Alexandria the vessel was bound, after loading her cargo, to proceed to "a safe port in the United Kingdom of Great Britain and Ireland," according to the orders to be received by the master at Queenstown or Falmouth. It is added, "or so near thereunto as she may safely get, and lay afloat at all times of the tide, and deliver the same, and so end the voyage." It is said that the words "according to the custom of the port" were originally in the charter-party, and purposely deleted before the parties signed. This appears to have been the fact. But I think the fact only material to show more clearly that the shipmaster did not bind himself, as a matter of direct obligation, to conform to the custom of every port to which he might be ordered, leaving his obligation of delivery to be ruled by the common law. The case, I think, is not substantially different from what it would have been had the words never been inserted at all. If the words had not appeared deleted as they now do, I doubt if it would have been competent to prove that the parties had talked of inserting them, and ultimately resolved on leaving them out, which would just be to prove the communications anterior to the executed deed. When the vessel arrived at the Tail of the Bank, which is an open roadstead, more than twenty miles from Glasgow, it became manifest, and is not disputed, that she was too deeply laden to lie at all times afloat in the harbour of Glasgow. It does not very clearly appear from the evidence that she might not have sailed without injury a great deal nearer to Glasgow. But unquestionably she could not, with her full cargo, lie at all times afloat in Glasgow harbour. On the other hand, it was proved by the actual fact that after being relieved of a part of her cargo, estimated at the bar to amount to about one-fifth of the whole, she was enabled to lie afloat in the harbour at all times of the tide. I am of opinion that in point of law the master was bound to allow his ship to be lightened, and to proceed with her to Glasgow, as the shippers of the cargo demanded. I came to this conclusion on the

SCOTLAND.]

LEE v. HALEY.

[CHAN.

simple ground that this was nothing more or less than fulfilment of the charter-party after a fair and reasonable construction. The charter-party formed a mercantile contract, and must have put on it, not a strict and technical, but a fair and liberal interpretation, consistent with equity and good faith. Nothing, I think, could be more unreasonable than to insist that all the cargo should be delivered in the month of January in an open roadstead more than twenty miles from Glasgow; which not only involved great expense to the shippers in the way of lighterage, but was attended with no little risk. On the other hand, I think the shipmaster could suggest no real or tangible injury or peril to the vessel from the opposite course being followed. The vessel was bound to go to Glasgow if to that port she could safely get. If only four-fifths of the actual cargo had been laden she must have gone on to Glasgow without a moment's delay. In the case which actually occurred, there was no legitimate interest to object to the shippers' placing her in the same position by lightening her to the extent of one-fifth. The vessel was only thereby enabled to make the voyage expressly engaged for. She was exposed to no accident which her owners did not voluntarily undertake. It is not proposed that any part of the expense of lightening the ship should fall on her owners; the shippers have discharged it all. It is admitted that the process, if followed out immediately on demand, did not extend the running days allowed for unloading more than the charter-party gave. In no point of view can it be said that the vessel incurred any loss or risk more than her owners contemplated. I am of opinion, therefore, that what the shippers demanded was just, that fair and reasonable fulfilment of the contract which every mercantile contract involves. It is a fulfilment which I think squares with the very words of the contract. The vessel was to go to Glasgow, "or so near thereunto as she may safely get and lay afloat at all times of the tide." I think the words, "as she may safely get," are reasonably to be construed to mean "as it is possible to take her with safety." And this possibility must be considered with reference to the due and usual method of accomplishing such safety. If the obstacle to her proceeding was a bar at the mouth of the harbour, which a slight lightening would enable her to surmount, I cannot think that the master would be entitled to refuse the lightening, and to insist on delivering the whole cargo in the open sea. The only interest secured to the ship by the charter-party was that she should not be required to go where she could not safely get, and should deliver no part of her cargo except where she could lie afloat at all times of the tide whilst doing so. As the shippers, by the proceeding taken by them, secured the vessel in both particulars, I am of opinion that they thereby took away from the master all ground of objection founded on these clauses of the charter-party. It was pleaded for the master that what the shippers demanded involved delivery of the cargo at two different ports or places of discharge, in place of one only. I consider this argument to be a fallacy; and to beg the question in issue. The proceeding at the Tail of the Bank was not in any sound sense delivery of the cargo; it was lightening for the purposes of navigation. Had the proposal been to take out four-fifths of the cargo at the Tail of the Bank, and to go on with the remaining fifth, the shipmaster's argument would have had a great deal more of plausibility, for in such a case a great deal may depend on the difference of more and less—it may draw that very distinction between lightening and discharging which is all-important in the case. If the ship had come up with her full cargo to the very entrance of the harbour; and had then been enabled to enter by a slight lightening it,

never could have been said that this was delivery at two ports of discharge. In point of principle, I think that it can as little be said in the present case. It was further pleaded for the master that in going beyond the Tail of the Bank he would have been taking his ship, if insured, beyond the limits of the policy, because beyond her proper port of discharge; and that this affords a criterion in his favour, with reference to his obligation to go farther. In such a case it is said he would have gone up to Glasgow uninsured, which he was not bound to do. But this argument I again consider to be a *petitio principii*. If, on a sound construction of the charter party, the Tail of the Bank was not the port of discharge, but Glasgow was so, and the process of lightening was nothing more than the due proceeding to enable the vessel to reach Glasgow, all argument from the supposed policy of insurance at once falls to the ground. In going up to Glasgow from the Tail of the Bank (being enabled thereto by being lightened), the vessel was only prosecuting her intended voyage towards her port of discharge; and remained throughout under the protection of the policy, if such had been taken out. This is to be said on the supposition (which is the only ground of the argument) that the terms of the supposed policy were identical with those of the present charter-party. But it is not an unimportant observation, that not only are policies in general worded very differently from charter-parties, but in estimating their effect very different considerations may come into operation. The policy in the usual case ceases to operate when the voyage, properly so called, terminates; that is, when the vessel arrives at the port of discharge, or, as is often said, 24 hours after being safely moored, and anterior to delivery of the cargo. The charter-party continues to operate until delivery of the cargo is made, and it is only then that the ship ends the voyage in the sense of the charter-party. This difference in the two instruments excludes an indiscriminate application to one of the principles applicable to the other; and warns of the exceeding peril of all arguments from analogy. I am of opinion that the judgment pronounced in the Sheriff-court should be altered, and the defenders assoilzied from the conclusions of the action.

Agent for pursuer, H. Buchan, S.S.C.

Agents for defenders, J. and R. D. Ross, W.S.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by T. BROOKSBANK and R. STEWART ROCHE, Esqrs.,
Barristers-at-Law.

Dec. 17 and 18, 1869.

(Before Lord Justice GIFFARD.)

LEE v. HALEY.

Injunction—Title of trade—Imitation of—Actual deception—Delay in filing bill.

Where a trader believes that he has good ground for complaining of a colourable imitation of the style of his business, he is justified in waiting until he can collect a sufficient number of cases to show that the alleged attempt has succeeded, before he files his bill; inasmuch as it would not be safe for him to come into this court until he could establish actual cases of deception.

The plaintiffs, L. and Co., coal merchants, established a business in Pall Mall as "The Guinea Coal Company." The defendant had been their manager, and was known to their customers, but he left their service in Jan. 1869, and set up in the same trade in Beaufort-buildings, Strand, under the title, "The Pall Mall

CHAN.]

LEE v. HALEY.

[CHAN.]

Guinea Coal Co." In August he removed to premises in Pall Mall only a few doors from the plaintiff's premises, and in November a bill was filed by L. and Co. to restrain him from carrying on business there under that name, and they gave evidence of numerous instances in which their customers had been misled into giving orders to the defendant:

Held, that an injunction awarded by Malins, V.C., must be continued.

This was an appeal by the defendant against an order of Malins, V.C., granting an interlocutory injunction to restrain him from using the name of "The Pall Mall Guinea Coal Company," in Pall Mall, or any other name or style so framed as to be a colourable imitation of the name or style of the plaintiffs, or so as to deceive the public, or lead to the belief that the business carried on by the defendant was the same as that carried on by the plaintiffs, or in any way connected therewith.

The hearing before his Honour is reported in 21 L. T. Rep. N. S. 546, and there and in the judgment of the Lord Justice all the facts sufficiently appear.

Glasse, Q. C., and Nalder, supported the appeal, and contended, first, that the plaintiffs were not entitled to relief, inasmuch as they had sold systematically underweight, and had professed to sell Wallsend coal when really they had not done so; secondly, on the ground of delay in filing the bill; and, thirdly, that there could be no title to prevent a man from describing his business as of Pall Mall, when his place of business really was in Pall Mall—the title "Guinea Coal Company" being open to everybody, and there being at least half-a-dozen coal businesses known by that name. They referred to

Croft v. Day, 7 Beav. 84;

Morgan v. McAdam, 15 L. T. Rep. N. S. 348;

Hogg v. Kirby, 8 Ves. 215;

The Leather Cloth Company v. The American Leather Cloth Company, 11 H. of L. Cas. 523; 12 L. T. Rep. N. S. 742.

Kerr on Injunctions, 481.

Osborne Morgan, Q. C., and H. Cadman Jones for the respondents.

Lord Justice GIFFARD (having disposed of the allegations of the plaintiffs selling by short weight and under misrepresentations):—As regards the question of delay, I think the defendant first set up in Beaufort-buildings in March last. His setting up under that name in Beaufort-buildings did not interfere, and was not calculated to interfere, with the plaintiffs, and therefore the time until he removed to Pall Mall was not material. Then we come to August, and true it is that in August he first set up in Pall Mall. But when you come to look at the question of delay, each case must necessarily depend upon its particular circumstances and its own particular nature. Now the first thing which is to be observed in cases of this description is this, that it would not be safe for any plaintiff to come into this court until he could establish actual cases of deception, because you would be for ever trying hypothetical cases; and you would have a number of people brought forward to say, and probably truly, that the thing done was not calculated to deceive. That being so, I think the plaintiffs were quite justified in waiting until they could collect a sufficient number of cases to prove to the court that there had been a case of deception. But beyond and besides that, we must consider this. I have heard a great deal of argument to this effect, that if this injunction stands, a trade will be stopped. That is not so. The trade will not be stopped in the least. The only thing

that will be done is this, that the defendant will be restrained from selling under this particular name. He may sell in Pall Mall coals at a guinea per ton to his heart's content, but the only thing he may not do is to use a name which is calculated to induce customers to come to him under the supposition that they are going to the plaintiffs. Therefore the injunction is one with reference to which I do not think, in the first place, there has been any delay which is not sufficiently accounted for, because the plaintiffs were bound to bring forward cases of deception; and, in the second place, when you come to the nature of the injunction, I do not think it material.

The actual facts of this case are very simple and plain, and depend upon principles which are well known, which this court has asserted again and again, and I trust always will assert. The case is that the plaintiffs have carried on business in Pall Mall for a series of years under the name of the Guinea Coal Company, and there is evidence to show, as one would suppose, that they were well known as the Pall Mall Guinea Coal Company. The defendant first of all sets up as the Pall Mall Guinea Coal Company in Beaufort-buildings. That was not found, and, indeed, was not calculated, to induce persons to deal with him, under the supposition that they were dealing with the plaintiffs. All persons, of course, going to Beaufort-buildings would know perfectly well that they were not dealing with the persons carrying on their business in Pall Mall. Then it is said, there are a number of other companies who call themselves Guinea Coal Companies, some with prefixes, and other Guinea Coal Companies with no prefixes at all; but all of them carry on business in such a way as that they could not be mistaken for the Guinea Coal Company carrying on business in Pall Mall.

Then it is said, for that and other reasons, that there can be no property in the name of the Guinea Coal Company. I quite agree that there can be no property in the name, and the principle which these cases proceed upon is, that there is no property in the use of the word; that even in a trade mark there is no property, so to speak, but the principle upon which the court interferes is, that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce his customers to deal with him under the supposition, and in the belief that they are dealing with the others. There is accumulated evidence of persons who have been deceived. Many persons have been deceived, and where we see exactly what the defendant did, I certainly do not acquit him of an intention to deceive, and that I must say emphatically; what he does is this: he goes first of all to Beaufort-buildings, and adopts the name of the Pall Mall Guinea Coal Company. The circular which he sends out when he removes from Beaufort-buildings to the customers of the old firm is this:—"Pall Mall Guinea Coal Company offices," and pasted over so that you cannot see where the original place was, "removed to 46, Pall Mall." I say that was calculated, and I believe intended to induce the persons to believe that it was this very coal company removed from one part of Pall Mall to another.

For these reasons I am clearly of opinion that this injunction was properly granted, and there is no objection to it upon the ground that it is confined to the particular street of Pall Mall; it is quite right that it should be so confined, because in all probability if the same name was used in some other street, it would lead to no mistake or deception.

CHAN.]

Re THE NORTHERN ASSAM TEA COMPANY.

[CHAN.]

I think this injunction has been granted, and properly granted, upon the well-known principles of this court, which are applicable to all cases of this description, viz., that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person. That being so, this application must be refused with costs. If the defendant chooses to have an undertaking as to damages he can, but it will make no difference as to the costs. I understand that was not pressed in the court below. I think it is the right of every defendant to have such an undertaking if he chooses, but it is not put in as a matter of course, nor unless it is asked for.

Solicitor for the appellant, C. G. Clarke.

Solicitors for the respondents (the plaintiffs) Jones and Starling.

Tuesday, Jan. 25.

(Before the LORD CHANCELLOR and Lord Justice GIFFARD.)

Re THE NORTHERN ASSAM TEA COMPANY.

Winding-up—Practice—Official liquidator—Appointment of—Rules on which court will act.

The rule laid down and acted upon by some branches of the court, that, ceteris paribus, the nominee of the person upon whose petition a winding-up order has been made will be appointed official liquidator, disapproved; the court being bound also to consider the wish of the persons, whether members or creditors, who have the main interest in the liquidation.

No hard and fast rule can, however, be laid down on the subject, but the court stated those considerations which should guide the court in making such an appointment, and in dealing with the costs of applications for that purpose.

This was an appeal motion on behalf of Mr. Galsworthy, a shareholder of the company, to discharge an order of the Master of the Rolls, whereby his Lordship had appointed a Mr. Samuel Barrow to be official liquidator of the company in preference to a Mr. James Gibbons, whose nomination the appellant had supported.

The case at the Rolls is reported in 21 L. T. Rep. N. S. 483, and it is only necessary to add to the circumstances there stated that on the balance-sheet prepared so considerable a deficiency of the estate was apparent that shareholders had really no interest whatever in the winding-up, which was simply a matter for the creditors; and that Mr. Barrow had since his appointment given the necessary security and entered upon his duties.

Sir Roundell Palmer, Q. C., Roxburgh, Q. C., and Graham Hastings supported the appeal, contending that the rule laid down by Malins, V. C. in *Re the General Provident Assurance Company*, 19 L. T. Rep. N. S. 45, was not salutary, and ought not to be followed, and referring to two unreported cases:

Re the Accidental Death Assurance Company;
Re the Agriculturist Cattle Insurance Company.

Jessel, Q. C., Swanston, Q. C., and Higgins supported the order, relying on the case first mentioned and *Re the International Contract Company*, L. Rep. 1 Ch. App. 523; 14 L. T. Rep. N. S. 843;
Re the London, Bombay, and Mediterranean Bank, L. Rep. 1 Ch. App. 525; 14 L. T. Rep. N. S. 843;
Re the Brighton Hotel Company (not reported);
Sects. 91, 92, 93, 133, 135, and 140 of the Companies Act 1862
were also cited.

Roxburgh, Q. C. having replied,

The LORD CHANCELLOR said.—I desire, in the first instance, to join my complaint to that which has been expressed by several judges, among others Malins, V. C. and Lord Cairns, as to there being contests of this description at all brought before the court, occupying the public time, and exhausting the funds of those interested in the discussion of such matters, whereas, in reality, in nine cases out of ten, the same persons who create the expenses have not a particle of interest. That is the case on the present occasion. The only legitimate purpose of those who are acting is to discharge their debts properly, but, nevertheless, they think it necessary that there should be a contest upon this matter in which the shareholders and creditors have not one particle of interest. It is very unfortunate that any such cases should be brought before the court, and, therefore, the Master of the Rolls, as well as Malins, V. C., have desired, as no doubt every judge must desire, to see how they could best take a course which would stop so ruinous and disastrous, and, I may say, discreditable a contest.

I do not, however, think that the rule laid down by Malins, V. C. attains the object he desires, and I should hesitate very much, I confess, if this case depended wholly upon that question, to follow even the authority of the Master of the Rolls, added to that of Malins, V. C., in laying down a rule such as I understand has been laid down, viz., that not merely *ceteris paribus* there is to be a preference given to the person who first brings forward the application for the winding-up, he being the petitioner who has the charge of the order made upon the winding-up; but it is this, if I understand the rule laid down by Malins, V. C.; and I think it follows from the words of the Master of the Rolls, who adopts that view altogether, that, with regard to the *cetera paria*, you are to look only to the character of the two parties proposed, and see whether they are equally competent for the discharge of the duty, and you are not, at least according to the rule as laid down, to have regard to the other circumstances of the case, viz., whether or not the shareholders, if they be the persons who have the main interest, or the creditors, if they be the persons who have the main interest, concur in the wish of the person who has the carriage of the order to appoint a particular person to be named by him. I cannot help thinking the very instance read to us by Mr. Jessel of the Brighton Hotel Company would be a warning and a beacon against laying down, by way of definite rule, that if two persons are equal as to their character, without regard to who may or may not elect them, the court ought to select (as in the case of ordinary suits in this court), by preference, him who is proposed by the person having the carriage of the suit; because that case of the Brighton Hotel Company, as read by Mr. Jessel to us, was a case referred to by the Vice-Chancellor in the judgment cited, and he says that, in that case, there was a company that had a small surplus which would have paid every creditor without any winding-up whatever; but yet, because there was a body on which those who come as birds of prey might feast, it was necessary that that body should be so dealt with. Is not that the strongest possible case for showing the disadvantage that might arise from giving to the person presenting the petition the carriage of the order, and the appointment of official liquidator and solicitor? Of course, if you add to the other encouragements which may exist for bringing these cases before the court, that of invariably giving to the person who has been the first in the field to present a petition for winding-up, the appointment of official liquidator also, you are adding very much to the temptation which exists among those persons, who do not consider

CHAN.]

Re THE NORTHERN ASSAM TEA COMPANY.

[CHAN.]

anything except their own interests, to take proceedings unnecessarily for the winding-up of companies with a view to the creation and payment of costs. I think it would be very hazardous to lay down any such rule as that.

It is very difficult to lay down any rule whatever. The only guiding star for one's course is this, to see how far these contests can possibly be prevented. The Act of Parliament, I am bound to say, does seem to throw upon the court, although it is only put in a permissive form, by the 91st section, the duty of paying attention to the views of the shareholders and creditors; and where those views are clearly and distinctly expressed, and the majority is clear and distinct, and they have a plain common object in view, which must be made apparent by evidence to the judge before whom the case is brought, I should say that would be a safer guide by far than saying that the matter is to be entrusted to the first person who presents a petition.

But the Lord Justice Giffard has mentioned a rule which, I think, might be a salutary one, although one incurs great risk in laying down fixed rules on subjects which must be subjects of discretion, and I should be very far from desiring to lay down any hard and fast rule whatever; but the rule which Lord Justice Giffard applied in chambers with advantage and efficacy was that of refusing every person but the person who carried his official liquidator their costs, and by allowing the person who did carry the person he nominated only the ordinary costs, and not costs as between solicitor and client. Some such course of proceeding as that seems to me, I am sorry to say, the only mode in which these contests can be effectually stopped.

I do not think the present contest is one which, on behalf of the applicants, presents a very favourable aspect, because the applicant is Mr. Galsworthy, a gentleman who is a shareholder. It is quite manifest from the balance-sheet, made out by Mr. Gibbons, who appears to be a gentleman of high credit and repute, and, as far as I can see from anything in the case, to have conducted himself with perfect propriety, that this is clearly and distinctly a creditors' winding-up, and that there is not a shadow of interest left in any of the shareholders. There appears to be a deficiency of 40,000*l.* made out by Mr. Gibbons in reference to the winding-up. The company is a limited company, and the interest of the shareholders is extinguished. Mr. Galsworthy is a shareholder, and a shareholder only, and has really no interest in the concern. Therefore when he now comes forward to take matters in hand, one must look a little carefully to see what right or title he has made out to put himself in that position. As regards the quantity of support, which, as I have said, one should pay some regard to, which has been afforded to Mr. Gibbons as official liquidator, you have to consider how many creditors support him as contrasted with the other gentleman brought forward, Mr. Barrow; because, as I said before, the shareholders are wholly out of the question. They have not the slightest interest in the matter. As regards the creditors they seem to preponderate on Mr. Barrow's side. I say "seem," because there is some degree of controversy as to the state of the matter. As to the 30,000*l.* claimed with reference to the sale of the estate, that is wholly out of the question, and is one instance to show how unwisely we should act if we hastily gave credit to what is said to be the condition of the shareholders and creditors in a matter of this description; because, whereas there was indorsed on the brief of one of the counsel appearing for creditors before the Master of the Rolls that he appeared for a creditor for 30,000*l.*, it turns out now, from Mr. Gibbons's own statement, that that is a claim which has been settled with for 1000*l.*, and for 1000*l.* alone that

gentleman is a creditor. That being so, I say I am not going to weigh accurately in nice scales what the state of the poll is as to these creditors; but it is enough for me to say that Mr. Gibbons has certainly not the preponderating number. Whether or not, had this case come before me originally, I should have thought there was any reason for displacing Mr. Gibbons, who was in the position of temporary official liquidator, it is not necessary for me to say; but he has been displaced, and the gentleman who has been put in the position of official liquidator, Mr. Barrow, has given security, has entered on the duties and functions of his office, and seems to be, as is agreed on all hands, upon an equal footing with Mr. Gibbons as to his capacity for management. There does not seem to me to be any preponderance, putting it in the mildest form, of creditors, in support of Mr. Gibbons. The shareholders, as I said before, have no voice in the matter, and, under all these circumstances, I think one can safely say that the conclusion which the Master of the Rolls has come to, although the reason he has given for that conclusion is not altogether satisfactory to my mind, and although it appears to me he has not altogether exercised, to the full, his discretion with reference to the subject, because he has extended the rule of Malins, V.C., and given a sanction to that rule, which rule, I think, is scarcely sufficient to guide the judgment of the court; yet when the whole matter comes to be investigated, I can see no reason for differing from the judgment he has given. I should not have considered it for a moment if I thought it a matter of discretion, and of discretion generally, because nothing can be more mischievous than to allow an appeal on the ground that it is a matter of discretion for the judge who investigated the question. But, now investigating it, and finding that, irrespective of the question of whether or not any such hard and fixed rule ought to be adopted as that which has been suggested, there is adequate reason for retaining Mr. Barrow, and therefore I think the appeal motion must be refused, and in consequence of its being the appeal motion of Mr. Galsworthy, who has no particle of interest in the matter, I think it ought to be refused with costs.

Lord Justice GIFFARD said.—I quite agree that you can lay down no hard and fast rule in cases of this description; and, as far as I can see, certain I am it is not desirable to lay down any such rule as appears to have been laid down—namely, that the nominee of the petitioner should have a preference. I think that is very undesirable, because, to my mind, it would be throughout an additional bait for trafficking in petitions of this description, in which, unfortunately, there is at present trafficking enough. I think it would be far better to lay down as a rule, although I do not say an universal rule, that no one should have the costs of the application for the appointment of official liquidator, but he who applies and succeeds, and then only the ordinary costs of an ordinary application. Three-fourths of these contests and applications are for costs, and I believe if that rule were acted on we should see but very few of them. I may add besides, that the position of a petitioner in a winding-up is very different from that of a plaintiff in a suit. A plaintiff in a suit, although a receiver may be appointed, still remains *dominus litis* and has the carriage of everything, whereas when an official liquidator is appointed, he becomes *dominus litis*, and the petitioner is wholly displaced. There is, therefore, no analogy between the position of a plaintiff (and it may be, and I have no doubt in many cases is, a very salutary rule that he should

ROLLS.]

ATTORNEY-GENERAL v. WAX CHANDLERS' COMPANY.

[ROLLS.]

have the preference in the appointment of a receiver) and the position of a petitioner in the appointment of an official liquidator.

With respect to the present case, I must say I think it was very wrong on behalf of those parties who examined or cross-examined witnesses on a contest of this kind. I think it is a very ill-advised and improper proceeding, unless there is a case of fraud alleged, to examine witnesses on such subjects as sending a circular and matters of that sort, for it is nothing more nor less than waste of the time of the examiner, and a waste also of the time of the court. Be that as it may, Mr. Barrow has been appointed, and has given his security, and it would lead to very much additional expense if he were now displaced. Therefore, independently of that the fact that the Master of the Rolls has to some extent exercised his discretion would be a reason why he should be retained, and the appeal dismissed; but I must say if Mr. Galsworthy had been an appellant who had a real interest, I should have been very much disposed not to have refused his appeal with costs. Being of opinion, however, that he has no real interest whatever in this company on this question, and that it is neither more nor less than an official liquidator's application, I think it right to dismiss the appeal with costs.

Solicitors for the appellant, *Dean and Chubb.*

Solicitors for the respondent, *Mercer and Mercer.*

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

July 6 and Aug. 6, 1869.

ATTORNEY-GENERAL v. WAX CHANDLERS' COMPANY.

Will—Construction—Charitable bequests—Devise of real estate for the intent and purpose and upon condition to pay charitable bequests out of the rents—Increase in value—Application of increase.

K. by his will, made in the year 1558, gave certain freehold houses in the city of London to his son and to the heirs of his body, and for default of such issue it was his will that the W. Company and their successors should have the said houses for this intent and purpose, and upon this condition, that they should yearly distribute 8l. in the following manner, namely, 7l. 15s. amongst several charities in the will specified, and the other 5s. to the master and wardens for the time being equally; and it was the testator's will that the rest of the profits of the said houses should be bestowed on the reparations thereof. And if the company and their successors should leave any of the things specified in his will undone, then it was the testator's will that his next of kindred should enter into the said houses, and them have and hold unto him and his heirs for ever, upon condition that he and they should do all the things specified in the will.

At the date of the will the property was worth about 9l. a year, and now, with a small piece of land purchased by the company, its annual value had increased to the sum of 330l., out of which the company paid the sums specified in the will, and retained the residue for their own use.

On an information being filed praying that the company might be declared to be trustees of the property for the charities named in the will:

Held, that the charities could not take more than the specified annual amounts given to them by the will, and that the company were entitled to the property beneficially subject to the payment of the specified annual amount, and upon condition that they kept the property in repair.

William Kendall, by his will dated the 31st Jan.

1558, duly executed and attested as then by law required for the devise of freehold estates, gave unto William Kendall, his son, all his houses and tenements in the Old Change, in the parish of Mary Magdalen, in London, at Old Fish-street, to have and to hold unto the said William, and to the heirs of his body lawfully begotten, and for default of such issue the testator's will was, that the Master and Wardens and Commonalty of the Mystery of the Wax Chandlers of the City of London, and their successors should have the said housings and tenements for this intent and purpose, and upon this condition, that they should yearly distribute 8l. of lawful money of England after this manner (that is to say), to the poor inhabitants of the parish of Mary Magdalene aforesaid, at Old Fish-street, 4l. lacking 2s., in gowns for men and women, and coals, at the discretion of the churchwardens of the said parish, to be given and delivered unto the said poor inhabitants in the month of December yearly, and the said 2s. to the churchwardens of the same parish for their painstaking, and to distribute yearly to the poor inhabitants of the parish of Bexley, in the county of Kent, 38s. of good and lawful money in England, and to be given and delivered yearly about the third and fourth days of Nov. yearly, by the discretion of the churchwardens and chief inhabitants of the said parish of Bexley then being, and 2s. to the churchwardens of the said parish of Bexley for their great pains, and 35s. to be distributed unto the poorest men and women of the Company and Mystery of Wax Chandlers of London, and the other 5s. to be distributed to the Master and Wardens of the Wax Chandlers for the time being equally; and the testator's will was that the rest of the profits of the said houses and tenements should be bestowed upon the reparations of the said houses and tenements. And if the Master, Wardens, and Commonalty of the Mystery of Wax Chandlers of London and their successors did leave any of those things undone above rehearsed, then it was the testator's will that the next of kindred unto him should enter into the said tenements and them have and hold unto him and unto his heirs for ever upon condition that he and they and every of them should do all those things above rehearsed in all points, as it was above rehearsed by him, the testator.

The property comprised in this devise consisted at the date of the will of a freehold messuage called the King's Head, and four other freehold messuages and a warehouse situate in Old Change, and which in the year 1550 were let at rents amounting in the whole to 9l. 4s. per annum. This property, which has since been rebuilt, together with a small piece of land surrounded on all sides (except where it abuts on the street) by the land comprised in the will, which was purchased of one Deborah King by the Wax Chandlers' Company in 1790 (it was alleged) out of moneys derived from rents and profits of the premises devised by the testator's will, now consists of three houses, Nos. 17, 18, and 19, Old Change, together with certain warehouses and workshops in the rear thereof, which are let to several tenants at rents now amounting to about 330l. per annum.

The testator's son, William Kendall, died without issue on the 5th Nov. 1563, and the defendant company thereupon, by virtue of the testator's will, came into possession of the property, and they have ever since been and are now in possession or receipt of the rents and profits of the property, out of which they have regularly paid the several sums, mentioned in the will, amounting to 7l. 15s. annually, and have appropriated the whole of the remainder of the rents and profits to their own private benefit; and they claim to be entitled absolutely for their own use to the whole income of the property subject

ROLLS.]

ATTORNEY-GENERAL v. WAX CHANDLERS' COMPANY.

[ROLLS.]

only to the annual payments amounting to 7*l.* 15*s.* specified in the will.

In consequence of this claim the charity commissioners certified the matter of the charity to the Attorney-General, who accordingly filed the present information, praying that it might be declared that the defendants were not entitled for their own benefit to the whole income of the property devised by the will of the said William Kendal subject to an annual charge of 7*l.* 15*s.*, but that the defendants were trustees of the said property, and of the whole income thereof for charitable purposes subject to the specific payment of 5*s.* annually by the said will given to the master and wardens, and to such increased allowance (if any) as might be proper to be made in respect of such last-mentioned specific payment; that it might be declared that the aforesaid small piece of land purchased of Deborah King in the year 1790 was subject to the trusts of the said will, and formed part of the property of the charity; that the defendants might account as trustees on the above footing for the income of the said property received by them, and the application thereof during such period as the court should think fit. The information also prayed for the appointment of a receiver, for the settlement of a scheme for the regulation and management of the charity, &c.

Jessel, Q. C. and Vaughan Hawkins, for the Attorney-General, submitted that as the testator by his will substantially exhausted the income of the devised property in charitable bequests, the increase which had taken place in the income of the property was applicable to the charitable purposes. They cited

Attorney-General v. Mayor, &c., of Beverley,
6 H. of L. Cas. 310;

Thetford School case, 8 Co. 130;

Attorney-General v. The Coopers' Company,
3 Beav. 29.

As to the small piece of land purchased by the company in 1790, and which could not now be distinguished from the property comprised in the devise, they submitted that the company, as trustees, must take the consequence of having mixed their own funds with the trust funds, and must hold the entire property in trust for the charities; at most, they might be allowed a fair price for that piece of land. They cited

White v. Wakley, 26 Beav. 20;

Cook v. Addison, L. Rep. 7 Eq. 466;

Andrews v. Hailes, 2 Ell. & Bl. 329;

Kinsmill v. Millard, 11 Ex. 313.

Sir Richard Baggallay, Q.C., and C. Brown for the company, contended that as the testator at the date of his will had not exhausted the rents of the property on the charities, the intention to give the surplus to the company must be inferred. They cited:

Attorney-General v. Master and Wardens of the Skinners' Company, 2 Russ. 407;

Attorney-General v. The Cordwainers' Company,
3 My. & K. 534;

Attorney-General v. Trinity College, Cambridge,
24 Beav. 383;

Attorney-General v. Brazenose College, 2 Cl. & F.
295;

Attorney-General v. Corporation of South Moulton,
14 Beav. 361; on appeal 5 H. L. Cas. 1.

Jessel, Q.C., in reply, argued that the direction to apply "the rest of the profits" on the repair of the houses, left no surplus undisposed of; if the words had been out of the profits, it would have been different. In order to give this property to the company beneficially, two things were requisite, viz. (1.) there must be an indication or intention in the gift itself that the benefit shall be given; and (2.) there must be no trust; here there was no

indication of the intention, and there was a distinct trust. He cited:

Attorney-General v. Trinity College, Cambridge
(sup.);

Hayter v. Trego, 5 Russ. 113;

As to the intermixed piece of land, he cited:

Dann v. Spurrier, 7 Ves. 235;

Powell v. Thomas, 6 Hare 300.

Ang. 6.—Lord ROMILLY.—This is an *ex officio* information, instituted by Her Majesty's Attorney-General, against the Wax Chandlers' Company, praying: [His Lordship stated the prayer of the information as above set forth.] The question depends upon the proper construction to be put upon the will of William Kendall. [His Lordship stated the will, and the death of the testator and his son.] The Wax Chandlers' Company then took possession of the property, and the value of the property, which at the death of the testator appears to have been 9*l.* 6*s.*, at the time when they took possession of it appears to have been 16*l.* a year, beyond all reprises. The Wax Chandlers' Company have since that time down to the present enjoyed the property, which is now of the value of 330*l.* per annum, paying thereout the various sums specified in the will, amounting in the whole to 8*l.* per annum. In the year 1790, the company bought a small piece of land for the sum of 350*l.*, which was surrounded by the land comprised in the said devise of William Kendall. The money for this purchase was advanced by one of the members of the company, and was repaid to him out of the general income and assets of the company, but there is no evidence before me to identify the purchase-money with any of the proceeds arising from the devised estate of William Kendall, and as in these cases strict proof is necessary in order to take property away from a company, or a person, which has been enjoyed by them for nearly seventy-seven years before the information was filed, I am of opinion that, as regards this piece of land, the information fails. As regards the devised tenements, this depends upon the construction of the will, and raises a point which, so far as I am acquainted with the cases upon the subject, is new. It is this: a testator possessed of real property producing more than 8*l.* a year, gives the property to the Wax Chandlers' Company, and their successors to this intent and purpose, and on this condition—that they pay divers sums for charitable purposes, amounting in the whole to 7*l.* 15*s.*; he then gives 5*s.* to the master and wardens of the company, and goes on thus: "And the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparations of the said houses and tenements." Does this direction infer a benefit to the company? If they perform the obligation of keeping the property in repair, is the company entitled to take the rest, or to whom does it go? This, in my opinion, is clear—that if it had been given to the company, or to any stranger, to be held merely with a condition of keeping the premises in repair, the whole would go to that person, provided he performed the condition and kept the property in repair. It is clear also, that more than is required for the purpose cannot be expended in repairs, that is, it cannot be expended properly in repairs, it would be only wasted. It is clear that at the time of the death of the boy (the testator's son), when the income of the property was 16*l.* per annum, clear of all repairs, the surplus was far more than was necessary for the repairs of the houses. There are, in my opinion, three sets of persons who may claim this surplus. It is necessary to consider which set has the best claim. The first claim is that of the charities which are named in the will. The second is that the surplus is undisposed of, and

ROLLS.]

ATTORNEY-GENERAL v. WAX CHANDLERS' COMPANY.

[ROLLS

belongs to the heir of William Kendall; and the third is that it belongs to the company itself. I am of opinion that the charities cannot claim more than the specified annual amounts given to them. I have searched in vain in the books for a case of this description—viz., a devise in these words: "I give my farm of Whiteacre to A. and his heirs for ever, on trust out of the rents to pay 100*l.* for ever, to St. George's Hospital" (a perfectly good devise, because the trustees of St. George's Hospital can take property in mortmain), "and to apply the rest of the rents in the erection of farmhouses." The rents far exceed the whole of the sum required for the purpose. Is there any disposition of the residue? Is the heir of the testator disinherited, or can the charity say, "We are entitled to take the whole?" Does the charity stand in any better position in this respect than any private individual would do? I apprehend that it does not; but, if it does, then it is to be observed here that the whole of the property here is not, properly speaking, given to the charity. This circumstance strikes me, how does the gift of the 3*l.* 18*s.* to the poor of St. Mary Magdalen, and 1*l.* 18*s.* to the poor of the parish of Bexley, differ from the 5*s.* given to the Master and Wardens of the Company? It is true that the two first payments are charitable, and that the last is a personal gift to the persons who from time to time fill the offices of Master and Wardens, for it is important to observe that the 5*s.* is not given to the company. The commonalty are nowhere mentioned as partaking of any part of it. It is a personal legacy to be divided annually amongst the persons who may fill these offices. If the whole income is to be distributed *pro ratâ*, the Master and Wardens must take such a share of the increased income as 5*s.* at the date of the testator's death bore to the then existing income of the property. I think that it is impossible, by saying that the rest shall be bestowed upon the reparation of the houses to hold that this is a gift to charity, even if all the rest of the income were devoted to charity, which it clearly is not, for the 5*s.* to the Master and Wardens is not, properly speaking, a charitable gift. I am clear that I must read the residuary gift in one of two ways; either just as if the testator had said this: "I give what may be required for the repair of the property, and I give the rest to nobody;" or, secondly, as if he had said, "I give this, and I require as a condition inseparable from the devise I have made that the devisee shall out of the rents keep the property in repair;" and I am of opinion that the proper mode of reading the will is to read it as if this were a condition appurtenant to the devise already made, and not as a separate and independent devise. My principal reasons are to be found in the will itself. It is obvious to me from the whole scope of the will that the testator intended to benefit the company. In the beginning of the will he recites that he is a member of the company. In the next place the devise to the company is complete, that is to say, to the master and wardens and their successors. If he had gone on to say, "on this condition," no question would have arisen upon it, but it goes on thus: "for this intent and purpose and upon this condition." I am as little entitled to convert the whole devise into a trust upon the two first words, as I am entitled to reject the two first words, and treat it as an absolute devise solely on condition. I think that the fair way of reading it is to read the words as distributive—that the devise is upon the intent and purpose of making the payments after stated, and upon the condition afterwards stated—that you keep the property in proper repair, and that on failure of the performance of those trusts and conditions you are to deliver it over to my kindred. Another proof of his wishing to benefit the com-

pany is this, that he gives thirty-five shillings to the poorest men and women of the company, and a third is a gift which he makes to the master and wardens. Observing all this in the will, and observing that he himself was a member of the company, he gives no benefit to the company *qua* company, unless it is to be obtained by the surplus rents. That the testator considered that the persons who performed his wishes or carried his bequests into execution ought to receive some return is obvious from his gift of the 2*s.* to the churchwardens of the parish of St. Mary Magdalene and the parish of Bexley, and yet he gives the company, as I have observed before, in words absolutely nothing. Another circumstance also impresses me strongly. Unless some benefit were to be derived from doing all that the testator required, what inducement was there for the company to undertake the trusts at all, or what terror was there in the threat of forfeiture if the company did not perform them; and, further, what motive could be found for his kindred to undertake a troublesome trust that would do them no good? The company would lose nothing. The 35*s.* to the poor men and women of the company, and the 5*s.* to the master and wardens would be paid by the kindred exactly the same as before. But the circumstance which presses on me most strongly is this. I think that it is plain and to be inferred from the will that the testator intended that his kindred should stand in the place of the company, in the event of their failure to perform what he told them to do. The kindred clearly took the property beneficially, not only because unless they did so they could not be induced to take an onerous burthen; and it is expressly given to them on condition that they do the things above rehearsed in all points. What possible reason can be assigned for the testator intending the charities to take the whole of the property if the company administered the estate, but only the exact sum specified by him if his kindred took it? What appearance is there that the testator preferred the kindred to his own company in this matter? Then the testator gave the property to the company, subject to a trust and upon a condition. This condition is clearly expressed when the gift over to the kindred takes effect. My opinion is that the kindred are merely substituted for the company, and the company and the kindred have like powers and interests. If the company do not perform the matters entrusted to them, then the kindred, as the testator doubts not, will do so. It is always to be remembered in these cases that it is a question of intention to be gathered from the whole of the will, and the question upon this will is, did the testator intend that the whole of the property, which, judging from the accounts of the rental, must have left a surplus at his death after providing for the repairs, to be distributed among his legatees, or did he intend that his company should derive some advantage from his devise? I think the latter. I think that the information fails, and that it must be dismissed.

Browne.—I am afraid that the late Act does not extend to costs in Chancery cases.

Lord ROMILLY.—No.

Solicitors for the informant, *Fearon, Clabon, and Fearon.*

Solicitor for the defendants, *H. Gregory.*

ROLLS.]

BUBB v. YELVERTON.

[ROLLS.]

Saturday, Feb. 26.

BUBB v. YELVERTON.

Bond—Consideration—Racing debts.

A member of the Jockey Club incurred considerable racing debts, and was unable to pay them. Being threatened by his creditors with proceedings, which would have resulted in his expulsion from the club, and in various losses which he would have sustained thereby, he entered into a compromise by which he paid a certain sum down, and gave his creditors a bond for 10,000l. :

Held, that the bond, having been given not to pay racing debts, but to avoid the consequences of not having paid them, was perfectly good, and could be proved against the obligor's estate.

Adjourned summons.

This was an application by Mr. Henry Steele and Mr. William Nicholls for leave to prove against the estate of the late Marquis of Hastings, which is in the course of administration in the above suit, for 10,000l., upon a joint bond given to the applicants by the Marquis of Hastings and the Earl of Westmoreland under the following circumstances :

In the early part of the year 1868 the Marquis was indebted to various persons connected with the turf, amongst whom were Steele and Nicholls, to the amount of nearly 50,000l., which sum consisted almost entirely of bets lost on horseracing. The creditors threatened to enforce against the Marquis the rules of the Jockey Club, under which they could have prevented him from attending or running his horses at the various races during the season of 1868, and the Marquis would thus have become liable to pay a considerable sum in the shape of forfeit in respect of the horses which he retained, as well as of the other horses which he had sold; and he would moreover have become liable to actions by the purchasers of the horses, and to expulsion from certain sporting clubs of which he was a member. To obviate these inconveniences an arrangement was effected in June 1868 under which the Marquis paid 10,000l. down, and gave his bond for 10,000l., payable in six months after date, to Steele and Nicholls, the Earl of Westmoreland joining in the bond as surety. In pursuance of the arrangement Steele and Nicholls paid a composition to the various creditors whose claims were thus adjusted, and the Marquis was enabled to run his horses in the races for which they were already entered, and won large stakes by doing so. The Marquis died before the expiration of the six months, and the above suit was instituted for the administration of his estate. Steele and Nicholls took out a summons for leave to prove to the amount of the bond, and the summons was adjourned into court. It was admitted that the arrangement had been duly carried into effect by Steele and Nicholls, and the only question was whether the proof could be admitted in the present state of the law as to securities given in consideration of any contract arising out of wagers on horse-racing and gaming in general.

By the first section of 9 Anne, c. 14, it is provided that "from and after the 1st May 1711, all notes, bills, bonds, judgments, mortgages, or other securities and conveyances whatsoever given, granted, drawn, or entered into, or executed by any person whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting

as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall, during such play so game or bet, shall be utterly void, frustrate, and of none effect to all intents and purposes whatsoever."

By the first section of 5 & 6 Will. 4, c. 41, it is enacted that so much of the 9 Anne, c. 14, and several other Acts therein recited, "as enacts that any note, bill, or mortgage shall be absolutely void, shall be and the same is hereby repealed; but, nevertheless, every note, bill, or mortgage which, if this Act had not been passed, would, by virtue of the said several lastly hereinbefore mentioned Acts or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed, for an illegal consideration, and the said several Acts shall have the same force and effect which they would respectively have had, if, instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration."

By the 15th section of 8 & 9 Vict. c. 109, the rest of the Act of 9 Anne, c. 14 was repealed.

Sir Roundell Palmer, Q.C., Southgate, Q.C., and W. W. Knox, in support of the claim, contended that the bond was not given in consideration of any contract arising out of wagers on horse-racing, but to escape the consequences with which the Marquis was threatened; and that even if it were given in consideration of such a contract it would be good in the present state of the law, and that the applicants were therefore entitled to prove for the amount. They cited,

Fitch v. Jones, 5 E. & B. 238;
Hill v. Fox, 4 H. & N. 359;
Rosewarne v. Billing, 9 L. T. Rep. N. S. 441;
 15 C. B., N. S., 316;
Hawker v. Wood, 1 W. R. 316;
Hawker v. Hallowell, 3 Sm. & Giff. 191;
Knight v. Canibers, 15 C. B. 562;
Jessopp v. Lutwyche, 10 Ex. 614;
Johnson v. Lansley, 12 C. B. 468;
Fisher v. Bridges, 2 E. & B. 118;
 9 Anne, c. 14;
 5 & 6 Will. 4, c. 41;
 7 & 8 Vict. c. 3 and c. 58.

Jessel, Q.C., and Rowcliffe, for the executors, took no part in the argument.

Sir Richard Baggallay, Q.C., and Pemberton, for Lord and Lady Marsham and their infant children, the residuary legatees under the will, contended that the claim could not be admitted, as it was substantially a claim to recover money lost by wagers on horse-racing, which is rendered irrecoverable by the 18th section of 8 & 9 Vict. c. 109. They cited

Hay v. Ayling, 16 A. & E. 423;
Waite v. Jones, 1 Bing. N. S. 662;
Collins v. Blantern, 1 Sm. L. C. 325.

LORD ROMILLY.—I will not trouble you, Sir Roundell Palmer, to reply in this case because I have no doubt that the bond is a perfectly good bond, and can be recovered and proved against the estate. I do not mean to express any opinion, whatever I may think upon the subject, whether, if a person incurs debts in racing, and gives a bond for payment of them, that bond can be proved against his estate. But there was a perfectly good consideration quite ulterior to, and independent of that in this case, and it is impossible to read the evidence of Mr. Steele and Mr. Padwick and the cross-examination, and the evidence of Lord Westmoreland, without seeing clearly that it was given

V.C. S.]

WALLINGER v. WALLINGER.

[V.C. S.]

not to pay racing debts, but to avoid the consequences of not having paid them which the creditors were determined to enforce—a course which would have been very serious for the Marquis, and which would have cost him a very considerable sum of money; not that the Marquis (and it is just to his memory to say so) ever intended to avoid paying these debts, but he had not the means of doing so at the time; he had got into very great difficulties, and when Lord Westmoreland assisted him, he gave the bond. But it was pressed upon him by the circumstance that Mr. Steele and Mr. Nicholls would have taken steps which would have been exceedingly painful to him, and which would have involved him in very serious and considerable pecuniary liabilities in the shape of forfeiting stakes, in the shape of having to answer actions by persons who had bought horses from him under the promise and faith that they had engagements which they could fulfil, but which by reason of his misconduct they were unable to perform. I am of opinion, therefore, that the obligees on this bond are entitled to prove the bond against the estate, and that they are entitled also to prove for the costs of this proceeding.

Solicitors for the applicants, *Pemberton and Reeves*.

Solicitors for the executors, *Wordsworth and Blake*.

Solicitors for the residuary legatees, *Barlow, Bowling, and Williams*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Dec. 8, 13, and 20, 1869.

WALLINGER v. WALLINGER.

Power—Invalid appointment—Will—Residuary gift.

A testatrix who, by her husband's will, had a power to appoint to any one or more of her children certain property which, in default of appointment, was to be divided among her children equally, and who also had, under her marriage settlement, a general power of appointment over certain other property, by her will, which was expressed to be made in pursuance of every power, authority, direction, estate, or interest in anywise enabling her in that behalf, made an appointment of part of the first mentioned property in favour of her son J. and his children, and afterwards "appointed, devised, and bequeathed all her real and personal estate not therein specifically and absolutely appointed or bequeathed unto and to the use of her daughter A. absolutely for her own or separate use."

Held, that the appointment to J. and his children was invalid; and that all the property over which the testatrix had any power of appointment, whether under the will or the settlement, was absolutely and well appointed to A.

The question in this case turned upon the validity of an appointment which had been exercised under these circumstances. Serjeant Wallinger, by his will, dated the 15th April 1858, after disposing of certain bequests and legacies, gave the residue of his property to his brother, the Rev. W. Wallinger, and his nephew, C. J. Fisher, on trust to pay the income to his wife for life, and on her decease to pay the principal to or among his children, as she should by deed or will appoint, in such shares and proportions, and whether to one only, or to some or all, as she should direct, and in default of appointment then to his children equally.

The testator died in April 1860, leaving three sons, Henry, James, and Arnold Wallinger, and one daughter, the plaintiff, Amelia Anne Wallinger.

testator's widow, by her will, dated the 24th

May 1867, after reciting that it was made in pursuance of every power, authority, direction, estate, or interest in anywise enabling her in that behalf, and appointing her daughter, Amelia Anne Wallinger, and the said C. J. Fisher, her executrix and executor, appointed and bequeathed certain personal property, part of the testator's residuary estate, unto her said daughter and C. J. Fisher, upon trust during the life of her son, James Wallinger, to pay and apply at such times and in such manner as they in their absolute discretion should deem proper, such parts as they should think fit of the annual income of the property for the personal use of the said James Wallinger, or his child or children by his first or second marriage only, or any or either of such children; and subject as aforesaid that they should hold the property and the income thereof in trust for all or any of the children of the said James Wallinger by his first or second marriage only, or any or either of such children, for such interests, in such proportions, and in such manner in all respects as her said son should by will appoint; and in default of such appointment, in trust for the said Amelia Anne Wallinger absolutely. Then came the following clause;—"And I appoint, devise, and bequeath all my real and personal estate not hereinbefore specifically and absolutely appointed or bequeathed unto and to the use of my said daughter, Amelia Anne Wallinger absolutely for her own sole and separate use."

The testatrix died in Jan. 1869. Under her marriage settlement the testatrix was entitled to considerable personal property, over which she had a general power of appointment, and which in default of appointment was to go to the children of the marriage.

Upon the death of the testatrix, this bill was filed for administration of her estate by her daughter, Amelia Anne Wallinger.

The questions, as stated by the bill, were these: First. Whether the will of the testatrix was not invalid so far as it purported to be an appointment in favour of her son for life, and for his children, and to give to trustees a discretion as to the application of the income. Second. Whether the residuary disposition contained in the will of the testatrix comprised such interests, if any, as such will purported to appoint to her son's children, but which were not thereby effectually appointed, or whether such interests were subject to the trusts contained in the testator's will in default of appointment? Third. Whether the residuary disposition contained in the will of the testatrix comprise such of the testator's residuary estate as was not comprised in the specific appointments to the testatrix's son James Wallinger? Fourth. Whether a case of election was raised by the said residuary disposition?

Dickinson, Q.C., and Charles Hall for the plaintiff, contended that the appointment to James Wallinger and his children was clearly bad, and that the property so appointed therefore went under the last clause in the testatrix's will, which was sufficient to convey everything to the plaintiff.

Karslake, Q.C. and Dumergue, for the defendant Arnold Wallinger, argued that the words used by the testatrix did not amount to an appointment. The power was limited, and it was essential to the due execution of such a power that the intention to appoint should be manifest. There having been, therefore, a failure in the exercise of the power by the testatrix, the property remained subject to the trusts of the testator's will. They cited,

Moss v. Harter, 2 Sm. & G. 458;

Hope v. Hope, 18 Jur. N. S. 828;

Clogstoun v. Walcott, 13 Sim. 523;

V.C. S.]

WOTHERSPOON v. CURRIE.

[V.C. M.]

Jones v. Curry, 1 Swan. 66;
Evans v. Evans, 23 Beav. 1;
Probert v. Morgan, 1 Atk. 440;
Andrews v. Emmot, 2 Br. C. C. 297;
Bennett v. Aburrow, 8 Ves. 609;
 Sugd. on Powers, 294, 305.

Greene, Q.C., and *Waller*, for the defendant *James Wallinger*, submitted that the intention of the testatrix could alone be regarded. The court could not suppose that by one and the same instrument the testatrix intended to make two different appointments of the same property, or that she considered her first appointment as bad. He referred to

Hope v. Hope (sup.);
Clogstoun v. Walcott (sup.).

Freeman, for the children of *James Wallinger*, submitted that the case involved a question of election. The plaintiff took large benefits under the testatrix's settled property, and could not be permitted to defeat the appointment to the children of *James Wallinger* without election. He referred to

Whistler v. Webster, 2 Ves. jun. 367;
 1 Jarm. on Wills, 3rd edit., 421.

J. T. Humphrey for the trustees.

Dickinson, Q.C. in reply.

The VICE-CHANCELLOR.—No doubt there is a great degree of difficulty in this question, but putting the fair construction upon the ultimate words of absolute appointment of all that had not been specifically appointed, it seems to me impossible to say that this lady left unappointed any part of the property included in her will or under her settlement over which she had a power to appoint. There is no doubt about the principles which govern the case. Mr. Karslake was quite right in saying that this, like every question on the validity of appointments depends upon the question of intention. There is also great room for the argument that this lady having appointed to *James Wallinger* and his children certain specific parts of the property, the natural inference would be that when she came to appoint or dispose of the rest of her property, she could not intend either to dispose of or appoint what she had previously appointed in express terms. But after all it comes to a question of construction, because nobody can argue that the words about ultimate appointment of all that had not been before appointed, could be so general as to include everything, whether previously well-appointed or ill-appointed. What was well appointed could not be included; what was ill-appointed must be included if the words are absolute and universal, as in my opinion they are. It is impossible to say that the plaintiff is not absolutely entitled to the whole of the appointed property, but only to that part of the property which was well appointed. As to the argument the case involves a question of election, it proceeds upon a complete misapprehension of the principles on which the case of *Whistler v. Webster* (sup.) was decided. Here nothing is left unappointed, nothing is claimed in default of appointment, and there is no room for raising a question of election. Upon the whole, therefore, the declaration of the court must be that the appointment to *James Wallinger's* children is invalid, and that upon the true construction of the will and appointment of *Mrs. Wallinger*, all the property over which she had any power of appointment under the settlement or under the will, is absolutely and well-appointed to the plaintiff.

Solicitors for the plaintiff, *R. M. and F. Lowe*.

Solicitors for the defendants, *R. D. Hughes, F. H. Turner*.

V.C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
 Barristers-at-Law.

Feb. 24 and 25.

WOTHERSPOON v. CURRIE.

Trade-mark—Imitation—Rival advertisements.

The plaintiffs had been for many years the manufacturers at *Glenfield* of starch, which was described on their packets as "*Glenfield Starch*," and which had acquired a considerable reputation under that name. In 1868 the defendant commenced manufacturing, also at *Glenfield*, starch which was made up in packets labelled "*C. and Co., Starch Manufacturers, Glenfield*," in consequence of which several persons had been induced to purchase the defendant's starch, under the impression that they were purchasing the "*Glenfield Starch*."

Held, that, notwithstanding that the defendant manufactured his starch at *Glenfield*, he was not entitled to use that name so as to avail himself of the reputation of the plaintiffs.

This was a motion for an injunction to restrain the defendant, *John Currie*, his servants, workmen, and agents from applying the word "*Glenfield*" to or in connection with starch manufactured by or for him, and from using the word "*Glenfield*" in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be "*Glenfield Starch*," and from selling or causing the same to be sold as "*Glenfield Starch*," and from doing any act or thing to induce the belief that starch manufactured by or for him was "*Glenfield Starch*," or starch manufactured by the plaintiffs. For many years previously to the year 1847, Messrs. *Fulton and Co.*, of *Glenfield*, near *Paisley*, in Scotland, manufactured a species of powder starch, which they called by the name of "*Glenfield Patent Double Refined Powder Starch*," but which was commonly called and known in the trade and by the public as "*Glenfield Starch*."

In Jan. 1847 the plaintiff, *William Wotherspoon*, purchased of Messrs. *Fulton and Co.* their business and works at *Glenfield*, and the exclusive right of manufacturing starch in the manner in which it had been manufactured by them, and selling the same under the name or description of "*Glenfield Patent Double-Refined Powder Starch*," and for some time after such purchase the plaintiff *Wotherspoon* continued to manufacture starch at the works at *Glenfield*, but he afterwards removed his manufactory to *Manwelton*, near *Paisley*; such manufactory had ever since been known as the "*Glenfield Starch Works*," and the starch manufactured there still bore the original name of "*Glenfield Patent Double Refined Powder Starch*," or more shortly, "*Glenfield Starch*," and was manufactured by the plaintiffs under the style or firm of "*Robert Wotherspoon and Co.*" The starch so manufactured was made up into packets of various sizes, each packet being enclosed in blue paper, upon which was pasted a green label bearing the words, "*Glenfield Patent Double Refined Powder Starch*."

In the year 1869 the plaintiffs ascertained that the defendant, *John Currie*, who kept a shop in *Paisley*, and had been originally a workman in the employ of Messrs. *Fulton and Co.* at *Glenfield*, was making and selling starch enclosed in blue paper with green labels, bearing the words "*Royal Palace Starch, Currie and Co., Starch Manufacturers, Glenfield*;" the word "*Glenfield*" being printed in large and conspicuous letters, and that such starch was being sold by retail dealers as "*Glenfield Starch*." It appeared that the defendant, about the end of the year 1868, hired of Messrs. *Fulton*

V.C. M.]

WOTHERSPOON v. CURRIE.

[V.C. M.]

and Co. a small building belonging to them at Glenfield at a rent of 12*l.* a year, with a view to commencing the manufacture of starch, but that only two or three hands were employed by him there for the purpose, and it was alleged by the plaintiffs that the sole object of the defendant in hiring this building was to give colour to the use of the word "Glenfield" on his labels.

It also appeared that Glenfield was neither a town, a hamlet, nor a village, nor had it a post office, but that it was merely a field in which two or three manufactories were situate, and the directory gave the names of about fifty persons as residing there. The evidence on the part of the plaintiffs furnished several instances in which persons had asked at different shops for "Glenfield Starch," and had been supplied with the defendant's starch. On the other hand the defendant alleged that he had no fraudulent intention in hiring the building at Glenfield; that he had hesitated whether he should set up his manufacture at Glasgow, Renfrew, or Glenfield, but that he selected Glenfield because there was a spring of water there particularly suitable for the manufacture of starch; that the word "Glenfield" on his labels was merely used as an advertisement, and that his starch had attained a celebrity quite independently of the word "Glenfield" being used in connection with it. It also appeared that it was the custom of the trade to enclose powder starch in packets of the description used both by the plaintiffs and the defendant.

Glasse, Q.C., and Fischer for the plaintiffs, contended that the defendant had adopted the name of "Glenfield" upon his labels for the purpose of getting his starch purchased in the market as "Glenfield Starch," which was the plaintiffs' manufacture; and that the plaintiffs were entitled to the exclusive use of the word "Glenfield" in connection with the manufacture and sale of starch.

They referred to

Seixo v. Provizende, L. Rep. 1 Ch. App. 192; 14 L. T. Rep. N. S. 314.

Glenny v. Smith, 2 Dr. & Sm. 476;

Rodgers v. Nowill, 6 Hare 325.

Cotton, Q.C., and Freeling for the defendant, contended that the word "Glenfield" was used by him merely as an advertisement or statement where his starch was manufactured, and that his labels were not calculated to mislead purchasers acting with ordinary caution into the belief that they were purchasing the plaintiff's starch. No person can acquire a monopoly in the name of a place, so as to prevent any other person, who is *bona fide* carrying on his business at that place, from putting the name of the place upon his goods. The defendant simply advertises himself as a rival manufacturer. They referred to

Leather Cloth Company v. American Leather Cloth Company, 11 H. L. C. 523; 12 L. T. Rep. N.S. 742;

Burgess v. Burgess, 3 De G. M. & G. 896.

Colonial Life Assurance Company v. Home and Colonial Life Assurance Company, 33 Beav. 548; 10 L. T. Rep. N. S. 448;

London Assurance v. London and Westminster Assurance Corporation, 32 L. J. 664, Ch.; 8 L. T. Rep. N. S. 497.

The VICE-CHANCELLOR.—I only wish to hear you, Mr. Glasse, as to the right of the defendant, to use the word "Glenfield" on his labels.

Glasse in reply. The fundamental rule is that one man has no right to pass off his goods as the goods of a rival trader, and therefore he cannot use a name which has become associated with the goods of another person, so as to induce purchasers to believe that he is selling the goods of that other person. This is not a case of rival manufacturers

as in *Leather Cloth Company v. American Leather Cloth Company*, 11 H. L. C., see pp. 538, 540.

The VICE-CHANCELLOR.—All these questions depend upon the particular circumstances of each case. The question here is, has everything been done *bona fide*? Has there been an intention to mislead or not? Now I am much struck with that part of the defendant's evidence in which it is said that he hesitated whether he should set up his manufacture at Renfrew, Glasgow, or Glenfield, but that he decided on Glenfield, because there was a spring of water there particularly suitable for the manufacture of starch, and he denies that he so decided, because of any advantage that might be derived from the use of the word "Glenfield." If this was the case, why did he not sell his starch without using the word "Glenfield" on his packets? He puts in a quantity of evidence at great expense in order to maintain his right to use the name, and yet he says the name is of no advantage. What object then has he in using the name? His packets are labelled "Currie and Co., starch manufacturers, Glenfield," but they do not state where Glenfield is. Glenfield is neither a town, a hamlet, or a village, nor has it a post-office. How then is a letter to find the defendant? Why is the word "Glenfield" placed by itself, and in such conspicuous letters? The fact is this: The plaintiffs' starch has gained a reputation, and is well known as "Glenfield Starch," and the defendant thinks that he can make use of this reputation. It is clear from the evidence that several persons have in fact been induced to purchase the defendants' starch under the impression that they were purchasing "Glenfield Starch." [The Vice-Chancellor then went through the evidence bearing on this point, and continued:] Now one man may adopt or imitate the label or trade mark of another with the most innocent intention possible, but the law has settled that if his imitation is such as is calculated to mislead purchasers into the belief that he is selling an article manufactured by that other, this court will interfere. But in this case it appears that the defendant had for twenty years known the plaintiffs' starch was sold as "Glenfield Starch." What could have been his object in putting the word "Glenfield" so conspicuously on his labels? If it had been a place well known, I could quite understand his doing so, but to what am I to attribute all this anxiety on his part to use the name? I am satisfied that his object was to make use of the reputation of the plaintiffs. The case is precisely similar to the case lately before me of the Guinea Coal Company, *Lee v. Haley*, L. Rep. 4 W. N. 258, 268; 21 L. T. Rep. N. S. 546. The sole object of the defendant in that case was to avail himself of the connection and reputation of the plaintiffs, as I am satisfied the object of the defendant in this case is to avail himself of the connection and reputation of the plaintiffs, and thereby to induce the public to buy his starch as the starch of the plaintiffs. Whatever words or description he used on his labels, he should not have used the one word the use of which would prove injurious to the plaintiffs. I am satisfied that this was a deliberate and fraudulent intention on the part of the defendant to palm off upon the public his starch as the plaintiffs', and such a proceeding this court will not for one moment tolerate. The reason given by the defendant for setting up his works at Glenfield—namely, that there was a spring of water there particularly suited to the manufacture of starch, is, my opinion, a frivolous pretence. But the defendant contends that, as he is carrying on his business at Glenfield, he is therefore entitled to use the name on his packets, and that the plaintiffs do not possess an exclusive right to the name; but I think that the

V.C. M.]

Re CHAWNER'S WILL—Re ROBERTS.

[V.C. J.]

court, in coming to a conclusion on cases of this kind, should look at all the surrounding circumstances of the case, and endeavour to ascertain what is the intention and object of the defendant. The case here is analogous to that of a man selling goods under his own name, when the same class of goods has been previously sold by another man under the same name, and so have acquired a reputation in the market. I quite agree with what is laid down by Mr. Kerr in his work on Injunctions, p. 477, where he says, "The mere user by a man of his own name is of itself no evidence of fraud, but there may be other elements in the case, showing that the name has been fraudulently used for the purpose of reaping the benefit of the reputation which another has already acquired. It is in each case a matter of evidence, whether or not the use of the name has been fraudulent. The principle on which the court proceeds in cases of this sort is accurately laid down by Lord Langdale in *Perry v. Truefitt*, 6 Beav. 66; there he says, "A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means which contribute to that end; he cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark, but whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception, and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark." The case of the *Leather Cloth Company v. American Leather Cloth Company* (*sup.*), turned entirely on the imitation not being colourable, so that the common run of mankind could not have mistaken the one trade mark for the other. The case of *Seix v. Provisende* (*sup.*), is exactly applicable to this case. There the court acted on the principle that a man whose goods have obtained a reputation in the market is entitled to all the advantages of that reputation. [The Vice-Chancellor referred at length to that case, and continued:] Looking, then, at the whole of the circumstances of this case, I feel satisfied that the defendant, in printing and exhibiting the name "Glenfield" so conspicuously on his labels without any address did so with the idea that he could gain some profit for himself out of the celebrity of the plaintiffs; and I think it is conclusively shown by the conduct of the defendant throughout that it was his deliberate intention to get his starch known as "Glenfield Starch," under which title the plaintiffs' starch was extensively known. On all these grounds, I am clearly of opinion that an injunction must be granted in the terms of the notice of motion.

Solicitors for the plaintiffs, *Willoughby and Cox*.
Solicitors for the defendants, *Roberts and Simpson*.

Friday, July 23, 1869.

Re CHAWNER'S WILL.

Mortgage—General power to mortgage—Power of sale.

A testator directed his trustees to raise a sum of money by mortgage, as they thought fit, and subject to such mortgage devised the estate to certain persons:

Held, that the direction to mortgage gave the trustees power to insert in the mortgage a power of sale.

This case came on upon a petition presented by

the trustees of the will of Edward H. Chawner, dated in Aug. 1868, whereby he devised a certain estate to the petitioners, to whom he gave a general power, by mortgage, out of said estate, to raise a certain sum of money, in their discretion. And the estate, subject to such direction, was given in a certain manner, and upon this no question turned. The trustees were uncertain whether, in mortgaging the estate under the power given by the will, they could insert in the mortgage-deed a power of sale, and they now petitioned under Lord St. Leonards' Act (22 & 23 Vict. c. 35) for the advice and opinion of the court upon that question.

Wingfield in support of the petition. It was always considered that a mortgage should, to make it perfect, contain a power of sale. No doubt the cases were conflicting. In *Clark v. Royal Panopticon*, 4 Drew, 26, Kindersley, V.C. held that a power to mortgage did not include a power of sale; but then came Lord Cranworth's Act (23 & 24 Vict. c. 145), which by sect. 11 makes a power of sale essential to a mortgage; and that was also held by the Master of the Rolls in *Bridger v. Longman*, 24 Beav. 27; also in *Cook v. Dawson*, 29 Beav. 123. Here there was, moreover, a direction with an absolute discretion.

Streeten for the devisees.

The VICE-CHANCELLOR.—I consider that a power to mortgage includes a power of sale, that is, that a power of sale is a necessary incident to such power. When a testator directs money to be raised by mortgage, he means in the ordinary way, and that the mortgage deed should contain what such deeds do generally contain—that is, a power of sale. I quite concur in the opinion expressed by Lord Romilly in *Cook v. Dawson*, where he says that a power to mortgage includes the power to give to the mortgagee all such remedies as he ought to have, one of such remedies being a power of sale. I consider, therefore, and I express my opinion to be, that these trustees being directed to raise a sum of money by mortgage of the trust estate, as they shall think fit, have power to insert in the deed a power of sale, but only with six months' notice.

Solicitor, *Beck*.

V. C. JAMES'S COURT.

Reported by the Hon. ROBERT BUTLER, Barrister-at-Law.

Saturday, Feb. 12.

Re ROBERTS.

Practice—Declaration of Title Act—(25 & 26 Vict. c. 67), s. 6.

Where, upon a petition presented under the above Act, the petitioner proves such possession and states such title as, if established, would entitle him to a declaration under the Act, a reference will be ordered to chambers to establish the title.

This was an unopposed petition, presented in the matter of the Declaration of Title Act 1862, by Thomas Roberts, an infant, by his guardians, praying for a declaration that under the provisions of the above Act, the petitioner was entitled to one moiety of a house, No. 41, Windmill-street, near the Haymarket, for an absolute inheritance in fee simple in possession, free from incumbrance, subject only to a lease, in the petition mentioned, to one John Proger.

The petition stated the will of Robert Hendy, dated the 31st May, 1806, whereby the house was devised to James Badham for life, remainder to his two daughters Elizabeth and Caroline, their heirs, and assigns, as tenants in common; the death of the testator and of James Badham; the marriage

V.C. J.]

Re BURRELL; BURRELL v. SMITH—CORBETT v. HILL.

[V.C. J.]

of Elizabeth Badham; the marriage of Caroline Badham to John Roberts; various leases of the property; the death of John Roberts and of Caroline Roberts, she having duly received one moiety of the rents up to her death; and that John Roberts, the eldest son and heir of his mother Caroline Roberts, died in May 1865, leaving the petitioner his heir at law; also that no solicitor was called in or consulted by Caroline Roberts, in reference to any will or testamentary disposition by her, that the petitioner had been informed by some of Mrs. Roberts's children that she was often requested by them to make a will, but refused to do so, invariably stating, that the premises would go under her settlement equally amongst her children; that diligent search had been made, but no trace could be found of the existence of the title deeds or of any settlement. That no such settlement was ever registered in Middlesex; and alleged that the petitioner was entitled to the moiety in fee. It was stated at the foot of the petition, that it was not intended to serve the petition on any person; nor had it been.

The petition was supported by the affidavits of the solicitor and of a member of the family.

W. H. Terrell, for the petitioner, referred to the 6th section of the Act 25 & 26 Vict. c. 67.

The VICE-CHANCELLOR, being satisfied that the petitioner had proved such possession, and stated such title as, if established, would entitle him to a declaration under the Act, ordered a reference to chambers, in conformity with the 6th section.

Solicitor, C. P. Pritchard.

Tuesday Feb. 15.

Re BURRELL;

BURRELL v. SMITH.

Administration—Equity of redemption in copyhold—Legal or equitable assets—3 & 4 Will. 4, c. 104—Insufficient estate—Costs of plaintiff as between solicitor and client.

In the administration of the estate of anyone dying before the 1st Jan. 1870, the equity of redemption of copyhold estate is legal assets.

Where a plaintiff in a suit for administering an insufficient estate for the benefit of others, had commenced the suit in the least expensive way possible, he was allowed his costs as between solicitor and client.

The question raised on this adjourned summons was, whether the equity of redemption of a copyhold estate was applicable to the payment of specialty debts in priority to simple contract debts; in other words, whether it was legal or equitable assets.

The testator, Thomas H. Burrell, who died in 1863, by his will appointed the defendant Smith and his (testator's) sister, Louisa Burrell, his executors, and devised to them all the residue of his real and personal estate upon trust for the persons therein named, but he did not charge any part of his property with, or devise any part of it subject to, the payment of his debts.

As the whole of the real and personal estate was devised in trust for sale, an administration suit was commenced by one of the residuary legatees against the executors by summons.

It was found that the testator at his death was possessed of some copyhold property in mortgage. This was sold under an order in the suit, the mortgagees paid, and the balance, amounting to 259l. 16s., was now in court.

From the chief clerk's certificate, it appeared that if the specialty creditors were to have payment in

priority, they alone would swallow up the whole of the assets.

The cause, which was adjourned out of chambers into court, now came on for further consideration, on the question of whether the 259l. 16s. representing the sale of the copyholds, was not equitable assets.

Cozens Hardy for the plaintiff.—The question turns upon the construction of the 3 & 4 Will. 4, c. 104. We say that by that statute all real estate, whether freehold, copyhold, or customaryhold, is first made assets for the payment of all creditors—so far as the assets are equitable; but then comes the proviso at the end, which says that creditors by specialty in which the heirs are bound are not to lose their priority. If it be necessary, the point is decided in

Foster v. Handley, 1 Sim. N. S. 200; 15 Jur. 73;

F. H. Colt, for specialty creditors, supported the same view, and referred to

Cook v. Gregson, 3 Drew. 547;

Cummings v. Cummings, T. & L. 64;

Boyle for the defendants, as representing the simple contract creditors.—It is admitted on the other side that by the former part of the statute this property is made equitable assets. Then as to the proviso it is contended that all it means is that creditors by specialty in which the heirs are bound are to have the same priority as they had before the Act. But before the Act creditors by specialty, in which the heirs are bound, could not go against copyhold estate; copyhold estate was never assets before the Act for any creditors whatever. Consequently, this is made by the statute equitable assets.

The VICE-CHANCELLOR said it appeared to him the question was substantially governed by the authority of *Foster v. Handley*: (1 Sim. N. S. 200.) In that case the same sort of argument that had been used in this case with regard to an equity of redemption in copyholds was urged before Lord Cranworth with regard to an equity of redemption in freeholds, and was overruled by him. Indeed, according to one of the reports, Lord Cranworth, whether necessarily or not, actually ruled that an equity of redemption in copyholds was within the proviso, i.e., that it was legal assets. Accordingly he must hold that the specialty creditors must be paid in full in this fund also, before any of the simple contract creditors were paid.

Cozens Hardy asked for the costs of the plaintiff as between solicitor and client; and referred the court to *Burkitt v. Ransom*, 2 Cols. 536, followed by *Weston v. Clowes*, 15 Sim. 610; and see *Morgan and Davey*, on Costs, p. 136. The plaintiff began and carried on the suit in the least expensive way.

The VICE-CHANCELLOR held that the plaintiff in this instance was entitled to his costs as between solicitor and client.

Solicitors, *Sharpe, Parkers, and Pritchard*; *G. F. Cooke*; *T. H. Williams*.

Feb. 16 and 18.

CORBETT v. HILL.

Trespass—Contiguous houses—Projecting room—Right to space above the projection.

Plaintiff, the owner of two contiguous houses in the city of London, conveyed one of them to the defendants by a deed which correctly marked out on a plan the ground site of the house conveyed. Over this site there pro-

V.C. J.]

Re THE MERCHANTS' AND TRADESMEN'S ASSURANCE SOCIETY.

[V.C. J.]

jected on the first floor, a room of the plaintiff's house, which was supported by the other house :

Held, that the right to the vertical column of air over the projection was determined by the ground site, and hence belonged not to the plaintiff, but to the defendants.

This was a motion for decree.

By a deed dated the 23rd April 1866, a messuage, warehouse, and hereditaments, numbered 15, Philpot-lane, "as the same were then in the occupation of" certain tenants, and another messuage, warehouse, and hereditaments, situate and being No. 34, Eastcheap, in the city of London, "as the same were then in the occupation of Joseph Prime" were conveyed to such uses as the plaintiff Charles Joseph Corbett should appoint, and in default of appointment to the use of the plaintiff for life, remainder to uses to bar dower, remainder to the use of the plaintiff in fee.

By an indenture dated the 26th June 1866, the messuage, warehouse, and hereditaments at 34, Eastcheap, "as the same was then lately in the occupation of Joseph Prime, and then of said Joseph Corbett," was conveyed by the plaintiff and another to the defendants Thomas Rowley Hill and Edward Bickerton Evans, their heirs and assigns.

On each indenture there was a plan drawn on the margin.

Shortly after June 1866, the defendants began pulling down the house and premises No. 34, Eastcheap, and the plaintiff then discovered that one of the rooms on the first-floor of his house, No. 15, Philpot-lane, projected into and was supported by the defendant's house. He also discovered that a cellar or vault belonging to his house No. 15, Philpot-lane projected under the basement floor of the defendant's house; and that, on the other hand, a cellar or vault belonging to the defendant's house, No. 34, Eastcheap, projected under the basement of the plaintiff's house.

Neither of these three projections appeared in the plans, which were of the ground-floor. The projecting cellar belonging to the plaintiff's house was in part virtually under the projecting room belonging to the plaintiff's house.

The defendants in rebuilding their premises No. 34, Eastcheap, manifested an intention of building over the roof of the projecting room—in other words, of entering upon the vertical column of air above the projecting room, and they claimed the right to do this.

The plaintiff, on the other hand, claimed the column of air above the projecting room *usque ad cælum*, and the soil below the projecting cellar *usque ad inferos*; and, after a correspondence, filed the bill on the 3rd Oct. 1868.

On the same day the Master of the Rolls granted an *ex parte* injunction to restrain any further erection; but the defendants nevertheless proceeded on the 3rd, and up to twelve o'clock on Monday the 6th Oct., when a notice to commit was served. By this time the walls of the building-over the projecting room were finished but not roofed in.

On the 3rd Dec. 1868 the defendants moved before Giffard, V.C., now Lord Justice, to dissolve the injunction, when his Lordship dissolved the injunction, but reserved the costs to the hearing.

The bill as amended prayed for a declaration that the projecting room was not comprised in the hereditaments conveyed to the defendants by the deed of the 26th June 1866, and for an injunction to restrain the defendants from erecting, or building, or placing any erection or structure over or on the roof of the projecting room, or any part thereof.

Amphlett, Q. C. and Lindley for the plaintiff.—The

bill is filed to prevent not a mischief, but a perpetual trespass. They cited

Doe v. Burt, 1 Tr. 701;

Press v. Parker, 2 Bing. 456;

Martyr v. Lawrence, 2 Do G. J. & S. 261;

Kerslake v. White, 2 Starkie, 508;

Kay, Q. C. and Bovill, for the defendants, were not called upon.

THE VICE-CHANCELLOR.—In this case the plaintiff seeks an injunction to prevent the continuance of a building which has been erected over a certain property, which, but for two rooms that I am about to refer to, would be a court-yard into which there would be an opening into the house 34, Eastcheap. The plaintiff conveyed that house to the defendant. He conveyed it by a plan which carefully delineates the site of the house. The ordinary rule of law is that whoever has got the *solum*—whoever has got the site, is the owner of everything up to the sky and down to the centre of the earth; but that ordinary presumption of law no doubt is frequently rebutted, particularly with regard to property in towns, by the fact that other adjoining tenements of a joint ownership or from other circumstances protrude themselves over the freehold; and the question is, whether the protrusion is a diminution of so much of the freehold, including the right upwards and downwards, or whether the protrusion is not merely the right to that horizontal *stratum* limited by the ceiling on one side and the floor on the other, that is to say, a flat. In my opinion this protruding room here was simply a protrusion of that extent and that limited character. It was a protrusion which the plaintiff has retained as part of his freehold in Philpot-lane. According to the cases to which Mr. Amphlett referred, a man may have a *solum* or soil which may be apparently in another man's house. My opinion is as clear as anything can be that that room remains part of the house in Philpot-lane. But being part of the house in Philpot-lane does not carry with it anything above or anything below; that is, subject to the exception which has been obtained or made by reason of the protrusion, the owner of the house in Eastcheap still remains the owner of everything, including the column of air over which the supposed trespass has been made. That being so, the plaintiff has failed. The decree will be: "The court being of opinion that the plaintiff is entitled to the column of air over so much of the projecting room as projects over the site described in the plan, dismiss the bill with costs; but without prejudice to any question as to the ownership of the room."

Solicitors for the plaintiff, *C. T. Jenkinson and Son*.
Solicitor for the defendant, *Worthington Evans*.

Feb. 26 and 28.

Re THE MERCHANTS' AND TRADESMEN'S ASSURANCE SOCIETY.

Mutual assurance company—Transfer of business—Policy-holder—Novation of contract.

By the deed of settlement of an assurance society dated in 1847, it was provided that the subscription capital should be subject to be paid off as therein provided; and in the mean time was to be deemed a guarantee fund. The general funds of the society other than the guarantee fund were to be called the assurance fund. In 1855 the subscription capital was paid back to the subscribers with interest and a bonus, and the guarantee fund was put an end to, the shareholders mutually releasing each other. In Feb. 1858, the society transferred all their goodwill, premiums, and effects

V.C. J.]

Re THE MERCHANTS' AND TRADESMEN'S ASSURANCE SOCIETY.

[V.C. J.]

to an association; and it was agreed that all the liabilities of the society in respect of the policies should be borne by the association; that the association should indemnify the society and its members; and that all claims in respect of policies should be paid and satisfied out of the funds of the association. In Oct. 1858, the business of the association was transferred to the Albert Company.

A policy having been effected in 1850 with the directors of the society, and the life having dropped in 1868, since which time the Albert Company and the association had both been ordered to be wound-up, the holders of the policy presented a petition to wind-up the society.

Held, that the agreement in 1858 effected a complete novation of the original contract between the assured and the society; and petition dismissed.

Semle, after the payment off of the subscription capital of the society in 1855, the society could no longer be the subject of a winding-up order.

This was a petition by Thomas Stephens, executor of Joseph Laycock, deceased, for the common order to wind-up The Merchants' and Tradesmen's Mutual Life Assurance Society.

By the deed of settlement of the society, dated the 9th March 1847, and made between the shareholders of the first part, the directors of the second part, the auditors of the third part, the trustees of the fourth part, and a covenantor for the society of the fifth part, after reciting that the immediate subscription capital of the society was to be 100,000*l.*, in 2000 shares of 50*l.* each, which was to be paid off, with interest, and a bonus as soon as such an amount of profits should have been realised as to make its continuance unnecessary, the parties thereto of the first, second, third, and fourth parts covenanted with the covenantor, amongst other things, as follows:—

The subscription capital of 100,000*l.*, in 2000 shares of 50*l.* each, was to be subject to be paid off as thereafter provided, and in the mean time was to be deemed a guarantee fund. The general funds of the society, other than the subscription capital, were to be called "the assurance fund," and were to consist of all premiums, fines, and other moneys or payments to be received for policies.

Clause 22 provided that as soon as it should appear that the net profits of the assurance fund should be equal in amount to double the amount of the bonuses, it should be lawful for the directors to convene an extraordinary general meeting, and lay before it a statement of the debts, assets, and liabilities of the society; and, subject to the direction of the meeting as to the time and place of payment, the amount paid up by each shareholder in respect of his shares, with a bonus of 5*l.* per cent., should be paid and returned to him, thereupon the guarantee fund should be discontinued and wound-up; the shareholders should be acquitted and discharged, as respected the society, and indemnified by the society against strangers, from all further obligations, liabilities, and transactions of the society in respect of their shares, and from all the covenants and stipulations of the deed of settlement, except as to any previous breach; thereupon the clauses and provisions therein contained, so far as the same were applicable to shareholders, should be considered at an end as respected shareholders only, and the balance then standing to the credit of the assurance fund should thenceforth form the assurance fund of the society, and be the only fund for receiving and paying all moneys on account of its business and affairs.

By clause 25 "the bonus apportioned to members in respect of any policy" fallen due since the last apportionment was to be paid forthwith, or (clause 28) be allowed in reduction of premium.

By clause 186 all sums to be claimed under any policy were to be paid out of the funds of the society; and by clause 189 all shareholders and members of the society were to be entitled to the same remedies against the society for the recovery of any policies, annuities, or bonuses as they would be entitled or subject to as assured if not shareholders or members.

By clause 193, the directors were empowered to make sale of or transfer, on sufficient indemnity, any portion of the business, policies, or contracts of the society to any other society or company of the like nature.

Clause 239 provided that if at an extraordinary general meeting a resolution, already passed at a special meeting of directors, should be passed, for dissolving the society, and the same should be confirmed, then from the time of such confirmation the society should, except for the purpose of winding-up the affairs thereof, be dissolved, and the business concluded, "and save by the means aforesaid no dissolution shall be had of the society."

Clauses 240 and 241 were as follows:

240. Immediately upon the dissolution of the society the directors shall, out of the funds and property of the society, pay and satisfy all immediate demands from or in respect of assurances, annuities, endowments, or other contracts or engagements, and shall, if practicable, obtain from other assurance companies, an undertaking to pay and satisfy the remainder of such claims and demands, and in consideration thereof shall cause to be transferred to such other assurance company, or as the directors thereof shall appoint, so much of the funds or property of the society as shall be agreed upon between the contracting parties as sufficient, and shall cause to be done and executed all such contracts, acts, deeds, matters, and things as in the opinion of the directors shall be necessary or advisable for carrying the said arrangement into effect, and if any funds or property of the society shall remain, after answering all claims on the society and other the purposes aforesaid, the directors shall cause so much thereof as shall not consist of money to be converted into money, and shall then cause the clear moneys or funds of the society, if any, to be divided, paid, and distributed in such manner as the directors shall think fit amongst the shareholders and members thereof for the time being, according to their right and interest therein.

241. Notwithstanding dissolution of the society, the deed of settlement and duties of the shareholders and members—including the powers to call and hold extraordinary or general meetings, and the powers to call for and enforce the payment of further instalments on shares, or contribution from the members—shall, until all claims and demands shall have been respectively satisfied and provided, and until a final division shall have been made of the residue (if any) of such moneys or funds as aforesaid, remain in full force so far as the same may be necessary for discharging the liabilities of the society and winding-up the affairs thereof.

On the 4th June 1850, Joseph Laycock effected a policy with the society on his own life for 200*l.* The policy was executed by three of the directors; and it was agreed that the sum assured should be paid "out of the funds of the society."

By a deed dated the 1st Nov. 1855, and made between the shareholders of the society of the one part, and the directors of the other part—after reciting that it had been ascertained by the directors that the net profits of the society were then equal to double the amount of the bonuses directed to be paid to the shareholders by the deed of settlement; that the directors had that day, in pursuance of a resolution duly passed to that effect, paid to the several shareholders the amount of the capital actually paid-up by each of them in respect of his shares, with a bonus of 5*l.* per cent.; and that, pursuant to the same resolution, the guarantee fund had been discontinued and wound-up—the parties thereunto mutually released each other from all claims and demands for or on account of any matter or thing in any wise relating to the society. The directors also covenanted to indemnify the shareholders.

By an agreement, dated the 25th Feb. 1858, and made between the society of the first part, the directors of the second part, the directors of the

V.C. J.]

Re THE MERCHANTS' AND TRADESMEN'S ASSURANCE SOCIETY.

[V.C. J.]

Bank of London and National Provincial Insurance Association of the third part, and the trustees of the association of the fourth part, after reciting that the directors of the society had proposed to dispose of and transfer the business of the society to the association, and the directors of the association had agreed to purchase the same for considerations stated in two several agreements, bearing even date therewith, it was witnessed that the society and its directors thereby disposed of and transferred to the association all the goodwill, benefit, and advantage of the society, and all the premiums which, as from the 5th Dec. 1857, might or would be payable, with the lease and all the estate, effects, and credits of the society.

The trustees and directors of the association thereby agreed to enter into all necessary covenants (but so as to be binding upon the assets of the association only, and not upon themselves personally in their respective assets) for payment of the rent and covenants in the society's lease, and for indemnifying the society from the same.

The agreement also contained the following clauses :—

2. The risks, engagements, and liabilities of the society, upon or in respect of the said policies respectively, and also upon or in respect of all other the affairs and business of the society whatsoever, and notwithstanding the omission of any such risk, engagement, or liability in the account or statement hereinafter provided for, shall be undertaken and borne by the association; and the association, by their trustees and directors on their behalf, shall and will indemnify the society and the directors thereof from and against all such the aforesaid risks, engagements, and liabilities respectively, and from and against all costs, charges, and expenses in respect of the present agreements, and the carrying of the same into effect or otherwise in relation thereto.

3. All claims whatsoever which shall be made or become payable upon policies of the society in respect of the deaths of persons assured by them, and also upon all other the affairs and business of the society as aforesaid, shall, subject to such lawful exceptions as the directors of the society might have made, be paid and satisfied by and out of the funds of the association.

8. The directors of the society, as far as they reasonably can, will procure the several persons holding or entitled to policies or other engagement in the society, to accept in exchange for or renewal thereof, policies or engagements of the association. And in all cases, whether such exchange or renewal shall or shall not be made, the association will indemnify the society and their directors against all liabilities whatsoever in respect of such policies and engagements, so long as the same shall respectively remain in force.

13. The society shall not, after the day of the date hereof, enter into any engagement, or incur any liability whatsoever (other than such as may be necessary for carrying on the ordinary business of the society), without the consent and approval of the board of directors of the association.

The Bank of London Association was not a registered company, and the liability of the shareholders was not limited, except by the terms of the life and other policies granted by the association.

By another agreement dated the 7th Oct. 1858, the business of the association was transferred to the Albert Life Assurance Company, and the agreement was confirmed by the shareholders of the association on the 20th Oct. following.

On the 29th Sept. 1868, Joseph Laycock died. In Sept. 1869 the Albert Company was ordered to be wound-up; the Bank of London Association was also in liquidation.

Mr. George Thomson, who was manager of the society from its commencement until Feb. 7, 1858, deposed that under the circumstances which he stated, namely, the agreement and resolutions above mentioned, there are "no shareholders in" the society, and the society "has no capital, stock, money, funds, or assets of any description."

O. Morgan, Q.C. and Cookson for the petitioner.—On the question of the jurisdiction of the court to wind-up the society in its present circumstances, they referred to

Companies Act 1862, s. 199;

Re London Marine Insurance Association's cases, 20 L. T. Rep. N. S. 943;

Ex parte Phillips, 3 De G. & Sm. 3;

Warwick v. Worcestershire Railway Company, 13 Jur. 651.

Eddis, Q. C. and Rodwell, for the official liquidators of the Bank of London Association, and for a director of the society; and

Kay, Q. C. and J. N. Higgins for the official liquidators of the Albert were not called upon.

The VICE-CHANCELLOR.—It appears to me that if I had seen the deed of Feb. 1858, I should have stopped the argument *in limine*, that is to say, I should have endeavoured to stop it without the great waste of time, which seems to me to have occurred since the matter was first mentioned on Saturday. The matter seems to me almost too plain for anything that can be called argument. The society was a mutual society, I think, in 1855, with nothing but an insurance fund; and there was a right to have payment out of that fund when the event occurred in 1858, by a transaction to which the petitioner, or the person whom the petitioner represents, was a party, that is to say, by a general meeting of the society all the members of the society entered into an arrangement, by which, in fact, the mutual association was effectually put an end to. And by a deed by which they are all bound, all the assets of the company, including that fund, were handed over to another society. That other society entered into these stipulations, by that same deed. The risks, engagements, and liabilities of the society, upon or in respect of the said policies respectively, and also upon or in respect of all other the affairs and business of the society whatsoever, and notwithstanding the omission of any such risk, engagement, or liability in the account or statement hereinafter provided for, shall be undertaken and borne by the association; and the association, by their trustees and directors on their behalf, shall and will indemnify the society and the directors thereof from and against all such risks, engagements, and liabilities respectively, and from and against all costs, charges, and expenses in respect of the present agreement, and the carrying of the same into effect, or otherwise in relation thereto, all claims whatsoever which shall be made or become payable upon policies of the society in respect of the deaths of persons assured by them, and also upon all other the affairs and business of the society, shall, subject to such lawful exceptions as the directors of the society might have made, be paid and satisfied out of the funds of the association." After that bargain on the part of this man, it is impossible for him to say that there is anything to be done. He has no right to call on any of his brother policy-holders to pay him anything. He has no right whatever to have any funds distributed between him and them. He has his remedies, and whatever those remedies may be it is not for me to point them out, against the society which undertook to pay this policy with his consent. If there ever was a case of novation (supposing that there originally was a creditor and debtor, which there would not be here) this seems to be the most complete novation that could possibly be conceived. Whether there has been any subsequent novation as between the Bank of London and the Albert is not a matter now before me to consider. The petition must be dismissed with costs. The two companies will take their costs out of their own funds respectively. His Honour added that one or other of the companies ought to pay the petitioner.

Solicitors: for the petitioner, Barton, Yeates, and Hart; for the official liquidator, Paine and Layton; Lewis, Munns, and Co.

Monday, March 28.

BOWES v. LAW.

Buildings—Covenant not to erect—Boundary wall—
Vinery—Damages—Injunction—Parties—Costs.

Plaintiff bought a piece of land, bounded on the south by a road, from a vendor, who covenanted by the conveyance that "no buildings," except dwelling-houses of a definite building cost, should be erected on the land on the other side of the road. Defendant afterwards contracted to purchase from the same vendor the land on the other side of the road, which he also agreed to fence in by a railing or walling from 4ft. to 7ft. high. Defendant also agreed to enter into a covenant with the vendor similar to that which the plaintiff had entered into.

Defendant afterwards turned the land which he had agreed to purchase into part of his pleasure ground, and built a boundary wall running along the road, 8ft. 6in. high, except at one spot, where he raised it for a few feet in length to 11ft. high, in order to support against it the roof of a vinery, which he also built on the land agreed to be purchased by him:

Held, that the building of the garden wall to the height of 8ft. 6in. was not a breach of the covenant:

Held, further, that the raising of the wall to the height of 11ft., and the building of the vinery, were breaches of the covenant.

The court refused to order the defendant to pull down the wall and vinery, and gave the plaintiff 40s. damages.

The plaintiff having made the vendor a defendant, was ordered to pay his costs, he being an unnecessary party.

By an indenture dated the 29th Oct. 1866, the defendant George Allison conveyed to the plaintiff Thomas Bowes a piece of land, bounded on the south by a street or road called Carlton-terrace, being part of the Mard End Estate, in the parish of Croft, near Darlington, Yorkshire. By the same deed Allison covenanted with Bowes that "no building, except dwelling-houses to front with Carlton-terrace, should be erected or built on any of the lots numbered 30 to 47, both inclusive, on the plan thereinbefore referred to, and should not be of a less cost than 200l. for each house on each lot."

In 1869 George Allison contracted with the other defendant, the Rev. Frederick Henry Law, rector of Croft, for the sale to him of these lots, numbered 30 to 47, and other adjoining property; and by the agreement Mr. Law stipulated to make a permanent fence around the premises, to the satisfaction of the vendor or his agent, either by railing or walling from 4 to 7ft. high. He also agreed that he would enter into a covenant with the vendor, similar to that stated above, and indemnify the vendor against any breach of the same.

Mr. Law proceeded to throw this land into the pleasure ground adjoining the rectory, and he built along Carlton-terrace a wall, 8ft. 6in. high throughout, except at one part where he raised it 11ft., and built inside it a vinery with a roof leaning against the wall.

The plaintiff, in May 1869, filed the bill for an injunction to restrain the defendant, Mr. Law, from continuing the erection of this wall and vinery.

A mandatory injunction was moved for on the 11th Nov. last, and was ordered to stand to the hearing, on the defendant's undertaking.

Kay, Q.C. and Dewsnap, for the plaintiff, contended that both the wall and the vinery were "buildings," and so within the restriction. They cited

Tipping v. Sokersby, 2 K. & J.;

Coles v. Sims, 6 De G. M. & G. 1;

Childs v. Douglas, 5 De G. M. & G. 739.

Amphlett, Q.C. and *Kekewich*, for the defendant Law, argued that a wall was not a building within the meaning of this covenant; that a wall of 8ft. 6in. in height, and in a small part of it 11ft. high, could not damage the plaintiff to any appreciable extent, and was far more advantageous to him than a row of houses built for 200l. each; and that a vinery, even if a building, could not be a breach of the covenant, as it was actually out of sight. They cited

Morish v. Harris, L. Rep. 1 C. P. 155;

Keates v. Lyon, L. Rep. 4 Ch. 218; 20 L. T. Rep. N. S. 258.

Kay, in reply, on the question of the wall only. It is not necessary to show pecuniary damage when it is sought to restrain the breach of a contract.

The VICE-CHANCELLOR (after stating the facts).—Now the word "buildings" is perhaps an ambiguous expression, and certainly in its ordinary use does not signify a wall. I certainly think that the repairing or reinstating of buildings would include the repairing or reinstating of a garden wall, or of a wall inclosing or defining some portion of a field, as is to be found in some parts of the country. It may be that in a covenant of this kind the word "buildings" may have a more restricted meaning; but I observe that in *Child v. Douglas* (Kay 560; 5 De G. M. & G. 739) the word "building" was held to apply to the erection of a very high wall, rising to some fifteen feet. A difference of opinion certainly was expressed by one of the learned judges (Knight Bruce, L.J.), and no concurrence of opinion was expressed by the other (Turner, L.J.); and even the learned judge who decided the point said that whilst he was of opinion that a wall fifteen feet high would be an infringement, he doubted whether the covenant would prevent the erection of a wall five feet high; and he was satisfied that a wall two feet high with an iron railing upon it, was not at all events such a "building" as the court would interfere with. In this case, sitting as judge and jury, I have to consider whether the erection of a boundary wall, including the portion of it of increased height where the vinery is placed, is a breach of the covenant. The lower portion of the wall is 8ft. 6in. high, which is not an unusual or improper height, or different in these respects from a wall two feet high and surrounded by a railing, as suggested by the Lord Chancellor in *Child v. Douglas*. I am of opinion that such a wall as this, built *bonâ fide* as a boundary of a garden, is quite as proper and justifiable as the wall four feet high with the iron railing upon it, referred to in the judgment in that case. Therefore, I am of opinion as regards the wall, that as to that part of the prayer which asks that the defendant be ordered "to pull down and remove any wall or walls from the same premises," the suit has failed; and I may observe that the draftsman has been obliged to add the words "wall or walls," wishing to bring them within the terms of the injunction, though the covenant has the word "building" only. I think that the suit, so far as that goes, has failed; but I am of opinion that the erection of a vinery and the making of the wall of a greater height at that spot is a clear infraction of the covenant against "buildings," except of the specified class. If this were allowed merely because the roof of the vinery is constructed by way of slope against the wall, the plaintiff might be deprived of the benefit of his covenant, by the erection in a similar way of a stable, a cowhouse, or anything else which might be built against the wall, and which might cause the very injury to the property sought to be provided against, viz., the erection of some offensive or injurious building, instead of or in addition to the erection of houses of the value of 200l. or up-

C. P.]

WALLIS (app.) v. BIRKS (resp.)

[C. P.]

wards. The plaintiff, therefore, it appears to me, was well founded as far as regards the vinery; and the question for the court is, what ought to be done; whether a mandatory injunction ought to be granted, or whether the alternative jurisdiction should be resorted to, which has been given to the court by recent legislation. I am of opinion, having regard to all the circumstances, and considering that no substantial annoyance or injury has been occasioned to any right of the defendant's, that a declaration will be sufficient for the purpose of protecting the title, and I do not think it necessary to give to the plaintiff the power of doing such an unreasonable and unneighbourly act as that of taking down this vinery, which is a great convenience to the defendant without affording to the plaintiff, himself, any benefit. I propose, therefore, to declare that the erection of a boundary wall on the piece of ground is no breach of the covenant in the bill mentioned; but that the raising of the wall for the purpose of placing, and the placing against it of a vinery, are breaches of the covenant. But, under the circumstances of the case, the court doth not think fit to order the removal thereof, and doth assess the damages in respect thereof at 40s. Then there must be an injunction to restrain the defendant Law from making any further addition to the wall or vinery, further than putting a coping to the wall, or from committing any other breach of the covenant; and the defendant Law must pay the costs of the suit, except the costs of the defendant Allison, who was not a necessary party, which must be paid by the plaintiff.

Solicitors: *Burn*, for *F. T. Stevenson*, Darlington; *Cree and Last* for *Newby*, Richmond, and *Walton*, Stockton-on-Tees; *Clarke, Son, and Rawlins*, for *Allison, Son, and Willan*, Darlington.

Common Law Courts.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING,
Esqrs., Barristers-at-Law.

REGISTRATION APPEAL.

Friday, Jan. 21.

WALLIS (app.) v. BIRKS (resp.)

Registration—County vote—Perpetual curate—Equitable freeholder.

A. being perpetual curate of B., land within the parish of B. of more than 40s. annual value was conveyed in accordance with the statute in that behalf, to A. and his successors, in exchange for other lands of equal value. The perpetual curacy had never been augmented out of Queen Anne's Bounty. On the death of A., C. was made perpetual curate of B. in his stead:

Held, that C. had at least such an equitable freehold interest in the land in question as to entitle him to have his name inserted on the list of voters for the parish of B.

At a court, held before the revising barrister appointed for the revision of the list of voters for the parish of Burwell, in the county of Cambridge, William Wallis duly objected to the name of the Rev. Thomas Rawson Birks being inserted in the list of voters for the said parish.

The Rev. Thomas Rawson Birks (the respondent) was the incumbent, as the perpetual curate, of the parish of the Holy Trinity, Cambridge. He was licensed upon due presentation thereto on the 5th Jan. 1866, "to perform the office of perpetual curate or incumbent of the church of the perpetual curacy

of the Holy Trinity, Cambridge" (as appeared by the instruments which were set out in the case.) He claimed to be on the register of voters in respect of land at Burwell, in the county of Cambridge, of more than the clear annual value of 40s., which was taken in exchange for other land attached to such perpetual curacy.

By a certain indenture of exchange, bearing date the 2nd Sept. 1856, and made between Thomas Morland and Conrad Wilkinson, therein described of the first part; the Right Rev. Thomas, Lord Bishop of Ely, ordinary and patron of the vicarage of the parish of Holy Trinity, in the borough of Cambridge, of the second part; and the Rev. Chas. Clayton, clerk, Fellow of Caius College, Cambridge, in the University of Cambridge, incumbent of the said vicarage, of the third part; whereby it is amongst other things recited that, by indenture bearing date the 5th April 1855, and made between Frederick Randall of the first part, William Wilson of the second part, John Eadon of the third part, and the said Thomas Morland and Conrad Wilkinson of the fourth part, and for the valuable considerations therein mentioned, the piece of land situate at Benwell aforesaid, hereinafter particularly described, was conveyed and assured to such uses as the said Thomas Morland and Conrad Wilkinson, or the survivor of them, his executors or administrators, should at any time before the expiration of twenty-one years from the death of such survivor, by any deed or deeds appoint, and in default thereof and subject thereto, to the use of the said Thomas Morland and Conrad Wilkinson, their heirs and assigns for ever. And whereby it is further recited that, by virtue of an Act of Parliament passed in the 55th year of the reign of his late Majesty King George the Third, intituled "An Act to enable spiritual persons to exchange the parsonage or glebe houses or glebe lands belonging to their benefices, for others of greater value or more conveniently situated for their residence and occupation, and for annexing such houses and lands so taken in exchange to such benefices or parsonage, or glebe house and glebe lands, and for purchasing and annexing lands to become glebe in certain cases, and for other purposes," it was lately agreed between the said Thomas Morland and Conrad Wilkinson that the said Thomas Morland and Conrad Wilkinson should give to the said Charles Clayton and his successors, the pieces or parcels of land thereinbefore mentioned, and thereafter particularly described, in exchange for a piece of land situated in the parish of St. Andrew-the-less, in the borough of Cambridge. And whereby it is further recited that the several directions in the said recited Act had been complied with, and that in pursuance of the said recited Act, and the said proceedings taken by virtue thereof, the said recited agreement for the said exchange had been and was thereby ratified and confirmed by the said Thomas Lord Bishop of Ely, as ordinary and patron, and by the said Charles Clayton as incumbent of the said vicarage. It was thereby witnessed that, in pursuance of the said recited agreement, and in consideration of the said piece of land in the parish of St. Andrew-the-Less, in the borough of Cambridge, so agreed to be given in exchange, they the said Thomas Morland and Conrad Wilkinson, by and with the consent and approbation of the said Thomas, Lord Bishop of Ely, as ordinary and patron of the said vicarage, upon the acceptance of the said Charles Clayton as incumbent, by and with the consent and approbation of the said ordinary and patron testified as therein mentioned, did grant, bargain, sell, and exchange unto the said Charles Clayton and his successors, vicars of the said vicarage for the time being, for ever (*inter alia*), all that piece or parcel of land situate, lying, and being in Burwell afore-

C. P.] YGLESIAS AND OTHERS v. THE ROYAL EXCHANGE ASSURANCE CORPORATION. [C. P.]

said, containing by admeasurement 2a. 1r. 15p., then or late in the occupation of James Scott, together with the appurtenances thereto belonging, to hold the same with the appurtenances unto and to the sole use and benefit of the said Charles Clayton and his successors, vicars of the said vicarage of Holy Trinity aforesaid, for the time being, for ever, in exchange for the said piece or parcel of land and appurtenances, situate in the said parish of St. Andrew-the-Less, in the said borough of Cambridge.

No proof was given of any augmentation from Queen Anne's bounty of such curacy.

The following is a copy of the claim:—

Reverend Thomas Rawson Birks.	7, Trumpington Road, Cambridge.	Freehold Land.	Broad Hedges.
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The revising barrister decided that such incumbency being a perpetual curacy conferred upon Mr. Birks a sufficient freehold estate in the property at Burwell (he receiving the rents thereof), as to entitle him to vote in respect thereof, and he allowed his vote accordingly.

If the court should be of opinion that the respondent had a sufficient freehold interest in the said land, his name was to be retained on the register, but if otherwise, then his name was to be erased.

O'Malley, Q. C., for the appellant.—The statute 1 Geo. 1, stat. 2, c. 10, s. 4, provides that where any minister of any church, curacy, or chapel shall receive a grant from the Queen Anne's bounty, he and his successors shall be deemed a body politic with perpetual succession by such name as in the grant of such augmentation shall be mentioned. The grant of the land, in respect of which the respondent claims, was made to Mr. Clayton (the former perpetual curate), and his successors; but as it is found in the case that no grant was ever made out of Queen Anne's bounty to this perpetual curacy, the perpetual curate was not and is not a body corporate, and the respondent is not in point of law Mr. Clayton's successor. The respondent is nothing but a stipendiary curate, and cannot take land in succession. He cited

Greenslade v. Darby, L. Rep. 3 Q. B. 421; 18 L. T. Rep. N. S. 463; 37 L. J. 137, Q. B.;

2 Burn's Eccles. Law, 55, (citing *Weldon v. Green*);

Price v. Pratt, Bunb. 273;

Mason v. Lambert, 12 Q. B. 795; 17 L. J. 366, Q. B.

[*WILLES, J.*—Who then is entitled to the land?] Possibly Mr. Clayton, or else it reverts to the grantor. That, however, is another question. [*WILLES, J.*—If the land reverted to the grantor, that would hold good in equity as a trust for the benefit of the successive incumbents of this curacy. In any case, the present curate has an equitable right by the conveyance. He is thus at all events the equitable freeholder, and that is quite sufficient.]

Keane, Q. C., for the respondent, was not called upon.

Judgment for the respondent.

Attorneys for appellant, *J. and C. Cole*, for *E. Foster*, Cambridge.

Attorney for the respondent, *J. F. Isaacson*, for *J. Button*, Newmarket.

Saturday, Jan. 29.

YGLESIAS AND OTHERS v. THE ROYAL EXCHANGE ASSURANCE CORPORATION.

Costs, taxation of—Commission to examine witnesses abroad—Costs of sending out a barrister from England—Master's discretion.

In a case of great intricacy and importance, a commission was obtained to examine witnesses in the Canaries, and the plaintiff sent out, as one of his commissioners, an English barrister. In taxation of the plaintiff's costs, the master allowed a large sum for the fees and expenses of the barrister, and the court refused to interfere.

This was an action on a policy of insurance on a cargo of cochineal from the Canary Islands. The defendants pleaded, in substance, that the plaintiffs had not shipped a cargo of cochineal, but of barley, and had subsequently jettisoned it. They had also taken criminal proceedings in the Spanish courts against the shippers and the captain of the ship.

The plaintiffs, before the trial, obtained a commission to go to the Canary Islands to examine witnesses. Three commissioners were appointed by the plaintiffs, two of whom were mercantile men, residing on the spot, while the third was Mr. Underdown, an English barrister. The defendants also sent out a barrister to cross-examine the witnesses. The commission sat for twenty-two days, and Mr. Underdown was engaged twenty-three days besides in travelling.

At the trial before Bovill, C.J., a verdict was found for the plaintiffs. The master, on taxation of costs, allowed the sum of 575*l.* 9*s.* 8*d.* as the fees (at the rate of ten guineas a day) and travelling expenses of Mr. Underdown.

Watkin Williams for the defendants now moved for a rule to review the taxation, on the ground that the allowance for the plaintiffs' commissioner was excessive. He relied on the case of *Potter v. Rankin*, L. Rep. 4 C. P. 76, where the court had declined to interfere with the decision of the master, who had refused to allow for expenses of this character.

J. C. Mathew for the plaintiffs showed cause in the first instance. Under the circumstances, the employment by the plaintiffs of an English barrister was a necessary and reasonable step. *Potter v. Rankin* shows that this is a matter for the discretion of the master, and that when he has exercised it the court will not interfere.

BOVILL, C. J.—It is impossible to lay down any rule of universal application in these cases. In a general way, the master would, I should say, refuse to allow for the expenses of an English barrister sent out from this country to conduct a commission. At the same time there may be cases of such great importance, that each party might feel bound to avail himself of the services of counsel, and I am not aware that there is any inflexible rule against allowing their expenses. Whether they are to be allowed or not must of course depend upon the nature of the case. Now, it cannot be denied that this was a case of very great intricacy and importance. Charges of gross fraud were made, and even criminal proceedings instituted against the shippers. More than 800 questions were put by the defendants' commissioner and the issue of the trial, which took place before me, and lasted for five days, turned mainly upon the answers to the interrogatories. The defendants had, as one of their commissioners, a gentleman well versed in mercantile matters, and well able to conduct an inquiry of this kind. They had also a barrister to represent them. All these matters must be taken into con-

C. P.] VICKERY AND WIFE v. LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. [C. P.]

sideration. They must be decided by somebody, and I know no one who has better means of deciding them than the master, who has the briefs before him. Knowing what I do of the case, I certainly cannot say that I think the master has used his discretion wrongly; indeed I think, taking all the circumstances into consideration, that he was quite right in deciding as he did. I think the court ought to follow the rule laid down in *Potter v. Rankin*, and refuse to interfere.

M. SMITH, J.—I am of the same opinion. A question of this description must always depend upon the special circumstances of the case. It is impossible to lay down any inflexible rule upon the subject, or to say that expenses, such as these, shall never be allowed. A discretion is left to the master to allow or disallow these expenses as he may see fit. His discretion is always considered final, and the court will never interfere, unless either he appears to have proceeded on an erroneous principle, or to have exercised his discretion in a manner that is palpably wrong. It cannot be said here that the master has fallen into either of these faults. After what I have heard from my Lord, I think that the defendants themselves have shown the necessity for the course taken by the plaintiffs. I think that it might be better, in most cases, to settle beforehand, whether a commissioner should go out from this country or not; but that, I believe, has never been the practice.

BRETT, J.—The many discussions we have had during the last term on the subject of costs, satisfies me more than ever of the propriety of the rule, that the master's discretion is not in general to be interfered with. At the same time it would, I think, be a great injustice if we were to hold as a rigid rule, that the exercise by the master of his discretion should in every case be final unless a principle were involved. In the present instance, I must say that the master appears to have properly considered the importance and the difficulty of the case, and that it has not been shown that he was wrong in deciding as he has done.

Rule refused.

Attorneys for plaintiffs, *Maynard, Son, and Co.*
Attorneys for defendants, *Freshfields.*

Jan. 28 and 31, and Feb. 23.

VICKERY AND WIFE v. LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Writ of inquiry—Taxation of costs—Good jury.

Upon a taxation of costs in a writ of inquiry before the Secondary, a guinea each was allowed by the master for a good jury. An order for a good jury had been previously obtained by the plaintiffs, and the jurors had been summoned from the special jury list:

Held, upon a rule to review the taxation, that this payment was a just and reasonable remuneration for the jury's services, and was properly allowed as costs against the defendants.

On the 14th Jan., *Lopes, Q. C.*, on behalf of the defendants, obtained a rule *nisi* calling upon the plaintiffs to show cause why the master should not be at liberty to review his taxation of the plaintiff's bill of costs in this cause in respect of the allowance of two counsel and matters incident thereto, the allowance of a good jury, and the amount paid to them.

The following was the affidavit of the defendant's attorney, upon which the rule was granted:

This action was brought by the plaintiffs to recover damages from the defendants in respect of certain injuries

sustained by the plaintiffs at New Cross, on the 23rd June 1869, while travelling on defendants' railway.

The defendants suffered judgment by default, and a writ of inquiry was instituted before the Secondary of the City of London on the 18th Dec. last, and the damages were assessed by the jury at 180*l.*

The said writ of inquiry was executed by a good jury in pursuance of an order of Master Kaye, dated the 7th Dec. last, and made in consequence of a summons taken out by the plaintiff's attorney in that behalf, and the said order was silent as to costs.

On or about the 3rd Jan. last the plaintiffs' costs in this action were taxed by one of the masters of this honourable court.

The defendants object to the allowance of the following items in the bill of such costs so taxed against them:

Dec. 14th.—Two fair copies of brief with declaration, &c., folios 190 each	6	6	8
„ Two copies correspondence, equal to three B.S. each	1	0	0
„ Two copies particulars plaintiffs' claim folios 18 each	0	10	8
Dec. 16th.—Fee to Mr. Prentice, Q. C., and clerk, with brief	22	0	0
„ Attending him	0	13	4
„ Fee to him on consultation	2	19	6
„ Attending him to appoint	0	6	8
„ Fee to Mr. Thesiger, and clerk, with brief	16	10	0
„ Fee to him on consultation	1	3	6
Dec. 18th.—Paid jury	12	12	0

The defendants objected, as I am informed and believe, to the allowance of such items on the said taxation by the master.

No certificate by the said Secondary of the City of London of the said writ of inquiry being a fit and proper one to be determined by a good jury, was produced and shown to the master on the said taxation of costs.

An application was made by summons at chambers by defendants' attorneys for an order to stay proceedings in this cause for such time as should be sufficient to enable the defendants to apply to the court upon the question of costs, and thereupon by an order of the Honourable Mr. Justice Willes, dated the 10th of Jan. instant, it was ordered that all proceedings herein should be stayed until the 3rd day of next term, inclusive.

Affidavit of plaintiff's attorney in answer:

I have perused a copy of the rule in this cause, dated the 14th Jan. inst., and also a copy of the affidavit of defendant's attorney, upon which such rule was granted.

The writ of inquiry in this cause was executed before Mr. Secondary Potter and a good jury on the 18th Dec. 1869, and the hearing of the said cause occupied from eleven o'clock in the forenoon until past five o'clock in the afternoon, when the jury assessed the damages of the plaintiffs at 180*l.* beyond a sum of about 31*l.* already paid to plaintiffs by defendants.

The execution of the said writ of inquiry was attended by two counsel on behalf of the plaintiffs, and also by two counsel on behalf of the said defendants, and the brief for the said plaintiffs consisted of thirty sheets of paper, and contained the evidence of eleven witnesses; and nine witnesses were examined on the part of the said plaintiffs, and five on the part of the said defendants.

During the time occupied by the said jury retiring to consider the amount of damages to be assessed, I was applied to by the officer of the court for the court fees, and also for the fees for the jury, and I accordingly paid the sum 4*l.* 1*s.* for court fees, &c.; and on my asking the said officer what I was to pay the jury, he demanded of me one guinea for each of the said twelve jurymen, which I accordingly handed to him.

The Secondary of the said city of London duly certified on the writ of inquiry that this was a fit case to be heard by a special jury, and that such writ of inquiry, with the said certificate duly indorsed thereon, was produced to the master on the taxation of said costs. The circumstances under which the same was so produced are as follows:—On my applying for the return of the said writ of inquiry, and the finding of the jury indorsed thereon, I was informed by the said Secondary that he had not certified for a special jury, but if it was required he would do so, as he considered it a fit cause to be tried by a special jury; and on attending the said taxation of costs on the 3rd Jan. inst. I so informed the said master who allowed the costs of the said special jury, subject to the production of the said certificate of the said Secondary, and on the 14th Jan. inst. I, in company with defendant's attorney's clerk, again attended the said master, and produced to him the said certificate for a special jury, and he thereupon gave his allocatur for the amount of the said taxed costs.

During the progress of the said taxation the defendants objected to the master allowing two counsel, when I informed the said master what length the brief was, how many witnesses were examined, and how long the inquiry lasted; the said master then examined the brief, and stated that in his opinion, and he had had thirty-five years' experience, a brief with eleven witnesses was sufficient to warrant the attendance of two counsel, and he should exercise his dis-

C. P.] VICKERY AND WIFE v. LONDON, BRIGHTON, AND SOUTH-COAST RAILWAY COMPANY. [C. P.]

cretion and allow them; the defendants then submitted to the said master that if he allowed two counsel the fees were excessive; but the said master, upon argument, decided the fees were not excessive, and allowed them.

I say that I, on behalf of the said plaintiffs, attended the said summons on the 10th Jan. inst., for a stay of proceedings to enable the defendants to apply to this honourable court for an order for the master to review his taxation of costs herein, and the endorsement made thereon by the honourable Mr. Justice Willes was as follows:—"Order until the 3rd day of term not inclusive. I express no opinion."

I have consulted with counsel as to the advisability of applying to this honourable court to set aside the said writ of inquiry, and obtaining a new writ on the ground of the insufficiency of damages, and upon such consultation counsel was of opinion that the said damages were quite inadequate to the injuries received, but thought the plaintiffs could not succeed in setting aside the said writ of inquiry, and that the court would not interfere with the finding of the said jury.

By desire of the court, inquiry was made as to the manner in which juries were summoned upon writs of inquiry, and the following certificates were procured:—

From Mr. Secondary Potter:—

Previously to the passing of the Jury Act (6 Geo. 4, c. 50), there was a list of respectable tradesmen in constant attendance at the sheriff's office to try all writs of inquiry, which writs were then taken daily. If the parties required a better jury, an order was obtained for a good jury, and the jurors were of the same class of persons as formed the common jury trying causes in the Superior Courts. After the passing of the Jury Act, the jury in constant attendance at the sheriff's office was discontinued, and all juries were composed of common jurymen taken out of the same list of persons as composed the common juries for the Superior Courts, and, consequently, a good jury under that name no longer existed. Afterwards, when the sheriffs received an order for a good jury, it was treated as an order for a special jury, and the jury were nominated and treated as a special jury, and in court received one guinea each in each case. This has been the invariable practice in London since the passing of the Jury Act, no matter in which of the courts the action was brought, and until the present time, as far as I understand, has always been allowed.

From the Under-Sheriff of Middlesex:—

The practice in Middlesex with regard to good juries is identical almost with that of the City of London, viz., that a good jury has usually been nominated and summoned from the special jury list, and that in all cases where a writ of inquiry is executed before such a good jury they receive one guinea each, no distinction being made in this respect between a good and a special jury, unless the party who obtained the order chooses to have the jury selected from the common jury list, in which latter case they receive 10s. 6d. each.

Prentice, Q. C. and *Thesiger* showed cause against the rule. The allowance of one or two counsel is a matter for the discretion of the master. [The defendant's counsel abandoned this ground of the rule.] As to the fees for a good jury, the statutes, rules of court, and practice have all agreed in summoning and paying a good jury as if it were a special jury:

- 3 Geo. 2, c. 25;
- 24 Geo. 2, c. 18;
- 6 Geo. 4, c. 50, ss. 34, 35, 52;
- 7 Will. 4 & 1 Vict. c. 55;
- Reg. Gen. 23 Car. 2, r. 48;
- Reg. Gen. H. 2 Will. 4, r. 101;
- Reg. Gen. H. 16 Vict. (1853), r. 40;
- 1 Tidd's Practice, 9th edit. 787;
- 2 Arch. Pr., 11th edit. 987;
- 2 Lush's Practice, 2nd edit. 798;
- Gray on Costs, 365;
- Wilkinson v. Malin*, 1 C. & M. 237;
- Price v. Williams*, 5 Dowl. 160.

Lopes, Q. C. and *Laing* supported the rule.—There is no authority whatever as to the amount of the fees to be paid to a good jury, and there is no incident in common to a good and a special jury. Besides, the practice is not invariable:

Calvert v. Gordon, 3 M. & R. 124.

Cur. adv. vult.

Feb. 23.—The judgment of the court (*Bovill*, C. J., *M. Smith*, and *Brett*, JJ.), was delivered by *Bovill*,

C. J.—An application was made for a review of the taxation of costs in this case, first, with reference to the number of counsel allowed by the master, which point was disposed of in the course of the argument; and, secondly, on the ground that the master had allowed the costs of a good jury, and the fees paid to the special jurors upon the execution of a writ of inquiry. The defendants had suffered judgment to go by default; and the plaintiffs then applied for and obtained a judge's order for a good jury. The sheriff accordingly summoned such jury from the special jury list, and the sum of one guinea was paid to each jurymen, which payment has been allowed by the master. The practice of ordering a good jury existed long before the passing of the Acts which regulate special juries. Those statutes do not relate to writs of inquiry; and by the rules of court a good jury cannot be had without the order of a judge. The judge exercises his discretion as to whether it is a fit case for a good jury; and, if he makes the order, it has long been settled that the costs of the good jury are to be allowed on taxation: (*Wilkinson v. Malin*.) The principal object in obtaining an order for a good jury, since the Act of 6 Geo. 4, c. 50, has been that the jury should be selected from the special jury list, instead of from the common jury list (see *Price v. Williams*), and the practice of the Secondaries in the City of London ever since the passing of that Act has been, when such an order is made, always to select the jury from the special jury list, and the jurymen have invariably been paid one guinea each for their attendance. The practice in Middlesex has been somewhat different, as the Under Sheriff has given the party who obtained the order the option of having the jury selected from the special jury list, or from amongst a superior class of tradesmen on the common jury list. If the jurymen were selected from the common jury list, they were paid 10s. 6d. each; but, if taken from the special jury list, they have, as in the City of London, invariably been paid one guinea. In the present case the jury were selected from the special jury list, and were paid one guinea each, in accordance with that practice. The usual fee of a special juror has undoubtedly been one guinea ever since the passing of the Act of 6 Geo. 4, c. 50, which required a separate list to be made of special jurors; and by the 35th section of that Act it is provided that no juror shall be allowed to take more than the judge shall think just and reasonable, and which shall not exceed 17. 1s., except in case of a view; and this statute, therefore, seems to recognise one guinea as a proper fee. If the practice had existed and been sanctioned by the courts only since the passing of that Act (a period of nearly forty-five years), we should have been very loth to interfere with it; but, upon looking to the earlier statute of 24 Geo. 2, c. 18, it is clear that the fee of one guinea to special jurors was at that time also recognised by the Legislature; so that there is every reason to believe that for upwards of one hundred years the fee of one guinea has been adopted and approved by the courts. *In the Act of 24 Geo. 2, c. 18, after referring to the previous statute as to special juries, sect. 2 begins with a recital that complaints were frequently made of the great and extravagant fees paid to jurymen returned under the former Acts, and then prohibits the taking of more than the judge shall think just and reasonable, not exceeding one guinea, in the same terms as the subsequent Act of 6 Geo. 4, c. 50. The previous statute relating to special jurors was the 3 Geo. 2, c. 25; and sect. 15 of that Act, after reciting that doubts had been conceived touching the power of the courts to order special jurors to be summoned, except for trials at bar, expressly empowers the courts to order juries to be struck for

C. P.]

LIDGETT v. SECRETAN.

[C. P.]

the trial of issues in such manner as special juries have been, and are usually struck in such courts respectively upon trials at bar. In the 3 Geo. 2, c. 25, there is no mention of the fees to be paid to the special jury; but, from the recital in the Act of 24 Geo. 2, c. 18, s. 2, it seems probable that the payments exceeded one guinea to each special juror at that time. Long before these Acts it was the practice to summon special juries for trials at bar (where all trials originally took place), and probably they were also summoned for trials at Nisi Prius: (see *Philpot v. Feeler*, Cro. Jac. 672.) And from the case of *Rex v. Smith*, 1 Stra. 265, in the reign of George I., it would seem that this was done by a rule for a good jury, and that the persons summoned were often gentlemen who were in the commission of the peace. There can be little doubt that the special juries were composed of the principal freeholders; and in the 7th edition of *Trials per Pais*, edited by Giles Duncombe in 1739, p. 90, it is stated that it was the practice of the courts to order "the prothonotary to choose forty-eight out of the sheriff's book of freeholders of the most substantial men of the county." It also appears from Salk. 405, pl. 1 and 2, that, in the 8 Will. 3, the practice of striking a special jury from the freeholder's book was very much the same as it is at present. What was the precise date and origin of the fees, either to special jurors or common jurors, it is difficult to ascertain. In *Smith's Commonwealth*, which was written in the early part of the reign of Queen Elizabeth, and which is referred to in the interesting work of Mr. Forsyth upon trial by jury, it is stated in chapter 18 that "The party with whom they have given their sentence giveth the enquest their dinner that day most commonly; and this is all they have for labour, notwithstanding that they come, some twenty, some thirty, or forty miles, or more, to the place where they give their verdict; all the rest is at their own charge." In *The Duke of Richmond v. Wise*, 1 Vent. 124, 23 Car. 2, which was tried at Bar, and where a motion was made to set aside the verdict on account of the jury having been entertained by the successful party, it is said by the court to have "been usual at the assizes for the jury to receive the collation after verdict given, from him for whom they find, and that it would not avoid the verdict, but that such practice ought not to be." It appears, however, from *Powell's Attorney's Academy*, published in 1623, that at that time the ordinary and usual fee to each common jurymen was 8*d.*, and to each talesman 4*d.* At p. 141, under the heading of "Fees at Nisi Prius at Guildhall," are the following entries:—"To the jury per piece being of the number in hab. corp. 8*d.*" "To the rest that come in by the tales per piece, 4*d.*" And at p. 142, it is stated "to be the same upon a Nisi Prius in the country." But there is no trace of what the fees were to special jurors. It is clear, also, that in 1658 and in 1682, the practice was to pay the special jury upon a trial at bar: (See *Hunt v. Hollis*, 2 Sid. 77, where the jury came from Dorsetshire, and *Caldicot v. Earl Pembroke*, 2 Show. 248, where they were summoned from Wiltshire; and in *Reg. v. Inhabitants of Hermitage*, Carth. 239), it appears at p. 242 of the report that the prosecutors paid 65*l.* to the jury, who came up from Dorsetshire in very bad weather. In the 5th edition of *Trial per Pais*, published in 1718, after speaking of certain jurors being fined for taking money after their verdict, it is stated that "the practice is otherwise at this day; if it were not, the Middlesex juries would not so court the bailiffs to return them especially to trials at bar, where 5*l.* a man is a frequent gratuity, sometimes more." It is not improbable that, after the passing of the Act of 3 Geo. 2, c. 25, a similar practice as to the fees began to prevail with the special juries at Nisi Prius,

and that this may have led to the enactment in the 24 Geo. 2, c. 18, limiting the payment to one guinea, which is repeated in the later Act of 6 Geo. 4, c. 50. In the 1st edition of Bacon's Abridgment, published in 1736, and in the subsequent editions, title "Juries" (L.), "When and by Whom to be Paid," it is said: "Jurors in all civil causes are to be paid for their trouble and attendance, and the quantum is to be proportioned according to the distance of place, badness of the weather, &c.; but if they take any money or other reward for giving a verdict, they are not only punishable at common law by fine and imprisonment, but to a *decies tantum* given by the statute of 38 Edwd. 3, c. 12, i.e., a forfeiture of ten times as much as he hath taken. But, if some of the jurors appear, and the trial goes off *pro defectu juratorum*, those who appeared are not to be paid; for nobody has received any benefit from their attendance, and consequently not obliged to make them any recompense. But where a cause was appointed for trial at the bar of B. R., by a jury of Wilts, and a *venire* returned, and the jury summoned, but before the day the parties agreed, and, the summons not being countermanded, several of the jury appeared; it was ordered, on motion, that the attorneys on both sides should pay them. So if the jury find a special verdict, the charges of the jury shall be equally borne by both parties." And in the margin there is the following note: "In strictness, on a trial at Nisi Prius in the same county, they are only entitled to 8*d.*, and to 5*l.* on a trial at bar, where they come out of a foreign county;" citing *Trials per Pais*, 62, 216. And in *Impey's Practice of the Common Pleas*, 4th edit., published in 1794, at p. 398, there is the following passage: "I understand the talesmen are now paid the same as the special jury, and so they are in the King's Bench. Lord Mansfield said they served for a special purpose, therefore they ought to be paid the same as the special jurors; formerly it was otherwise." So far back as living memory extends, the fee to a special jurymen has been a guinea; and that fee appears to have been recognised by Acts of Parliament and sanctioned by the courts. It is true that it seems to depend upon usage, but many similar payments, and most important rights and privileges, have no other foundation than the usage and practice of the courts; and, the payment in question being only a just and reasonable remuneration to the jury for their labour and services, we are of opinion that it may and ought to be sanctioned as it has hitherto been. No authority has been produced to the contrary; and we are of opinion that the fees in this case were properly paid, and that the amount of them and also the other costs of the jury were properly allowed. The rule was moved as an experiment, and must be discharged with costs.

Rule discharged.

Attorney for plaintiffs, A. S. Edmunds.

Attorneys for defendants, Baxter, Rose, Norton, and Co.

Jan. 24 and Feb. 7.

LIDGETT v. SECRETAN.

Marine insurance—Policy on ship—Conclusion of risk
—Moored at anchor in good safety.

In a Lloyd's policy on ship, the risk was described "at and from London to Calcutta and for thirty days after arrival," and "upon the said ship, &c. until she hath moored at anchor twenty-four hours in good safety."

The ship after sustaining damage at sea to such an extent as to require incessant pumping to keep her afloat, arrived in the harbour of Calcutta, and was anchored

C. P.]

LIDGETT v. SECRETAN.

[C. P.]

on the 28th Oct. 1866. The captain gave the pilot the usual certificate that she was properly moored, and left in safety. Her passengers and cargo were discharged by the 8th Nov.

On the 12th Nov. she was taken into a dry dock in order that her injuries might be repaired. On the 5th Dec. in the course of her repairs, she was wholly destroyed by fire.

Held, that the words "moored at anchor in good safety" referred to the safety of the ship and not the moorings, but that they did not mean that the vessel was to arrive without any danger or injury from the effects of the voyage, nor on the other hand would they be satisfied by the vessel arriving and being moored in a sinking state, or as a mere wreck, or by a mere temporary mooring; that the underwriters were not responsible on a policy in these terms after the expiration of thirty days from the arrival and mooring of the vessel, and her having remained as a vessel and in possession or control of her owners, though not sound, for twenty-four hours; and that in the present case the vessel, though considerably damaged and leaky, and with one compartment full of water, existed as a ship at the time of her arrival, and was so safely moored that the underwriter's risk was concluded before the fire took place.

This was an action brought upon two policies of insurance upon the ship *Charlemagne* to recover certain losses as hereinafter more fully stated. Besides counts upon the policies the declaration contained a money count for the recovery of the premiums paid under the policies. The defendant to the money count pleaded never indebted, and to the residue of the declaration, payment into court of the sum of 100*l.* in full satisfaction of the plaintiffs' claims, and to this plea the plaintiffs replied that the sum so paid in was not sufficient to satisfy their claims.

The cause came on for trial at the Guildhall in the City of London, at the sittings after Michaelmas Term 1868, before the Lord Chief Justice and a special jury, when it was ordered by the court with the consent of the parties, that a verdict should be entered for the plaintiffs for the amount claimed in the declaration subject to the opinion of the court upon a special case.

The following statements appeared in the case:

The plaintiffs are shipowners in London carrying on business under the style and firm of John Lidgett and Sons, and the defendant is an underwriter at Lloyd's.

In July 1866 the plaintiffs were the owners of an iron sailing ship built at Glasgow in the year 1865, called the *Charlemagne*, of the burden of 1125 tons.

The plaintiffs being about to send the said vessel on a voyage to Calcutta and home to the United Kingdom, effected policies of insurance for 17,000*l.* upon the vessel valued at 20,000*l.*, and the policy was expressed to be "at and from London to Calcutta, and for thirty days after arrival," and was further expressed to be "upon the said ship until she had moored at anchor twenty-four hours in good safety." The Lloyd's policy was underwritten by the defendant for 150*l.* The plaintiffs also effected another policy on the *Charlemagne* "at and from Calcutta to London," on the usual Lloyd's form. The defendant underwrote this policy for the sum of 100*l.* The whole amount for which this policy was underwritten was 10,100*l.*

On the 22nd July 1866 the *Charlemagne* sailed from London on her voyage to Calcutta with cargo. She called at Plymouth, and there took in about 400 troops. She proceeded on her voyage with, for the most part, fair weather and light variable winds, until they reached the Bay of Bengal; she was not very heavily laden, and drew about 18ft. 6in. of water.

On 24th Oct., about 1 p.m., the ship struck

the ground heavily upon a reef or bank, called the Mutlah Bank, and continued doing so for about one hour, but only at intervals, there being always not less than four fathoms of water; the captain then let go the port bow anchor, for the purpose of canting the head of the vessel to the eastward, and used every effort to get her clear of the bank by stress of sail; but after 110 fathoms of the chain cable had been paid out, the chain parted, and the ship's head fell off to the south-west again. She was then on the outer edge of a bank known as the Mutlah Bank. The captain then deemed it best for the safety of the vessel, passengers and cargo, to force her over the bank, and for this purpose to throw over a portion of the cargo and stores in order to lighten her. Accordingly the crew and passengers jettisoned a large quantity of the cargo and stores and all sails were set, and the vessel thus lightened gradually worked her way over the bank at 2 p.m.

They then proceeded on their voyage to Calcutta under easy sail, and at 5 p.m. they sighted the Mutlah light ship, and were in the mouth of the River Hooghley: they then found the after compartment of the vessel full of water.

This compartment was water-tight, as hereinafter mentioned, and contained stores, principally wine. It was about 24ft. broad, 16ft. long, and 13ft. deep, the bulkhead separating it from the main hold was of iron, from the keel up to the between decks a height of 13ft., up to which height the compartment was water-tight. The bulkhead from the between decks to the flooring of the main deck was of wood.

There was no pump in this compartment, and the means of letting any water that might accumulate in it get to the ship's pumps was by a sluice at the bottom of the iron bulkhead, which was usually kept closed, but could be opened when required by means of a rod attached to the slide of the valve which communicated with the deck. Upon the leakage being discovered attempts were made to lift the sluice, but the rod broke and the sluice could not be opened. The cargo in the mainhold next to the sluice consisted of iron bars. If the sluice could have been opened the compartments would have been kept free of water by means of the ship's pumps.

Besides the leakage before mentioned it was also discovered that from the injuries the vessel had sustained whilst striking on the bank, the steering apparatus was damaged, and so deranged that it was impossible to put the helm more than about a quarter over to port.

The sluice above described not being available, a fire engine or force pump, which was ordinarily used for washing the decks, was employed to pump the water out of the compartment. The pump was worked by the troops, and the water was carried on deck in buckets and thrown overboard. About ten men were employed at the pump at a time, and eighteen in passing the buckets on deck; a hole was also cut in the bulkhead above the between decks so as to allow any water rising above the level of the iron bulkhead to escape over the between decks into the hold, and so come within reach of the main pumps of the vessel. The efforts of the troops, however, sufficed to keep the water below the level of the between decks and within the water-tight compartment.

The troops continued in the manner above-mentioned night and day to pump and bale the water until their arrival at Calcutta, when they were relieved by the Lascars, as hereinafter stated, and in this way the water was kept down, though the compartment was not emptied of water.

After sighting the light ship, the vessel was kept in sight of it, and under easy sail all that night.

On the next day, the 25th Oct., at half-past five a.m. they steered towards the pilot brig, which was

C. P.]

LIDGETT v. SECRETAN.

[C. P.]

then at anchor inside the light vessel, and got a pilot, when they set all sail, and sailed up the channel till seven p.m., when they came to anchor in Sangor Road, where they remained all night.

On the 26th Oct. they had fine weather throughout, and at one p.m. they engaged the steamship *Electric* to tow them up to Calcutta. The pilot who knew that the ship had been aground, and saw the pumping going on, would not get her under weigh as the tide did not suit.

On the following morning, the 27th Oct., at seven a.m., they were taken in tow by the steam tug *Electric*, which had been engaged as before mentioned, and they proceeded till seven p.m., when they came to anchor again below Garden Reach, and on the following morning the ship was again taken in tow, and at eight a.m. came to anchor in the river opposite Calcutta, and was there properly and securely moored in the usual way, and in accordance with the regulations of the port. The place where she was moored is within the Harbour of Calcutta, and is a place where vessels commonly discharge their cargo. A certificate was then given by the captain to the pilot, in which he stated that the ship "had been properly moored in a clear berth with thirty fathoms cable beyond the hawse each way, and Mr. J. H. Baldwin (the pilot) leaves her in safety." The certificate was dated the 28th Oct. 1866.

As they were proceeding up the channel to the above-mentioned anchorage, owing to the defective state of the steering apparatus, they ran foul of a buoy at a sharp turning of the river, and carried off the basket.

When the vessel was moored the troops were immediately disembarked. A fire engine was got from the shore, and twelve Lascars were hired to assist in pumping the water out of the after compartment. The Lascars came on board on the 28th Oct., and with their assistance for the first three days sixteen of the crew worked the engine, and the leak was got under control. The discharge of the cargo was proceeded with quickly, and was safely completed by the 8th Nov. As the cargo was discharged and the vessel lightened, the leak became less, and the compartment was kept nearly free of water. In the course of the discharge, the sluice before mentioned was opened. From that time the water was completely under command of the ship's pumps, and the Lascars, who up to this time had been continuously employed, were discharged. After this period the vessel did not make more than half an inch of water each hour.

All the vessels lying in the Hooghly are exposed to several sources of danger, for example, at the time of the year in question, there are powerful currents in the Hooghly running in opposite directions, a superficial one of several feet in depth running downwards to the sea, and a deeper one running up to the country. These currents are sometimes strong enough to tear a ship from her moorings. Hence, all vessels so lying are in some peril, and a vessel whose steering apparatus is injured, is in greater peril than one whose steering apparatus is in good order. The same effect is also to be produced by what is called the Bore. This consists of a rapid and powerful influx of water from the sea at a height of several feet above the river level.

The discharge of the vessel was completed with the exception of 200 tons of iron which were left in for ballast, and she was ready to go into dock on the 8th Nov., and there were docks able and ready to have taken her. On the 12th Nov. the vessel being in the state above described, was taken to the Union Dry Dock at Howrah, for survey and repairs. The vessel dredged up the river to the dock in the usual way without steam-tug or any other assist-

ance, and was steered with the assistance of a sail attached to the stern. This mode of assisting the steering is not uncommon in the Hooghly with vessels whose steering apparatus is in disorder.

Before going into dock the after compartment was allowed to fill with water, the object being to see when she was in the dry dock where the water could penetrate. The water did in fact leak in at the butts and rivets throughout the damaged parts. She was then carefully examined and a report was made by the surveyors on the 4th Nov. as follows:—

We, the undersigned surveyors of shipping, have, at the request of Messrs. Samuel Smith, Son, and Company this day surveyed the ship *Charlemagne*, Capt. Luckie, now lying in the Upper Union Dock of Howrah, where she has been placed, in consequence of her having struck on a sand bank outside the Hooghly, and after careful examination we report as follows:—

The ship *Charlemagne* was lying fair on the blocks, the docks being dry, and we found the following damage to have been sustained:

That the keel aft had been knocked over to starboard to the extent of 4'70in. in the space of 20ft. from aft, taking the original line of the keel as being straight, and it also deviates the same quantity, 4'70in. from a vertical line drawn down the stern post in a space of 19ft. measured up from the keel, and in consequence on the port or convex side, the butts in seven strakes or plates are badly strained to the extent of about 1'7in., and in this space the rivets are loosened.

The first scarp of the keel from aft between the plates has opened, and is leaking, although not so much strained on the starboard or concave side; three butts are weeping and some rivets strained, but nothing to compare with the opposite side.

The lower rudder brace is loose and the fly of the rudder is bent.

We therefore recommend that the rudder be unshipped and straightened, and that the plates in the defective part of the ship be removed in sufficient number to enable the workmen to bring the keel and sternpost to their regular position.

It may be necessary for straightening the rudder to remove two plates.

We recommend the whole of the bottom to be scraped and scaled, and the rivets and butts carefully examined below the water line.

When the plating is off we will hold another survey.

In addition to the damage stated by this survey, it was found after the plates had been removed that a few more rivets were broken than was at first supposed. Owing to these injuries the rudder would not go over to port more than about one quarter of the necessary distance.

Leakage through the joints, butts and rivets of an iron ship when at rest, is indicative of much more serious damage and of much greater risk and danger to a ship when the ship is afloat and liable to be exposed to weather, than the same leakage would indicate in a wooden ship.

To repair these various injuries the captain gave instructions to take down a certain number of plates in the way of the damage, and then to apply fire to the stern-post and keel to straighten them. By the 1st and 2nd Dec. all the plates which the captain wished removed had been removed, and fires were then placed under the keel by the captain's orders to straighten it. This was done, and fires were then applied to the stern-post for the same purpose. The stern-post had been partially straightened, and a fire was again applied to it on the afternoon of the 5th Dec. to complete the work. About dusk of that day the fire was drawn, and the carpenters began to set the small curve which remained in the stern-post, when it was discovered that the ship had taken fire inside, and notwithstanding all efforts to extinguish the fire it gained on them and totally destroyed the vessel.

The question for the opinion of the court is, whether the plaintiffs are entitled under the above circumstances to recover against the defendant for a total loss under the outward policy. If the court should be of opinion that the plaintiffs are so entitled, it is then according to the terms of the said order to be left to the arbitrator to determine what

C. P.]

LIDGETT v. SECRETAN.

[C. P.]

sum of money the plaintiffs are entitled to recover upon that basis, in addition to the sum of money paid into court, and judgment is then to be entered for the plaintiffs for such sum and costs. But if the court should be of a contrary opinion, it is then to be left to the arbitrator to determine whether the said sum of 100*l.* is sufficient to satisfy the plaintiffs' claims for the general and particular average under the outward policy and the total loss under the homeward policy, and, if not, what further sum the plaintiffs are entitled to, and if the arbitrator should find the said sum not sufficient judgment is then to be entered for the plaintiffs for such further sum in addition to the said sums so paid into court with costs, and if the arbitrator should find the said sum is sufficient the judgment is to be entered for the defendant with costs.

The material words of the two policies were as follows:—Policy for outward voyage upon ship valued at 20,000*l.*, "lost or not lost, at and from London to Calcutta, and for thirty days after arrival, with leave to embark troops at Portsmouth. . . . And further until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at Calcutta, upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed."

Policy for return voyage on ship valued at 20,000*l.*, "lost or not lost, at and from Calcutta to London, with leave to disembark troops at a port in the Channel," with a clause as to arrival at London exactly the same as the clause in the other policy concerning arrival at Calcutta.

Sir *G. Honyman*, Q.C. (with whom were *Watkin Williams* and *Cohen*) argued for the plaintiffs that, in order to give effect to all the words in the policy, the defendant's risk must extend for thirty days after the ship had been moored at anchor for twenty-four hours without accident or danger of accident. That the thirty days are to be reckoned after the expiration of the twenty-four hours was decided by *The Mercantile Marine Insurance Company, Limited, v. Titherington*, 5 B. & S. 765. As to the meaning of the words "moored at anchor in good safety," it was held in *Shaw v. Felton*, 2 East, 109, that it was not sufficient that a ship had arrived at safe moorings, but she must be in a state of security also. [BRETT, J.—Arnould says, 3rd edit. p. 395, she must be "in such a state of physical safety that she can keep afloat while her cargo is being unloaded."] That definition is not borne out by the cases cited, all of which go further; the test according to the cases seems to be whether the ship was in such a state that a homeward policy could attach.

Phillips Law of Insurance, s. 968 :

Parsons' Marine Insurance, vol. 2, p. 59 ;

Parmeter v. Cousins, 2 Camp. 235.

J. C. Mathew (with whom was *Mellish*, Q. C.) for the defendants contended that the words "in good safety" related only to perils which might arise during the first twenty-four hours after arrival, and that the destruction of the ship took place seven, if not eight, days after the conclusion of the defendant's risk. He cited

Lockyer v. Offley, 1 T. R. 252 ;

Bill v. Mason, 6 Mass. 313 (quoted by *Parsons*, vol. 2, p. 59) ;

Angerstein v. Bell, Park Ins. 45 (ditto, same page) ;

Waples v. Eames, 2 Str. 1243 ;

Whitwell v. Harrison, 2 Ex. 127 ;

Samuel v. Royal Exchange Assurance Company, 8 B. & C. 119 ;

Horneyer v. Lushington, 15 East, 46 ;

Roche v. Thompson, *Parsons' Marine Ins.* vol. 2, p. 67.

Sir *G. Honyman*, in reply.—The contention of the defendant gives no effect whatever to the words "in good safety."

Cur. adv. vult.

Feb. 7.—BOVILL, C. J. delivered the judgment of himself, Willes and Brett, J.J.—The policy in this case, which was upon the ordinary printed form of a Lloyd's policy, was effected by the plaintiffs on their iron sailing ship *Charlemagne*. The risk was described in writing to be "at and from London to Calcutta, and for thirty days after arrival ;" and by the other terms of the policy was to continue until the said ship, &c., should be moored at Calcutta. Then followed the usual printed words, "upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety." The ship left London for Calcutta, and, after sustaining damage at sea, arrived in the river Hooghly in the month of October 1866. She was then taken in tow by a steam-tug, and brought to moorings at an usual place of discharge within the harbour of Calcutta, where she came to anchor and was moored on the 28th Oct. The captain gave the pilot the usual certificate that she was then properly moored and left in safety. She had brought troops from England, who then disembarked, and her cargo was unloaded and completely and safely discharged by the 8th Nov., with the exception of 200 tons of iron, which were left in her for ballast. On the 12th Nov., she was taken from the moorings to a dry dock for survey and repairs ; and, in the course of her repairs in the dock, the vessel accidentally caught fire and was wholly destroyed on the 5th Dec. It was found in the case that the vessel had sustained considerable damage from striking on a reef or bank before she reached Calcutta, whereby she became much strained, and injured and leaky. Considerable repairs were necessary ; and she required extraordinary pumping, at first by the troops on board, and afterwards by an engine and Lascars from the shore, to get her clear of the water which was in one of her compartments. She was also injured in her rudder or steering apparatus, so as materially to affect her steering ; and she was in danger of breaking from her moorings from the current and bore of the river Hooghly ; and, if she had broken away, the defect in her steerage would have further endangered her. But, notwithstanding these matters, she remained at her moorings for more than twenty-four hours as a ship, though damaged, and safely discharged her cargo. Under these circumstances, it was contended on behalf of the plaintiff that he was entitled to recover as for a total loss by fire ; and on behalf of the defendant that the plaintiff was only entitled to claim in respect of the partial loss by sea damage before the arrival of the ship at her moorings, and that he was not entitled to claim anything in respect of the loss by fire, because that was incurred after the termination of the risk under the policy. If the thirty days covered by the policy are to be reckoned from the time of the ship's arrival at Calcutta, either in the sense of arrival in the port, or arrival at, and being finally moored at an ordinary place of mooring and discharge within the port, then, as the fire and loss of the vessel did not occur until the thirty-eighth day after she was to be moored at Calcutta, viz., the 5th Dec., the loss would not come within the policy ; but, if the risk was extended, and continued beyond such thirty days, by reason of the printed words "until she hath moored at anchor in good safety," and of the vessel having been moored in a damaged state as described, then the ship was covered by this policy at the time of the fire on the 5th Dec., and the defendant would be liable for the total loss by fire. Whether the thirty days were in this case to be reckoned from the arrival only of the vessel

C. P.]

THE THETIS.

[ADM.]

at Calcutta, or from her having been moored at anchor twenty-four hours in good safety, it is not necessary to determine, because we are all of opinion that, even in the latter view, the defendant is entitled to judgment. Assuming, then, that the thirty days are to be reckoned from the time of the ship being moored for twenty-four hours in good safety, the question arises, what is the meaning of those words in such a policy? We are of opinion that the meaning is not, as has been contended, that the moorings are safe, but that the words refer to the ship being in safety. The words cannot mean that the vessel is to arrive without any damage or injury whatever from the effects of the voyage; otherwise, the loss of a mast, or even a spar, a sail, or a rope, though the vessel was perfectly fit to keep not only the river but the sea, would, contrary to all the ordinary meaning of language, prevent her from being considered as in safety. So, on the other hand, the words would not, in our opinion, be satisfied by the vessel arriving and being moored in a sinking state, or as a mere wreck, or by a mere temporary mooring. We think also that the mere liability to damage, whether partial or total, during the twenty-four hours, by the occurrence of some or all of the perils insured against, cannot prevent the running of the twenty-four hours, because the extension of the period of risk for twenty-four hours after having moored in good safety, clearly implies that, notwithstanding the safety intended, the ship is liable to partial or total loss by the occurrence of a peril insured against. The American decision upon that point of *Bill v. Mason* was on the ground that, although the ship was during twenty-four hours after being moored liable to damage or total loss, she was not in fact either lost or in that case even damaged. Where, on the other hand, a ship arrived in port in a sinking state, and, on being moored, was obliged to be lashed to a hulk in order to keep her afloat until the people on board were landed, and where she sank on being moved towards the shore, it was held that she was not moored in safety, because the court considered that she in fact arrived as wreck, and not as a ship: (*Shaw v. Felton*). So where a vessel arriving in a hostile port with simulated papers, had her papers immediately taken, and her hatches sealed down by the officers of Government, although she was not formally condemned until afterwards, it was held that she had not been moored in safety for twenty-four hours, because she was in effect within the twenty-four hours taken from her owners by a foreign Government: (*Horney v. Lushington*.) Nor was a vessel which had been for a short period moored to a wharf, but within twenty-four hours was ordered into quarantine, and, whilst there, but more than twenty-four hours after the original temporary mooring, was lost by a peril insured against, considered to have moored in good safety, because, as it would seem, she had not, before the loss in respect of which the claim was made, been finally moored at the ordinary place of mooring: (*Waples v. Eames*.) Where a vessel, after being moored, remained in actual safety as a ship for twenty-four hours, and so that during the twenty-four hours her owners had complete and undisturbed possession of her, but afterwards she was seized in consequence of the master having smuggled before her arrival, it was held that the terms of the policy were satisfied, and that the loss by the seizure was a loss after the termination of the risk: (*Lockyer v. Offley*.) In that case, Willes, J., in delivering the judgment of the court, said: "There must be some certain and reasonable limitation in point of time laid down by the court when the insurer shall be released from his engagement. If he be liable for a month, he may be for a year, and so on. And we all think that the law on insurances would be left unsettled and in much

confusion if any other time were suggested than that prescribed by the policy, viz., the continuance of the voyage, and the ship's being moored twenty-four hours in safety." In the present case, the vessel, though considerably damaged and leaky, and with one compartment full of water, existed as a ship at the time of her arrival, and she was able to keep afloat, and did keep afloat as a ship for more than twenty-four hours after being moored, by exerting the means within the power of the captain. She arrived and moored at the ordinary place for unloading, and was so moored as a ship in the possession or control of her owners for more than twenty-four hours; and she remained as a ship, and in possession of her owners for more than thirty days after the lapse of the twenty-four hours before described, and until the time of the fire by which she was totally lost. If the underwriters are liable beyond thirty days from her being so moored for twenty-four hours, it is difficult under such circumstances to see where the liability is to end. We think the only safe rule in this case is to hold that, after the expiration of thirty days from the arrival and mooring of the vessel, and her having remained as a vessel, and in possession or control of her owners, though not sound, for twenty-four hours, the underwriters were not responsible. We are, therefore, of opinion that there was not a total loss within the period of risk covered by this policy, and that our judgment should be for the defendant.

Judgment for defendant.

Attorneys for the plaintiff, *Thomas and Hollams*.

Attorneys for the defendant, *Waltons, Bubb, and Walton*.

COURT OF ADMIRALTY.

Reported by HENRY F. PURCELL, Esq., Barrister at-Law

Thursday, July 1, 1869.

THE THETIS.

Salvage—Deviation—Master's authority.

The steamer T. fell in with the steamer S., which was in a disabled state, and the master of the T. undertook to tow the S. into port for a certain sum. He had never received instructions of any sort from his owners as to salvage services, and the policy of insurance and bills of lading of the T. provided that she might assist and tow vessels in all situations. The T., in attempting to take the S. in tow, came into collision with and sunk her, the T. being solely to blame.

Held, the master of the T. was acting within the scope of his general authority, and the owners therefore were liable.

Semhle, this would be the case even had there been no such provisions in the policy and bills of lading.

This was a cause of damage. The facts were as follows:—

The *Sardis* was a screw steamer of 1634 net, and 1800 gross tonnage. She had a crew of forty-one hands, and was bound from Smyrna to London. In the prosecution of her voyage she left Gibraltar on the 29th Dec. When she had passed the Gut, and was about seventy miles north-west of Cape Trafalgar, an accident happened to her engines, which prevented them from working, and she began to drift, and she was hove to. Between eleven and twelve the next morning the *Thetis* was descried, and signalled to take the *Sardis* in tow. The *Thetis* was a screw steamer of 548 tons, with engines of ninety-horse power, carrying merchandise and passengers from Marseilles to London. She was navigated by a crew of twenty-one hands. She came up with the *Sardis*, and her captain came on board, and it was arranged, after some negotiations,

ADM.]

THE THETIS.

[ADM.]

that the *Thetis* should tow the *Sardis* back to Gibraltar for 400l.

While the *Thetis* was endeavouring to commence to tow the *Sardis* a collision occurred between the two vessels by which the *Sardis* was so much damaged that she soon afterwards sunk.

It appeared that the policy of insurance on the *Thetis* contained a clause giving her leave to tow and assist vessels in all situations, and the bills of lading provided that she "might assist and tow vessels in all situations." The owners of the *Thetis* had neither authorised nor forbidden the master to render salvage services.

The Court, assisted by Trinity Masters, was of opinion that the collision was caused by the unskilful and unseamanlike manœuvring of the *Thetis*, and pronounced her solely to blame.

Milward, Q. C. and *Clarkson* for the owners of the *Thetis*, then contended that the master of the *Thetis* was not acting within the scope of his authority as agent for the owners, and that they were therefore not liable for the damage, and referred to

Barwick v. The English Joint-Stock Bank, L. Rep. 2 Ex. 259; 36 L. J. 174, Ex.;

Hawtayne v. Bourne, 10 L. J. 244, Ex.; 7 M. & W. 595;

Mitchell v. Crassweller, 13 C. B. 237; 22 L. J. 100, C. P.;

Wilson v. Rankin, 34 L. J. 62, Q. B.; 6 B. & S. 208; 12 L. T. Rep. N. S. 20;

Tobin v. The Queen, 16 C. B., N. S., 310; 33 L. J. 199, C. P.; 10 L. T. Rep. N. S. 762;

Croft v. Alison, 4 B. & A. 590;

Goff v. Great Northern Railway Company, 30 L. J. 143, Q. B.; 3 L. T. Rep. N. S. 850;

Howard v. Sheward, 36 L. J. 42, C. P.; L. Rep. 2 C. P. 148; 15 L. T. Rep. N. S. 183;

Greenwood v. Seymour, 30 L. J. 327, Ex.; 7 H. & N. 355; 4 L. T. Rep. N. S. 835.

Deane, Q. C. and *Cohen*, contra, referred to

Reg. v. Stephens, 35 L. J. 251, Q. B.; L. Rep. 1 Q. B. 702; 14 L. T. Rep. N. S. 593;

Simpson v. London General Omnibus Company, 1 H. & C. 526; 32 L. J. Ex. 34;

The Julia, Lush. 224.

Sir R. PHILLIMORE.—It has been contended that I ought not to condemn the owners of the *Thetis*, or render them liable for the damages of this collision, because the master of the *Thetis* was not acting within the scope of his authority as their agent, or in the course of his employment as their servant in attempting to assist the *Sardis*, which attempt led to the collision in question. In support of this contention a number of cases were cited to the Court from reports of the decisions at common law. The last case upon this subject of responsibility of the principal for the act of his agent is that of *Barwick v. English Joint Stock Bank*. Mr. Justice Willes delivered the judgment of the Exchequer Chamber in this case, and observed as follows:—"The general rule is that the master is answerable for every such wrong of the servant or agent, as is committed in the cause of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running-down cases; it has been applied also to direct trespass to goods, as in the case of holding the owners of the ships liable for the act of masters abroad improperly selling the cargo. It has been held applicable to actions of false imprisonment in cases where officers of railway companies, intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws. It has been

acted upon where persons employed by the owners of boats to navigate them and to take fares, have committed an infringement of a ferry, or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in. It has been argued that upon the principle of these cases the owner of *The Thetis* was not responsible for the wrongful act of the master, inasmuch as the latter had no authority, express or implied, to perform a salvage service. I was referred to the case of *The Rising Sun*, decided in the district court of Maine (Ware, 378). I have perused the judgment in that case, but have not been able to extract from it any assistance for the decision of the point of law before me. According to the evidence of the master in the case before me, he had received no instructions from his owners with respect to performing salvage service, and the owner deposed, "I have never authorised nor forbidden my ships to render salvage service—it has never come before me." Now it is to be remembered, in the first place, that the master of a ship is not an ordinary agent, but one of a special kind *sui generis*; secondly, that the rendering of salvage services is an obligation required by the dictates of humanity, by the principles of public policy, and by the general interests of society, and has been recognised as such by the practice and jurisprudence of every civilised state. "It is the duty," Lord Howell says, in the case of *The Waterloo*, 2 Dodson's Ad. Rep., p. 437, of all ships to give succour; others in distress; none but a freebooter would withhold it." It has been urged upon me that the act of the master in this case could not have been within the scope of his commission, and was not for the benefit of the owners, because a deviation for the purpose of rendering salvage service to property would, upon general principles, avoid a policy of insurance, but that is an undecided and very doubtful proposition of English law, and certainly one to which I cannot give my assent. It was, at all events, pronounced by the Privy Council in 1866 to be an undecided point of law: (*The True Blue*, L. Rep. 1 P. C. C. 254-5; see also MacLachlan on Shipping, 363.) I am aware that the American courts appear to have made a distinction between a deviation for the purpose of saving life and for that of saving property; it is, perhaps, not quite so certain, however, as generally supposed, that such distinction has been finally established: (2 Parson's Mar. Law, Bk. 2, c. 8, p. 298; 3 Kent's Com. 313-14, and note.) If it be necessary that I should express my opinion whether upon general principles of law the owner of the *Thetis* was responsible for the act of the master in causing this collision, I should express it in the affirmative. I think, having regard to the principles of law respecting salvage service, the master, though not directly authorised to do the particular act, was, to borrow the expression of Willes, J., "the agent in his place to do that class of acts," and that by the negligent performance of an act of this class the damage which is the subject of this suit was caused; and, therefore, that the owner "must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." But, in truth, when I find in the policy of insurance appertaining to this ship, a clause giving her leave to tow and assist vessels in all situations, and that it is provided in the bills of lading that she may "assist and tow vessels in all situations," I entertain little doubt that it is not

STAFFORD ASSIZES.

REG. v. WILLIAM TURNER.

[STAFFORD ASSIZES.]

competent to the owner to deny that the attempt to save the *Thetis* was within the scope of the authority, and in the course of the employment of the master. There is one further argument which I must not omit to notice, namely, that the master of the *Sardis* took upon himself the risk of employing the *Thetis*, and thereby exempted the owner from responsibility for the act of his agent, and for this proposition the case of *Fletcher v. Rylands*, in the Exchequer Chamber, L. Rep. 1 Ex. 265, was cited as an authority, but I do not think that the circumstances of this case support the proposition of fact to which this law is to be applied. The *Thetis* must have known her own power, and she adopted her own measures for the performance of the service which, as the evidence shows, she voluntarily and deliberately undertook; she was perfectly aware of the size, character, and condition of the vessel which she agreed to tow. No concealment or deception was practised. The damage was by no means in the category of a necessary or inevitable accident, but was caused, as I have already stated, by the negligence and unskilfulness with which the *Thetis* was navigated. I therefore pronounce the *Thetis* alone to blame for this collision.

Proctors for plaintiffs, *Clarkson and Co.*
Proctor for defendants, *Cooper.*

STAFFORDSHIRE LENT ASSIZES.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

OXFORD CIRCUIT.—CROWN COURT.

Tuesday, March 15.

(Before LUSH, J.)

REG. v. WILLIAM TURNER.

Embezzlement—"Clerk or servant"—Commission.

The prisoner agreed with the prosecutor, a manufacturer of earthenware, to act as his traveller, and "diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by" the prosecutor, and that he would not, without the consent in writing of the prosecutor, "take or execute any order for vending or disposing of any goods of the nature or kind aforesaid, for or on account of himself or any other person." It was further agreed that the prisoner should be paid by commission, and should render weekly accounts.

The prosecutor subsequently gave the prisoner written permission to take orders for two other manufacturers. The prisoner being indicted for embezzlement under 24 & 25 Vict. c. 96, s. 68.

Held, that he was a "clerk or servant" of the prosecutor within the meaning of that statute. Reg. v. Bowers, 14 L. T. Rep. N. S. 671; L. Rep. 1, C. C. R. 41; and Reg. v. Marshall, 21 L. T. Rep. N. S. 796, cited and distinguished.

The prisoner was indicted for embezzlement.

The indictment charged that he on the 23rd April 1869, being then a servant to Richard Edwards, did by virtue of his employment, and while he was so employed as aforesaid, receive and take into his possession certain money, to wit, the sum of 34*l.* for the said Richard Edwards his master, and then fraudulently and feloniously did embezzle the same.

Two other counts followed of a similar form but relating to different sums.

Motteram and Brindley for the prosecution.

Young for the prisoner.

The prosecutor, a manufacturer of earthenware at

Burslem, had employed the prisoner as his traveller under a written agreement, the material parts of which ran thus:

The said Charles William Turner, for the considerations hereinafter mentioned (viz., a commission), for himself, his executors and administrators, hereby agrees to and with the said Richard Edwards, his executors, administrators, and assigns, that he the said Charles William Turner, from the day of the date hereof, shall and will act as the traveller of the said Richard Edwards, and diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by the said Richard Edwards, at such prices and on such terms as shall be from time to time set forth in a schedule of prices to be delivered to him by and under the hand of the said Richard Edwards, and further that he the said Charles William Turner shall and will use his best endeavours and means to sell and dispose of the same goods at such prices and terms, and in all cases when he shall not receive any express direction relative thereto, will so act therein as will, to the best of his judgment, be most beneficial to the said Richard Edwards. And also, that he the said Charles William Turner shall and will pay and defray out of his own proper moneys all his travelling and hotel and other expenses. And shall not nor will without the consent in writing of the said Richard Edwards, at any time during the continuance of the agreement, take or execute any order for vending or disposing of any goods of the nature or kind aforesaid for or on account of himself or any other person or persons except the said Richard Edwards.

In other clauses it was further agreed that the prisoner should be paid by a commission payable quarterly, and that he should forthwith account for and "pay over unto the said Richard Edwards . . . all sums of money, bills, notes, and securities," which should have been received by or come to his hands for or on account of the said Richard Edwards. A supplemental agreement was afterwards entered into by the parties, by which it was arranged that the prisoner should cease to take orders in London, and another supplemental agreement provided that the prisoner should render his accounts weekly.

The agreements were put in and read. Evidence was given of acts of embezzlement.

From the cross-examination of the prosecutors' manager, it appeared that Mr. Richard Edwards had given the prisoner permission in writing to sell china for Mr. Baguley, of Hanley, another manufacturer, and also to sell for Messrs. Edwards of Longton; and the witness admitted that he knew that the prisoner had collected accounts for Messrs. Minton and Co. since he had been in the employ of the prosecutor.

These facts having been elicited,

Young submitted that the prisoner was not a "clerk or servant" within the meaning of 24 & 25 Vict. c. 96, s. 68, and that there was nothing on the face of the agreement to show that he was bound to employ his whole time for the benefit of the prosecutor; on the contrary, the prosecutor had given him permission to take orders for other manufacturers. A variation had been made with reference to the time of rendering the account. In Reg. v. Bowers, 14 L. T. Rep. N. S. 671; L. Rep. 1 C. C. R. 41, it was held that "a person who is employed to get orders for goods, and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, being paid by a commission on the goods sold, is not a clerk or servant within the meaning of this Act. In the present case the prisoner was paid by commission only.

LUSH, J.—In Reg. v. Bowers (*sup.*) there had been a material alteration in the position of the parties; the prisoner having been originally a traveller had set up business on his own account.

Young.—It cannot be said that the prisoner's whole time was at the disposal of the prosecutor in this case. In Reg. v. Marshall, 21 L. T. Rep. N. S.

BANK.]

Ex parte ATKINSON; Re BROOKSBANK.

[BANK.

796, a traveller was paid by commission, received no salary, and was at liberty to go where he pleased for orders; and it was held that he was not a "clerk or servant" within the statute relating to embezzlement.

LUSH, J.—I was party to that decision, and I think it is very much against you. Here the prisoner was bound by the terms of the agreement "diligently to employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders;" surely he was obliged to devote his whole time to the service of the prosecutor.

When summing up to the jury the learned Judge, after distinguishing larceny from embezzlement, and commenting on the facts of the case, said: Now was the prisoner a "clerk or servant" within the meaning of the statute? That depends on the terms of his employment. If a person says to another carrying on an independent trade, "If you get any orders for me I will pay you a commission," and that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a "clerk or servant;" but if a man says, "I employ you and will pay you, not by salary, but by commission," then the person employed is a servant. And the reason for such distinction is this—viz., that the person employing has no control over the person employed in the first case, but where, as in the second instance I have put, one employs another and binds him to use his time and services about his (the employer's) business, then the person employed is subject to control. Here Turner agrees with Mr. Edwards that he shall and will from the date of the agreement "act as the traveller of the said Richard Edwards, and diligently employ himself in going from town to town . . . and soliciting orders." It is, therefore, clear that he was employed as "clerk or servant" by Mr. Edwards, who had full control over his time and services.

Verdict guilty; sentence, eight months' imprisonment.

Attorney for the prosecution, *Sutton*, Burslem.
Attorney for the prisoner, *Tomkinson*, Burslem.

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

March 18 and 23.

(Before the CHIEF JUDGE.)

Ex parte ATKINSON; Re BROOKSBANK.

24 & 25 Vict. c. 134, s. 194—Deed registered under—Provisions of sect. 197 applicable to—Examination of parties under.

It is competent to the court, at the instance of the trustees, to inquire into matters connected with a deed of assignment duly registered under the 194th section of the Bankruptcy Act 1861, and this jurisdiction of the court is expressly reserved and protected by the 20th section of the Bankruptcy Repeal and Insolvent Court Act 1869.

The provisions of the 197th section of the Bankruptcy Act 1861, are equally applicable to deeds registered under the 194th section as to those registered under the 192nd.

The decision of Lord Westbury, L.C., in Ex parte Morgan, 1 De G. J. & S., respecting the application of the 197th section to deeds registered under the 194th section dissented from.

This was an appeal from the decision of the judge of the County Court at Bradford.

On the 18th Aug. 1869, W. Brooksbank, the debtor, executed a conveyance of all his real,

leasehold, and personal property and effects, to trustees for the benefit of his creditors with full powers of sale and administration as if they were assignees under a bankruptcy. The deed was duly registered on the 10th Sept. 1869, under the provisions of the 194th section of the Bankruptcy Act 1861. The trustees, being desirous of inquiring into the position of the debtor, and as to his property and effects, obtained a summons for that purpose from the registrar of the County Court at Bradford for the attendance of a Mrs. Atkinson to be examined on the 24th Feb. 1870. This summons was duly served, and Mrs. Atkinson attended on the day appointed, but refused to be sworn until she had received her expenses. These having been paid, she, under the advice of her solicitor, still refused to be sworn and examined. The matter having been adjourned into court, was argued at length upon the 25th Feb., and upon the 8th March the learned judge delivered judgment, requiring the witness to submit to the examination. Mrs. Atkinson still refusing to give evidence, was thereupon adjudged guilty of a contempt, and a warrant, was signed for her committal to York Castle, there to be detained until the court, or the Court of Appeal in Bankruptcy, should make order to the contrary.

This warrant was allowed to stand over to enable the witness to take the opinion of the Chief Judge upon the question by way of appeal. Notice of appeal was accordingly entered on the 10th March, and the following were therein stated as the reasons for such appeal:—

1. That the court had no jurisdiction to issue the summons under the deed.
2. That Mrs. Atkinson was not bound to submit to be sworn or examined.
3. That the summons was informal in not showing that the deed was registered, or the purpose for which the witness was to be examined.
4. That no proper day had been fixed by the order of the court, or, if so fixed, it was not the day upon which the summons was returnable.
5. That the affidavit upon which the summons was granted was not filed.
6. That the deed was not registered under the 192nd section of the Bankruptcy Act 1861.
7. That Mrs. Atkinson was not a creditor assenting to or bound by the deed.
8. That the only evidence produced was that the deed had been executed by the persons whose signatures were attested by Mr. Hutchinson, the solicitor to the trustees.

Green (solicitor) appeared for the appellant.—He contended that as the deed was not registered under the 192nd section of the Act of 1861, the court had no jurisdiction, inasmuch as the provisions of the 197th section applied only to deeds registered under the 192nd section, and not to deeds registered under the 194th. These latter deeds were binding only upon the executing parties, and were registered for no other purpose than to be made available in evidence against them. Such deeds did not affect the rights of dissenting or non-executing parties who took no interest under them. Any such creditors seeking to upset a deed registered under the 194th section might proceed by action at common law, and that was their remedy. Moreover, the court had no jurisdiction to grant a summons for the examination of witnesses under a deed like that before the court, inasmuch as all the authority which the court might have had under the provisions of the Bankruptcy Act 1861 was taken away by sect. 20, the repeal clause of the Bankruptcy Repeal and Insolvent Court Act 1869, and the reservation in that section as to the past operation of the enactments repealed did not affect the repeal or diminish its

BANK.]

Ex parte ATKINSON; *Re* BROOKSBANK.

[BANK.]

effect. The contrary construction would involve a difficulty and a clash of jurisdictions. He cited

Ex parte Mappin, 7 L. T. Rep. N. S. 167;

Ex parte M'Quire, *Ib.*, 169;

Ex parte Morgan, *Ib.*, 729;

Pearson v. Pearson, 14 L. T. Rep. N. S. 596;
L. Rep. 1 Ex. 308.

In *Symons and Strong v. George*, 10 L. T. Rep. N. S. 424, the only question decided was, that a deed registered under the 194th section was valid at common law. In that case the observations of Bramwell, B. were merely *obiter dicta*, and that learned judge afterwards decided the contrary way in *Pearson v. Pearson*, 14 L. T. Rep. N. S. 596. The only point decided in *Pfander v. Richardson*, 1 W. N. 335, was, that a deed might be good at common law, even though the conditions of the 192nd section were not complied with.

Stranger v. Miller, L. Rep. 1 Ex. 58; 13 L. T. Rep. N. S. 331; and

Ex parte Alexander, re Thin, 8 L. T. Rep. N. S. 748;

were also referred to.

Bagley for the respondents, the trustees under the deed, contended that all the creditors, as well as the trustees, were entitled to examine into the deed, and to investigate any circumstances which they might have reason to believe were indicative of fraud upon the part of the debtor, and that, whether the deed was registered under the 192nd or the 194th section of the Bankruptcy Act 1861 was immaterial. He cited

Symons v. George, 3 Hurlst. & Colt. 67 (and *sup.*);

Ex parte Lawrence, re Beale, 32 L. J. 61, Bank;

He also referred to sects. 120 and 267 of the Consolidation Act 1849, and sect. 136 of the Bankruptcy Act 1861.

March 23.—The CHIEF JUDGE delivered the following judgment:—This case comes before the court by way of appeal from an order of the learned judge of the County Court held at Bradford. A deed for the arrangement of the affairs of a debtor named William Brooksbank was executed in August last, and duly registered under the 194th section of the Bankruptcy Act 1861. By that deed the debtor conveyed and assigned all his real and personal estate and effects to trustees for the benefit of his creditors, to be distributed according to the law in bankruptcy, and in consideration of such assignment the creditors, parties to the deed, released the debtor from all claims which they had against him. The trustees being desirous of examining certain persons in respect of the estate and affairs of the debtor, applied in the usual form to the court at Bradford for summonses to compel the attendance at the court of those persons for the purpose of such examination. Amongst others a summons was issued and duly served upon Mary Atkinson, one of such persons. In obedience to the summons she appeared before the court, but objected to be sworn until her expenses of attending were first paid to her. This objection was removed by the payment to and the acceptance by her of the sum she required; she then, through her solicitor, raised further objections, which were argued at considerable length, and the learned judge having taken time to consider the matter, delivered a very careful judgment, in which he dealt with the several points of objection which had been urged, and being of opinion that they could not be sustained, he overruled them. The witness summoned, acting under the advice of her solicitor, still refused to be sworn, and the learned judge thereupon made an order for her committal, by reason of the contempt of court in which she so persisted; but inasmuch as it was stated that she intended to appeal against the order,

his Honour thought fit to suspend the execution of the order he had made for a period sufficient to enable her to bring on her appeal. That appeal is now made by, and in the name of, Mary Atkinson, by George Atkinson, her husband and next friend. The case has been fully argued before me, and the first objection taken is that the court has no jurisdiction in the matter, all such authority as may at any previous time have existed, being, it is said, extinguished by the 20th section of the Bankruptcy Repeal Act 1869, whereby the several statutes previously in force were repealed. It would obviously be a subject of great regret if by any omission or inaccuracy in the Act of 1869, such a mischievous consequence should follow. The object and purport of the Bankruptcy Act 1869, is to substitute a new law, and new modes of procedure in the place of those which had previously prevailed. It was no less its object and purport to continue, subject to the provisions of the new statutes, all such matters as had been commenced under the old law, and to provide for their being carried into full completion, by all such means as might be requisite for that purpose. Under the old law the 197th section of the Bankruptcy Act 1861 gave to the court in bankruptcy full jurisdiction over the subject of trust-deeds which had been duly registered; and if that Act had remained unrepealed it is not open to doubt that the court of the Leeds district in which the debtor resided would have been the court in which all requisite proceedings must have been taken. By the effect of the 130th section of the Bankruptcy Act 1869, and the General Orders made thereon, the jurisdiction of the Leeds court is transferred to the County Court whose order is the subject of this appeal. And by the 316th General Order all the jurisdiction and authority which the district bankruptcy courts had respecting trust-deeds, whether registered or in course of registration, on the 31st Dec. 1869, is vested in the County Courts to which the general jurisdiction in bankruptcy is now transferred. An attempt has been made to show that by a certain mode of construing the 20th section of the Bankruptcy Repeal Act 1869, this, the plain intention of the Legislature, has failed of effect, inasmuch as notwithstanding the repeal of the former statutes it is expressly enacted that such repeal shall not affect the validity of anything done or suffered before the commencement of that Act, or affect the course of any legal proceeding pending in bankruptcy or otherwise under any such enactment; but that, subject to the provisions of the new statutes, such proceedings shall be prosecuted as if the new Act had not passed. I am of opinion that the attempt to impeach the order upon this ground wholly fails, and that the County Court of Bradford, being satisfied of the validity of the deed which had been registered, not only might, but ought to exercise jurisdiction over the subject; and that, whether as a "pending proceeding" or not, it was incumbent upon the court to exercise all such powers as it possessed to give full effect to the law applicable to a deed, the validity of which was in the most express terms saved and protected by the repealing Act. Another objection which has been raised is, that the deed, having been registered under the 194th section of the Act of 1861 only, does not fall within the provisions of the 197th section; and that the powers conferred upon the court by the latter section can only be exercised with respect to deeds registered under the 192nd and 193rd sections; and consequently that the court at Bradford has exceeded its authority by ordering the examination of a person who, it is admitted, would be compellable to answer if the 197th section were applicable; and it is said that this contention is warranted and supported by the authority of cases referred to in the argument. Considering the great

BANK.]

Ex parte ATKINSON; Re BROOKSBANK.

[BANK.]

number of deeds registered under the Bankruptcy Act 1861, and the variety and magnitude of the interests which they may involve, it would be very inconvenient that any doubt should remain upon this subject; and it may, for this reason, be worth while to examine the cases which have been decided upon the point, and to consider what is the actual state of the law upon this subject. One of the principal features of the Bankruptcy Act 1861 was that division of it which related to trust deeds. It is headed, "As to trust-deeds for the benefit of creditors, composition and insolvency deeds executed by a debtor," and consists of nine sections, which together comprise the whole of the law in bankruptcy, to be administered upon this particular subject. The policy of the law seems to have been to facilitate arrangements between insolvent debtors and their creditors, and for this purpose to afford means other than the ordinary course of proceedings in bankruptcy, by which, under the circumstances prescribed, with the assent of a certain majority of the creditors, the several claims of the whole body of the creditors might be disposed of. This policy had been recognised by previous statutes, in which less perfect machinery was adopted, and which was laid aside in favour of the new regulations. To accomplish these objects with justice and safety to the general interests of creditors, and due regard to the established principles of law, a variety of provisions were indispensably necessary, and such of these as the Legislature thought it right to introduce are to be found in the division of the statute to which I have referred. There are, however, two leading principles which mainly govern the whole of these enactments; one is that, in the case where absent or non-assenting creditors are to be bound, sufficient publicity shall be given to the proposed arrangement by publication in the *London Gazette*, and that in every case all the creditors shall have convenient and accessible means of becoming acquainted with the details of the contract made between the parties, and the transaction by which their rights and interests are bound in some instances and affected in all. Thus, all such deeds as the clauses I have mentioned relate to must be registered at the same place by the same public officer, and within the same limited period of twenty-eight days, unless the court should otherwise order; the difference between them being that as to one class of deeds the assent of the prescribed number and amount of creditors is required previous to registration, whilst in the other no such assent is necessary. The reason of this difference is obvious: in the first case the provisions of the deed become binding upon all the creditors, assenting and non-assenting; whilst in the other, only those creditors are bound who have executed or assented to the deed. It is to me perfectly clear that the very reason and cause of the registration which is thus imperatively required, is that the subject matter of the deeds, in all its relations, and for its consequences, shall be by the very fact of the registration brought within the competence of the Court of Bankruptcy. After the best consideration I can bestow upon the subject, I have been unable to suggest any other reason for the requirements of the statute that the deeds should be registered in the manner prescribed, or for the provision which is made applicable to every such deed without distinction or exception than this, that, unless the requisitions are complied with, the deed as to which any such failure shall happen shall not be receivable in evidence; that is, that it shall fail wholly to accomplish the purpose for which it has been made. Keeping these considerations in mind, and reading the division of the statute I have mentioned as a whole, which I conceive

to be the only proper mode of construing this or any other statute, the 197th section is perfectly well adapted to its purpose, and is free from any question or ambiguity. For that section submits to the judicial determination of the court in bankruptcy every question that can arise under the deeds referred to whatever may be their form or object; and, by introducing the rules of law, and the practice and procedure in bankruptcy, and applying them to the cases which may arise under deeds, it protects every right which the debtor or a creditor may possess, and enforces such right without any needless delay or expense. By the argument which has been urged on behalf of the appellant it is not disputed that if the deed in question had been registered under the 192nd section there would be no doubt that it would fall within the provisions of the 197th section, but it is also insisted that inasmuch as the deed has been registered only under the 194th section none of the powers conferred upon the court by the 197th section can be exercised. I confess myself wholly unable to come to such a conclusion, or even to follow the train of reasoning by which it is arrived at. Suppose a case in which every creditor had in the most formal manner assented to a deed. There would be no necessity for proving the requisite proportions in order to bind non-assenting creditors. Suppose such a deed duly registered under the 194th section. Is that to be treated as a nullity? Are the creditors who have executed in reliance upon the good faith of the debtor who may have forborne claims which they might have enforced, and who afterwards discover that their debtor had fraudulently possessed himself of, and made away with, the assets which were by the deed devoted to the satisfaction of their debts, to be told that this statute, which requires the registration of the deed in order to give it validity, affords them no protection? That its provisions, careful and elaborate as they are, do not extend so far as to do them justice? That instead of putting in operation the swift and simple machinery supplied by the 197th section, they must resort to the slow and expensive process of a suit in Chancery, or such other course of legal proceeding as they may be advised. To expound the statute in any such manner would, in my opinion, be at once to misunderstand its plain meaning, and to deprive it of its usefulness as a general law. But then it is said to have been decided that deeds, though registered under the 194th section, are not contemplated by or included in the provisions of the 197th section; and in support of this proposition the cases of *Ex parte Morgan (sup.)*, and *Pearson v. Pearson (sup.)*, are relied upon. It is needless to say to say that the decisions which have been come to by the Superior Courts are entitled to the utmost respect, not only because of the just eminence and learning of the judges by whom they have been pronounced, but because they form the rules by which all other courts are to be guided, and are in fact binding in all cases to which the principle of such decisions applies. But these considerations only make it the more necessary upon all occasions to consider, with the utmost care, the exact principle which has been decided, and not by the ingenious selection, and more or less artful criticism, of the terms in which learned judges have expressed themselves, to draw conclusions which are not only foreign to the case in which those terms were employed, but which serve to mislead and render uncertain the rules of law which the judges have laid down. It has been asserted that in *Ex parte Morgan*, Lord Westbury, whose great learning and ability are entitled to the utmost deference at all times, and who, in expounding the Bankruptcy Act 1861, spoke with a most intimate knowledge of the statute of which he was him-

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Ex parte ATKINSON; *Re* BROOKSBANK.

[BANK.]

self the author, decided that deeds registered under the 194th section did not fall within the provisions of the 197th section. After the fullest consideration of that case, with which I am not now for the first time acquainted, I can come to no such conclusion. The question in that case was whether or not a debtor who had executed a deed of arrangement with his creditors, but who, not having obtained the assents of creditors which were necessary for its registration under the 192nd section, had registered it under the 194th section, had thereby deprived his non-assenting creditors of their ordinary rights, one of which is to make bankrupt a debtor who has committed an act of bankruptcy. The bankrupt insisted that having so registered his deed he was entitled to all the protection given by the 197th and 198th sections in the same manner and to the same extent as if the deed had been registered under the 192nd section, and that his creditors assenting and non-assenting were bound by the deed. The commissioner in the country adopted this view, and dismissed a petition for adjudication which had been presented by a dissenting creditor. From that decision the appeal was brought before the Lord Chancellor, who, in an elaborate judgment, decided that the protection which the bankrupt claimed was not extended to him by the deed so registered. That the protection so claimed by the bankrupt was the main subject for consideration is apparent from the terms of the judgment, as reported. The Lord Chancellor, after having pointed out the manner and effect of the registration required by the 192nd section, says, "It is plain, therefore, that the protection intended to be given to a deed under the 194th section was a protection extending only to such deeds as should be duly registered in the manner and form required by that section." He then adverts to the other form of registration under the 194th section, which, he says, gives the power and imposes the obligation of registering any deed of composition or deed for the benefit of creditors which has not been registered under the 192nd section, and such deed, he observes, "is to be registered simply in the Court of Bankruptcy." He comments upon the penalty which ensues upon the neglect to observe the requirements of the statute, and upon the circumstance that the forms of registration in the two cases are different, whereby "the consequences of the one do not attach to the other," and says, "The consequence of an observance in every respect of the terms of the 192nd section is that the deed is binding on the minority of the creditors who do not execute or assent to it. No such consequence is attached to the registration under the 194th section." And again, adverting to the registration being in fact and in terms made under the 194th section, he says, "It is impossible, therefore, that that deed can now be set up as having been duly registered under the 192nd section, and if it be not duly registered under that section it is not binding upon the creditors who are not parties to or do not assent to it." And the conclusion of the judgment deals with and covers the only point which was in question, viz., whether a creditor, not bound by a deed so registered, could make use of the deed itself as evidence of an act of bankruptcy? The terms of this part of the judgment are remarkable and precise. The Lord Chancellor says:—"The point which I decide for the purposes of the present motion are these, that this deed was not registered under the 192nd and 193rd sections; that it was intentionally and by submission of the parties registered under the 194th section; that validity as against the use now attempted to be made of the deed, is not given by the 194th section; that the present petitioning creditors, therefore, are not bound by that deed, but may treat it as an act of bankruptcy, to which I

think it amounts." I find, therefore, in this judgment a plain decision, upon precise grounds, of the only question which was raised and was essential for the decision of the appeal. If it be said that it goes further, and decides that none of the other provisions of this division of the statute apply to deeds registered under the 194th section, I can only say that I am unable to discover any such meaning in it, and am tempted to ask for what conceivable reason the Legislature should require a deed to be registered in the Court of Bankruptcy if that court was to lose all power and control over the proceedings which might ensue after the registration. The protection of the debtor, which might have been acquired by a different mode of registration, was undoubtedly not acquired; but the right of the creditors to invoke the aid of that court in which the deed had been registered, and to whose jurisdiction the debtor had submitted himself, for the purpose of enforcing its provisions, and of giving it full effect by such means as are within the administration of the court are in my judgment abundantly clear. It would surely be an unsatisfactory argument which should maintain that, because all the powers given to the court by the 197th section with respect to deeds registered under the 192nd need not and cannot be exercised with respect to deeds registered under the 194th section, therefore, whatever reason may exist for their exercise, such of the same powers as may be justly and usefully put in force for the benefit of debtors or creditors are to be neutralised and made inoperative. Not referring only to the case of *Ex parte Lawrence*, 1 De G. J. & S., but to the well-established principles and practice of the administration in bankruptcy with which no one was more intimately conversant than Lord Westbury, I am satisfied that he would be greatly surprised if he should learn that the construction which has been suggested could be put upon his judgment in *Re Morgan* (*sup.*) The case of *Pearson v. Pearson* (*sup.*), has also been cited in support of this appeal, and it cannot be denied that there are expressions attributed in the report to the learned baron by whom that case was decided which, if they were taken literally, and without reference to the subject to which they were applied, would be in favour of the proposition contended for, namely, that a deed registered under sect. 194, is not within or affected by the provisions of sect. 197. But let us see what the case was in which the judgment was pronounced. An action was brought by a solicitor as plaintiff to recover the money in which he declared that the defendant was indebted to him. The defendant pleaded, not that he was never indebted, but that the plaintiff had conveyed all his estate and effects to trustees, and that he had therefore deprived himself of the right to sue. The plaintiff replied in effect that his deed had been registered under the 194th section, not under the 192nd, and it was therefore argued on his behalf that the cause of action upon which he declared, and which is technically called a *chose in action*, had not passed to the trustees by the deed, such *chose in action* not being assignable at common law; and the single question for the court to decide was, whether by the effect of the 197th section the debt in question was vested in the trustees as if the debtor had become bankrupt, or whether the legal right to sue for it remained in the plaintiff. The justice of the case was apparent. The defence, if it might be called a defence, was utterly frivolous. It was clear that the assignment, whatever might be its consequences at law, was a good assignment in equity, and gave the trustee an equitable right to use the plaintiff's name for recovering the debt, although they could not b

BANK.]

Ex parte ROGERS.

[BANK.

reason of a mere technicality assert that right to which they were unquestionably entitled in their own names. No doubt such a case presented the strongest temptation to the court to decide against so flimsy and unreasonable an attempt on the part of the debtor to delay, for he could only delay, the compliance with a just claim. And accordingly their Lordships adopted various ways of reading the statute. It was suggested that sect. 194 is parenthetical, that words might be interpolated in sect. 197, and that the registration prescribed by the previous sections is only such as is mentioned in sects. 192 and 193: And all this for the purpose of deciding that by a deed registered under sect. 194 a debtor's *chose in action* not thereby assignable at common law, were not by virtue of sect. 197 so vested in the trustees as to make them the only persons competent to sue at common law for their recovery. I do not, however, understand their Lordships to have said, and still less to have meant to say, that being parenthetical it was to be disregarded and treated as if it had been omitted, or that the legal and equitable rights which the deed purported to confer were extinguished, or that the trusts declared by it were not enforceable, or not within the powers of the Court of Bankruptcy, in which the deed is by the statute imperatively required to be registered. With the utmost deference, therefore, to the learned judges by whom that case was decided, and not presuming to question their decision upon the subject to which it applies, I must say that it seems to me to be no authority for the proposition that because a deed of assignment registered under sect. 194 does not enable the assignee to sue in his own name for a *chose in action*, which was the property of the assignor before the deed, therefore the 197th section has no application to such a deed, and that all the power and jurisdiction which, by the 197th section, is given to the Court of Bankruptcy over "every such deed" after registration is wholly ousted. It would, in my judgment, be utterly unreasonable and unjust so to read the decision in *Pearson v. Pearson*. But even if it were possible to do so there would arise the utter impossibility of reconciling that decision with others pronounced in the same Court of Exchequer, and by some, if not all, of the same learned judges. For in *Hodgson v. Wightman*, 1 H. & C. 810, in an action to recover the amount of certain bills of exchange, the defendant pleaded a composition-deed executed by the plaintiff and other creditors, which deed had not been registered; and the plaintiff insisted at the trial that the deed was not receivable in evidence by reason of the prohibition contained in the 194th section. The objection being allowed at the trial, and verdict being entered for the plaintiff, the court was moved to enter the verdict for the defendant. The judgment of the whole court was delivered by Wilde, B., who says, p. 818: "We construe sect. 194 of the new Bankruptcy Act to apply to all deeds whatever, which are or profess to be, or are obviously on the face of them intended to be, deeds of arrangement or agreement between the debtor and the whole body of his creditors. It was clearly, in our opinion, intended to include not only deeds complying with, and framed under the provisions of sect. 192, but all other deeds whereby a man may compound or arrange with the whole body of his creditors. We cannot read the several sections of the Act relating to deeds of arrangement and avoid the conclusion that the scope of the new Act was to subject all such arrangements to the operation, to some extent at least, of the bankrupt laws, leaving it, however, open to the parties, by express provision in the deed, to qualify or restrain the application of such laws." *Symons v. George*, 3 H. & C. 68, is another case decided in the

same court, and by the same judges. The plaintiff's right depended upon a deed of composition registered under the 194th section, although the requisites of the 192nd section had not been complied with. The court decided, in effect, that the deed was within the 194th section, and that sect. 197 subject all such deeds, when registered, to the jurisdiction of the court in bankruptcy, and, not to quote the judgment of the other barons, these expressions of Bramwell B. go directly to the point:—"From the language of the 194th and 197th sections it does seem that, although this deed is not binding upon non-assenting creditors, its trusts may be administered under the provisions of the Bankruptcy Act, and with the assistance of the Court of Bankruptcy." Now, I have gone at greater length than I should otherwise have thought it necessary to do into the subject of this appeal, as well because I wished to express my entire concurrence with the learned judge whose order is objected to and who has exercised in pronouncing his decision the knowledge, discrimination, and patience, for which all who are acquainted with him know that he is eminent, as because the questions which have been raised may have a bearing upon other cases probably much more important than the present; and also because the law respecting deeds of arrangement and their consequences, depending partly upon the law as it existed before the commencement of the present year, and partly upon the statutes now in operation, ought to be known and understood, and preserved as free from doubt as possible. The conclusion I have come to is that the original contention on the part of the appellant and the present appeal are wholly unsustainable. Some merely technical or formal objections are stated in the notice of motion, but as they have not been argued it is unnecessary that I should observe upon them, further than to say they are not entitled to serious consideration. The order made in the County Court remains in its full force. The only order, therefore, which it is proper to make upon this appeal is, that this motion be dismissed with costs, to be paid by George Atkinson, the husband and next friend of the appellant, Mary Atkinson, to Isaac Rushbrook and Mr. Joseph Smith, the respondents, and that the sum of 20*l.*, which has been deposited with the registrar, be handed over to the said Isaac Rushbrook and Joseph Smith, and be received by them in part satisfaction of the costs hereby ordered to be paid.

Appeal dismissed with costs.

Attorney for the appellant, *M. K. Braund*, 3, Furnival's-inn, for *James Green*, of Bradford, Yorkshire.

Attorney for the respondent, *Fluker*, 10, Symond's-inn, for *James Gwynne Hutchinson*, of Bradford, Yorkshire.

Tuesday, March 29.

(Before the CHIEF JUDGE.)

Ex parte ROGERS.

Bankruptcy Act 1869, s. 125—Petition under notice to Creditors.

Where, under the 125th section of the Bankruptcy Act 1869, a petition has been presented and a resolution passed at a meeting of creditors, such resolution cannot be registered unless all the creditors have received notice of the meeting.

Bagley applied, *ex parte*, on behalf of the debtor for the direction of the court under the following circumstances: The debtor having filed his petition under the 125th section of the Bankruptcy Act 1869, called a meeting of his creditors to take place on the 24th March at Bangor. At this meeting

CHAN.]

Re THE NATIONAL PERMANENT BENEFIT BUILDING SOCIETY.

[CHAN.]

creditors were present whose debts amounted to upwards of 3000*l.*, and it was resolved to accept a composition of 10*s.* in the pound, but Mr. Keene, the registrar of the office for Registration of Arrangement proceedings in London, refused to register the resolution, it having come to his knowledge that twenty creditors, whose debts amounted to about 164*l.*, had not been served with notice of the meeting. An affidavit was read setting forth that the debtor, who was the proprietor of certain slate quarries in Anglesea and Carnarvon, did not himself attend to the business at either of those places, but intrusted the conduct of the same to the management and control of his son and a foreman, whilst he himself lived at Fulham-road, in Middlesex, and knew little or nothing about his creditors in Wales; that the creditors to whom notice of the meeting had not been sent, were omitted inadvertently; and it was further stated that the mistake originated in the fact that the debtor was required to furnish a list of his creditors to the registrar, whose duty it was to send the notices of the meeting to the several creditors.

The CHIEF JUDGE said he was quite willing to believe that the omission had arisen from inadvertence, but it was clear that there had been an irregularity which could only be remedied by giving fresh notices to all the creditors, and holding another meeting.

Ordered accordingly.

Solicitors, Chester and Urquhart.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by T. BROOKSBANK and E. STEWART ROCHE, Esqrs.,
Barristers-at-Law

Nov. 25, and Dec. 17, 1869.

(Before Lord Justice GIFFARD.)

Re THE NATIONAL PERMANENT BENEFIT BUILDING SOCIETY.

Building Society—No borrowing powers—Borrowing in order to make advances to members—Winding-up petition by the lender—Invalidity of debt—Petition dismissed.

The principle of Re The German Mining Company, 4 De G. M. & G. 19, that where a company has no power of borrowing, a person lending money to it which has been applied in paying debts recoverable by law against it, may yet in equity stand in the place of the creditors whose debts have been thereout paid, is not to be extended one iota.

And where a building society had no power of borrowing, but yet procured loans for the purposes of its legitimate business, which was to make advances to its members, which without such loans it had no funds to make, such loans were held not to be a legal or equitable debt from the society, and a winding-up order made upon the petition of the person making the loans was discharged, although upwards of two years had elapsed since the order was made, and the objection to the petitioner's debt was not taken at the hearing of the petition.

This was an appeal by Mr. Williamson and other contributors of the National Permanent Benefit Building Society to discharge an order for a call which had been made by the Master of the Rolls in order to provide funds for the payment of a debt due to the official liquidator of the National Savings Bank Association, who was appointed official liquidator in the winding-up of the building society also. The contention of the appellants was that the debt in question was not a debt from the latter society at

all; and as it appeared that this was its only debt, and that it was upon this that the winding-up order against the society was made and depended, leave was given to the appellants to move the Court of Appeal to discharge the winding-up order as well as the order for the call, and the two motions were brought on together.

The circumstances were as follows:

The society was established under the 6 & 7 Will. 4, c. 32, and its rules were certified by the registrar, and as certified provided that the shares should be ultimately of the value of 100*l.*, a subscription of 10*s.* monthly on each share being payable for twelve years and a half. There was power to make advances to the members, which were to be repaid by instalments; but the rules contained no power whatever to the society to borrow money.

The society appeared to have been in close connection with the National Savings Bank Association, and its prospectus stated that it was the intention to borrow money of the association in order to make advances to its own members.

The association was ordered to be wound-up in 1866, and it had at that time advanced to the society upwards of 1300*l.* The society being unable to pay the debt, the official liquidator of the association, as a creditor in respect of it, presented a petition to have the society wound-up by the court, and an order was made according to the prayer of that petition on the 13th July 1867, and the petitioner became official liquidator of the society. He carried in his claim in respect of the above advances, and it was admitted as a debt in Jan. 1868; it was, in fact, the only debt proved, and in order to satisfy it, the Master of the Rolls made the order for a call on the 27th July 1869.

The evidence established the fact that loans were made by the association to the society to the amount mentioned, and the money was traced to various members of the latter as advances from the society to them. It was shown that several of the appellants, though not all of them, were officers of both the association and the society, and were thus parties to the whole transaction.

Roxburgh, Q.C., and Cottrell supported the appeal, contending that a building society had no power of borrowing for any purpose, unless it was expressly authorised to do so by its rules, and here there was no such power. There was, therefore, no debt to support the petition, and the winding-up order and all that was consequent upon it ought to be discharged.

Sir Richard Baggallay, Q.C., and Higgins argued that the advances were clearly for the use of the society, which had had the benefit of them, and was therefore bound to repay them. But the objection ought to have been made at the hearing of the petition, and it came too late now.

The authorities referred to were:

Re The German Mining Company, 4 De G. M. & G. 19;

Re The Worcester Corn Exchange Company, 3 De G. M. & G. 180;

Re The London and Mediterranean Bank, Law Rep. 3 Ch. App. 651;

Re The Kent Benefit Building Society, 1 Dr. & Sm. 417; 4 L. T. Rep. N.S. 610;

Re The Cork and Youghal Railway Company, ex parte The London, Hamburgh, &c., Bank, 21 L. T. Rep. N.S. 735; L. Rep. 4 Ch. App. 748;

Laing v. Reed, 21 L. T. Rep. N.S. 773.

Lord Justice GIFFARD said: I will not trouble you in reply, Mr. Roxburgh. In point of form, this is an appeal from an order of the Master of the Rolls, but in reality the point upon which I am about to determine this case was never brought

[CHAN.]

Re THE NATIONAL PERMANENT BENEFIT BUILDING SOCIETY.

[CHAN.]

fairly before him, and was never fairly argued before him. Therefore the matter is very much like an original case before me. The case, when it is examined, really is a perfectly simple one. Before I go into it, I will dispose of what Sir Richard Baggalay said as to the parties who are making this application; and as to the delay. I quite agree that in many cases the delay may be of very great importance indeed, especially if it has been shown that there have been such things as sales of property and matters of that sort; and I believe that, where bankruptcies have been superseded, under which property has been actually sold, there has been a sort of confirmation of actual sales. I do not find in this case that anything of that description has taken place.

Then as regards parties: the nature of the objection in this case is such that I do not consider these parties personally disabled from bringing forward the case, more especially as they are not the only contributories on the list, they being about nine out of a number of thirty-six. But then I have no hesitation in saying that their conduct is such that they cannot be entitled to one sixpence of costs of any one of these proceedings. Although I think they are right in this application, and although I think the winding-up order ought not to be made, I certainly shall give them no costs on the order I am about to pronounce.

The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent decision of the court in *Laing v. Reed*, 21 L. T. Rep. N.S. 773, it was actually doubted whether, if you even put a limited borrowing power, as it was in that particular case, among the rules of a society of this sort, that particular rule would be lawful. However, what we have here is a limited benefit building society without any power to borrow, and the rules and very nature of that society show that it would be contrary to the constitution of the society to borrow money so as to bind the company, or to make the individual members of the company, as members, liable for borrowing money, because the whole substance of the society is that the members are to make certain monthly payments, and in consideration of those certain monthly payments and fines, and matters of that sort, they are to receive certain loans. That is what a benefit building society is, neither more nor less. After these rules had been certified and published, and the nature of the company had been fixed, a prospectus was issued, and by that prospectus the directors chose to say that they "have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before their turn for it regularly arrives, such members, of course, paying interest on the sum lent until their turn does arrive." If that does mean anything, if we look at the form and substance of the company, it can only amount to this—that the directors have chosen to pledge their personal liability. It is not a statement that the company were liable, or that any person who was a member of the company was at all bound, or was at all personally made liable in respect of any debt of the company.

That being so, let us just see what this winding-up order was made upon. It was made upon the petition of a creditor, and, in order to support that petition, that person must have made out that he was a creditor, either legal or equitable; one or other would be enough. I have already said that this benefit building society could not incur a debt by borrowing money upon loan. That is plain, and the contrary has hardly been argued. It could not do so any more than a mining company or any other of the companies which have not authority or power to bind their members by borrowing money.

If there is no legal debt, the next thing to inquire is, whether there is an equitable debt. A class of cases has been referred to on that subject, the principal of which is the *German Mining Company's* case, and another the *Cork and Youghal Railway Company's* case, which was before the Lord Chancellor and myself a short time ago. I have no hesitation in saying that those cases have gone too far, and that I am not disposed to extend them one iota. They were decided upon this principle, depending upon old cases, beginning with a case in the time of Peere Williams (*Marlow v. Pitfield*, 1 P. Wms. 558), where there was a loan to an infant, and the money went in paying for necessities; and I believe in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In those cases it has been held that, although the party lending the money could maintain no action at all, inasmuch as his money had gone to pay debts which would be recoverable at law, that party could come into a court of equity, and stand in the place of those creditors whose debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from.

Then it is said that circumstances have been clearly proved which bring this case within that principle. I really do not think it necessary to go through the paragraphs of the affidavit which have been relied upon for that purpose, or to go through the balance-sheet which is appended to that affidavit. The paragraphs which have been relied on are the 5th and 9th paragraphs, and one of the balance-sheets appended to Mr Barrow's affidavit. Suffice it to say that there is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against this company. In truth, all this money went for the purpose of loans to members of this company. It is not for me to say whether the banking company that lent the money have or have not any rights either as against the property of this company, which was pledged to them, or as against the persons to whom this money was lent. If they have any such rights, they can only be asserted by filing a bill, and taking a very different description of proceeding to that which has been taken here.

That being so, it follows, as I have already said, that there is no legal debt, and it follows that there was no equitable debt. The winding-up petition is in the nature of an execution. I take it, whether the parties may or may not themselves be personally liable, or however much I may disapprove of their conduct, that they are not to be precluded from saying that the title of these creditors to sustain a winding-up petition wholly and totally fails. In this case it fails wholly and totally. As I have said, there is no debt, either legal or equitable. The consequence is, that the winding-up must fail, and the order must be discharged. But, as I said before, I do not give a sixpence of costs to these parties, because their conduct has not entitled them to any costs in any shape or form.

Solicitors for the contributories appealing, *Brady and Son*.

Solicitors for the official liquidator, *Lewis, Munns, Nunn, and Longden*.

CHAN.]

Ex parte NICHOLSON; *Re* NICHOLSON.

[CHAN.]

Saturday, Jan. 29.

(Before Lord Justice GIFFARD.)

Ex parte NICHOLSON; *Re* NICHOLSON.

Bankruptcy — Composition-deed — Inequality—Assignment of all debtor's property absolutely to one creditor who guarantees the payment of the composition—B.A. 1861, ss. 192, 199.

A debtor, with three of his creditors as sureties, executed a deed by which he covenanted to pay his creditors a composition of 4s. in the pound, and in consideration of the three creditors incurring this liability, he assigned to them all his property absolutely. The deed contained also a release of the debtor by the creditors.

Held, that this was a good deed within sect. 192 of the B.A. 1861.

Bissell v. Jones, L. Rep. 4 Q.B. 49; 19 L. T. Rep. N. S. 262, approved.

This was an appeal from an order made by Mr Registrar Brougham on the 21st Jan. 1870, dismissing an application made under sect. 199 of the Bankruptcy Act 1861, for the stay of proceedings under a petition for adjudication of bankruptcy against John Nicholson, and for a dismissal of the petition.

John Nicholson was a contractor, and, being embarrassed in his affairs, he on the 20th Dec. 1869 executed a deed for the benefit of his creditors. This deed was made between John Nicholson of the first part, John Doulton, Henry Doulton, and James Duncan Doulton of the second part, and the several persons, companies, and partnership firms (including the said parties thereto of the second part) who were creditors of the said debtor, or who would be entitled to prove under an adjudication of bankruptcy against him (had such an adjudication been made on the day of the date of the deed) of the third part. The deed contained a recital that Nicholson was unable to meet his engagements in full, and that he had proposed to his creditors to pay them a composition of 4s. in the pound in full discharge of their respective debts in the instalments therein mentioned, the payment of the said composition to the other creditors to be guaranteed by the said John Doulton, Henry Doulton, and James Duncan Doulton, afterwards called the "guarantors." Then followed a recital that it was part of the proposal that certain plant, stock-in-trade, and chattels of the debtor should be absolutely assured to the guarantors, and that certain contracts into which the debtor had entered should also be assured to the guarantors, or dealt with as they should direct, and a recital that a majority in number, representing three-fourths in value of the creditors whose respective debts amounted to 10% or upwards, had agreed to accept the said composition.

The deed witnessed that in pursuance of the said proposal, and agreement and in consideration of the release by the creditors (other than the guarantors) hereinafter contained, the debtor and the guarantors did thereby for themselves, their heirs, executors, and administrators, covenant with the creditors respectively (other than the guarantors) and their respective executors and administrators, that they the debtor and the guarantors, or one of them, their or one of their heirs, executors, or administrators, would, upon demand by the creditors respectively (other than as aforesaid), at any time after the registration of the deed, deliver to the creditors respectively (other than the guarantors) the joint and several promissory notes of the debtor and the guarantors for the payment to the creditors respectively (other than as aforesaid) of the several instalments of the composition at the expiration of the respective periods of one calendar month and

four calendar months after such registration as aforesaid. Then followed a covenant by the debtor with the guarantors to deliver to them upon demand at any time after the registration of the deed his promissory notes for the instalments of the composition. Then came a release by the creditors, in consideration of the premises, of the debtor from the debts due to the creditors respectively, and a proviso making void the release, in case default should be made in meeting any of the promissory notes at maturity, or in case the debtor should be adjudicated bankrupt before the composition should be fully paid, and a further proviso that the deed should not prejudice the interests of the creditors against any sureties for their debts, or any security which the creditors might hold for their debts; but nevertheless that if the creditor according to the law of bankruptcy would be bound to realise his security, or to deduct the value of it before proving his debt in a bankruptcy, he should only be entitled to receive the composition upon the balance of his debt after realising his security or giving credit for the value of it. The deed then witnessed that in consideration of the liability thereby undertaken by the guarantors for payment of the composition, the debtor did thereby assign unto the guarantors, their executors, administrators, and assigns, all the plant, stock, and materials, horses and carts, belonging to the debtor and specified in an inventory thereof, to hold to the guarantors, their executors, administrators and assigns absolutely, provided that if the deed should not be registered the assignment should be void and of none effect. Then followed a covenant by the debtor with the guarantors to assign to them, or any two or one of them, at any time after the registration of the deed, at their request, the contracts thereinbefore covenanted, or any of them, and in the mean time to deal with the same in such manner as the guarantors, or any two of them, should direct. Lastly, it was agreed and declared that the deed was intended to be and operate as a composition-deed for the benefit of all the creditors of the debtor within the meaning of the provisions of the 192nd section of the Bankruptcy Act 1861 in that behalf. This deed was duly assented to by the requisite statutory majority of the creditors, and was registered on the 4th Jan. 1870, in pursuance of an order made by the court extending the time for registration until the 7th Jan.

The debt due to the Messrs. Doulton was by far the largest debt due by Nicholson. On the 31st Dec. 1869, a petition for adjudication of bankruptcy against Nicholson was presented by a dissentient creditor. The deed having been registered, notice was given by Nicholson of an application to the court that all proceedings under the petition might be stayed, and that the petition might be dismissed pursuant to the 199th section of the Bankruptcy Act 1861. This application was heard by Mr Registrar Brougham (to whom the matter had been delegated by the Chief Judge in Bankruptcy under the provisions of the Bankruptcy Act 1869), and the Registrar made this order: "It appearing to me that the said deed is not a deed within the meaning of the 192nd section of the Bankruptcy Act 1861, not being for the equal benefit of creditors, I hereby dismiss the said application."

From this order Nicholson appealed.

De Gex, Q.C. and *Doria*, for the appellant, contended that the deed in this case was not to be distinguished from the deed which was held good by the Court of Queen's Bench in the case of *Bissell v. Jones*, L. Rep. 4 Q.B. 49; 19 L. T. Rep. N. S. 292. According to *Re Cowen*, 16 L. T. Rep. N.S. 469; L. Rep. 2 Ch. 563, the creditors were the judges of the propriety of the bargain, unless the majority were actuated by dis-

CHAN.]

Ex parte BLAIR; *Re* MACKLE.

[CHAN.]

honest motives. There was no reason for inferring anything of that kind in the present case, inasmuch as the guarantors might lose greatly by the guarantee into which they entered. They cited also

Dewhurst v. Jones, 3 H. & C. 60; 10 L. T. Rep. N. S. 538;

Wells v. Hacon, 5 B. & S. 196; 10 L. T. Rep. N. S. 411.

Sargood, Serjt. and *Bagley* for the petitioning creditor.—The deed is bad, because it is unequal in its provisions. In *Dewhurst v. Jones*, the surety was not one of the creditors. In *Bissell v. Jones*, though the surety was a creditor, the assignment to him was on trust for the creditors. [Lord Justice GIFFARD: Was it not on trust to pay himself 20s. in the pound?] But in the present case the Doultons are made sure of their 4s. in the pound by the tangible property assigned to them, while the other creditors get nothing but promissory notes. That is inequality. Moreover, if the assignment were upon trust, the other creditors would be safe against a bankruptcy of the Doultons. They cited also

Ex parte Cockburn, 10 L. T. Rep. N. S. 252;

Thompson v. Knight, L. Rep. 2 Ex. 42; 15 L. T. Rep. N. S. 285.

Without calling for a reply,

Lord Justice GIFFARD said that, if he had dissented from the decision in *Bissell v. Jones*, he should have taken time to consider, as a unanimous judgment of the Court of Queen's Bench was entitled to very great weight. But he concurred in that judgment. In the present case he could not infer that there was not a fair bargain between the debtor and his creditors, and he thought that the Messrs. Doulton were not precluded by their instrument from voting. If the property had been realised, his Lordship thought that the creditors would not have got more than they would get under the deed. This was his Lordship's view, looking only at what appeared on the face of the deed. But if anything was shown to impeach the transaction, the case would be entirely different: it would be monstrously unfair that a person whose security was impeached should vote upon the deed. As it was, however, the case could not be distinguished from that of *Bissell v. Jones*, and, therefore, the Registrar's order must be discharged, with the expression of the opinion of the court that, in the absence of anything but what appeared on the face of the deed, it was a good deed under the Act.

Solicitor for the appellant: *J. A. Rose*.

Solicitors for the respondent: *Lewis, Munns, Nunn, and Longden*.

Monday, March 28.

Ex parte BLAIR; *Re* MACKLE.

Bankruptcy — Practice — Appeal—Order made by a registrar—Pending suit in district court transferred to registrar—Solicitor to assignee—Costs—Taxation—Time—The Attorneys' and Solicitors' Act (6 & 7 Vict. c. 73), s. 37—B. A. 1861, ss. 13, 14, 15—B. A. 1869, s. 130—General Rules in Bankruptcy, Jan. 1, 1870, No. 143.

Notwithstanding the rule laid down by the Court of Appeal in Chancery in *Ex parte Barnett*, 19 L. T. Rep. N. S. 406, that an appeal from an order made by a registrar from a district court of bankruptcy, when not acting as deputy for the commissioner, would not be entertained, an order made by a registrar acting in a matter referred to him by an order of the Lord Chancellor made in pursuance of the 130th section of the B. A. 1869, may be appealed from directly to the Court of Appeal in Chancery.

The Attorney and Solicitors Act (6 & 7 Vict. c. 73), has no application to the taxation by a registrar in bankruptcy, under the provisions of sects. 13 and 14 of the Bankruptcy Act 1861, of the bill of costs of the solicitor acting in the matter of a bankrupt for the creditors' assignee. The limit of twelve months after delivery of the bill, within which an order to tax may be applied for as of course, fixed by that Act has, therefore, no relation to such bill of costs.

In Oct. 1867 an adjudication of bankruptcy was made in the Liverpool District Court of Bankruptcy against one James O'Neil Mackle. The creditors on the 14th Nov. 1867 passed a resolution under sect. 110 of the Bankruptcy Act 1861 that the proceedings in the bankruptcy should be suspended, and this resolution was duly confirmed at a subsequent meeting of the creditors. On the 28th Nov. Mr. Blair was appointed creditors' assignee. On the 17th Dec. 1867 an order of discharge was granted to the bankrupt. Mr. Joseph Best, a solicitor, was employed by Blair as his solicitor in the matter of the bankruptcy, and he on the 18th Jan. 1868 delivered a bill of costs to Blair for business done in the matter of the bankruptcy. This bill amounted to 100l. 18s. 11d. It not having been paid, an action was commenced in Feb. 1870 for its recovery. On the 30th Dec. 1869 the Lord Chancellor, under the powers conferred by sect. 130 of the Bankruptcy Act 1869 made an order "that such part of the business pending in the Liverpool District Court of Bankruptcy, as is mentioned in the schedule of this order, shall be transferred to the courts, the names of which are set opposite to the respective matters in the said schedule, and, as to the residue of the said business, such, part thereof as can be disposed of by the registrar of the Liverpool Court of Bankruptcy, under the powers and authorities, rights and duties now possessed by him by virtue of any statute, rule or otherwise, shall be disposed of by him, and all such part of the residue of the business of the said Liverpool District Court as cannot be disposed of by him, shall be and the same is hereby transferred to the County Court of Lancashire, holden at Liverpool." Mr. Mackle's bankruptcy was not included in the schedule to the order. On the 8th March 1870, an application was made by Blair to Mr. Yate Lee, the registrar of the Liverpool District Court of Bankruptcy, to tax the above mentioned bill of costs. At this time Best had also been adjudicated a bankrupt, and Mr. Macfar, his creditors' assignee, opposed the application to tax the bill. The application was refused by the registrar, who gave, as the reason for the refusal, that the time had elapsed during which the bill ought to have been taxed without a special order in that behalf. From this decision Blair appealed to the Court of Appeal in Chancery.

W. Willis (of the Common Law Bar) on behalf of the appellant, opened the appeal.

C. W. Bardswell, on behalf of the respondent, objected that it was laid down in *Ex parte Barnett*, 19 L. T. Rep. N. S. 406; L. Rep. 4 Ch. App. 352, that the Court of Appeal in Chancery would not hear an appeal from an order made by a registrar in bankruptcy, unless he had made the order, not of his own authority, but as deputy for the commissioner. In the present case the Lord Chancellor's order gave the registrar power to dispose of such part only of the pending business as he could have disposed of as registrar if the Bankruptcy Act 1861 had not been repealed. The registrar was not acting in any sense as deputy for a commissioner, and therefore the court would not hear an appeal from his decision.

Without calling upon *W. Willis*,

CHAN.]

PHILLIPS v. FURBER.

[ROLLS.

Lord Justice GIFFARD said that he could see no difficulty in the way of the appeal. The present case and *Ex parte Barnett* stood in very different positions. In *Ex parte Barnett*, though there was a commissioner sitting in the same court, an attempt was made to take the opinion of the Court of Appeal on an order made by a registrar without first going to the commissioner himself. This the Court of Appeal refused to allow. But the present case was in a very different position. By the 14th section of the Bankruptcy Act 1861, bills of costs in matters in bankruptcy were to be taxed and settled by the registrar, subject to appeal to the court of which he was registrar. Then sect. 130 of the Bankruptcy Act 1869, provided that such part of the business pending in any country district court as the Lord Chancellor should think fit, should be disposed of by the registrar of that court. By that enactment it was meant that the business which was to be disposed of by the registrar should be entirely disposed of by him. The section, in fact, placed the registrar in the same position as a commissioner with respect to the business of which he was to dispose. No intermediate right of appeal was given, and therefore his Lordship should treat the decision of the registrar just as if it had been the decision of a commissioner.

W. Willis then proceeded with his argument on the merits of the appeal, and he contended that this was not a case to which the Attorneys and Solicitors Act had any application. The Court of Bankruptcy had always had a power to tax the bill of costs of the solicitor to the assignee of a bankrupt estate, for the court was administering the estate, and was bound to protect it in the interest of the creditors. This jurisdiction was recognised by the Bankruptcy Act 1861, and was given to the registrar by sects. 13, 14, and 15 of that Act. He cited

Ex parte Woolston, 3 M. D. & De G. 702;
Ex parte Pemberton, 2 De G. M. & G. 960;
Ex parte Heyden, 2 Gl. & J. 52;
 Griffith's Bankruptcy, p. 1073;
 Macrae and Doria's Practice.

C. W. Bardswell, for the respondent, contended that there was nothing pending in this bankruptcy after the resolution of the creditors to suspend the proceedings. After such a resolution the jurisdiction of the Court of Bankruptcy remained only for a very limited purpose, as was shown by *Ex parte Webster*, L. Rep. 2 Ch. App. 556. At any rate the power of the Court of Bankruptcy to tax must be exercised subject to the same restrictions as the power to tax in any other court, and moreover sect. 13 of the Bankruptcy Act 1861, expressly spoke of "taxable" bills. The limit of twelve months after delivery must apply as in an ordinary case of taxation between solicitor and client.

W. Willis in reply.

Lord Justice GIFFARD was of opinion that the Attorneys and Solicitors Act had no application to the case, which must stand simply upon the fact that the bill of costs was in a measure in bankruptcy. His Lordship thought that in all cases an assignee in bankruptcy should be able to protect himself against any demand which the creditors under the bankruptcy might make on him with regard to his solicitor's bill of costs. Costs of this kind were very like costs in a suit in Chancery in which an order had been made for taxation; and surely in that case it could not be said that if the taxation were not asked for for more than twelve months after the order to tax was made, the client had lost his right to taxation against his solicitor, unless a special order

could be made. In bankruptcy there was a general enactment in the Bankruptcy Act 1861 that the bill of costs of the assignee, who was dealing with the money of other people, should be taxed and settled by the registrar, and it was very right that such a bill should not be paid until its correctness had been certified by the registrar. The appeal must, therefore, be allowed, and the bill be referred to the registrar for taxation. The appellant and the respondent respectively would have their costs out of the estates which they represented.

Solicitor for the appellant, J. T. Miller.

Solicitor for the respondent, T. Etty, of Liverpool.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Feb. 10 and 11.

PHILLIPS v. FURBER.

Deed of inspectorship—Bill of sale—Bankruptcy—Assent of creditors—Evidence—Jurisdiction.

By a deed of inspectorship a debtor covenanted with the inspectors to convey and assign to them all his estate and effects if they should by writing so require. The inspectors signed a notice requiring the debtor to make the conveyance and assignment to them, but took no further steps in the matter. A few days afterwards the debtor executed a bill of sale of his furniture to a creditor; the bill of sale contained the usual power of sale under which the creditor sold part of the furniture, and after satisfying his own debt out of the proceeds of sale, retained the balance thereof and also the rest of the furniture. The debtor afterwards became bankrupt.

On a bill by the inspectors praying for a declaration that they were entitled to the balance of the proceeds of sale and to the rest of the furniture;

Held, that the inspectors, not having shown any desire to perform their functions until proceedings with regard to the estate had commenced in the Court of Bankruptcy, this was not a case in which the Court of Chancery would exercise its discretionary concurrent jurisdiction, but that it would leave the matter to the Court of Bankruptcy:

Held, also, that the covenant by the debtor in the inspectorship-deed to assign his property on demand did not vest any property in the inspectors, and that the demand for an assignment made by the inspectors did not render them the equitable owners of the property.

The affidavit made on the registration of an inspectorship-deed is not sufficient evidence of the assent of the creditors.

Stone v. Thomas, L. Rep. 5 Ch. App., examined.

By an indenture dated the 31st July 1868, and expressed to be made between John Bingham of the first part, certain persons therein called the inspectors of the second part, and the several persons, companies, and co-partnership firms who at the date thereof were respectively creditors of John Bingham, or who would be entitled to prove under an adjudication of bankruptcy against him founded on a petition filed on the day of the date of this indenture, of the third part, John Bingham covenanted to furnish the inspectors with a full and true account of his assets and liabilities, and that his books and papers should be during the continuance of the inspectorship open to their inspection, and that he would not, by proceedings in bankruptcy or otherwise, attempt to withdraw himself nor his estate or effects, &c., from the engagements contained in the deed of inspectorship. And the deed contained provisions that the estate should be administered in

ROLLS.]

PHILLIPS v. FURBER.

[ROLLS.]

accordance with the principles, rules, and practice of the then English bankrupt law, or as near thereto as circumstances would permit, having regard to the terms of the deed, and that at any time before the whole of the said estate should have been fully administered under the deed the debtor should (if the said inspectors or inspector should by writing under their or his hand so require) effectually convey, assure, and assign all his said estate and effects remaining outstanding or not divided, to the said inspectors or inspector, or to such person or persons as they or he might direct, in trust to be forthwith realised, and administered, and divided, according to the law of bankruptcy, among the creditors of the said debtor, according to the amount of their respective debts which should remain unpaid.

The deed was duly executed by the debtor and inspectors, and was duly executed or assented to by a sufficient majority in number and value of the creditors so as to be a valid and binding deed under the provisions of the 192nd section of the Bankruptcy Act 1861, and on the 28th Aug. 1866, it was duly registered under the provisions of that Act.

On the 23rd Feb. 1867, the inspectors signed and attempted to serve on John Bingham a notice requiring him to execute to them forthwith a conveyance and assignment of all his outstanding estate and effects, in accordance with the provisions of the deed of inspectorship. In consequence of John Bingham refusing to receive any communication from the inspectors, the notice was not actually served until the 8th March 1867, when it was left with a servant at his house. At the date of the service of the notice, Bingham was residing at No. 64, Lancaster-gate, and no part of his furniture, &c., had been removed from the house, but he had, on the 23rd July 1866, by an indenture of that date, assigned all his household goods, furniture, and effects then or thereafter in and about the said house and premises, No. 64, Lancaster-gate, to William Philip Strong Bingham and Leonora Frances Bingham, to secure a sum of 3000*l.*, and interest.

By an indenture dated the 11th March 1867, to which William Philip Strong Bingham and Leonora Frances Bingham, were parties, John Bingham assigned the said furniture and effects to one Charles Furber, to secure a sum of 750*l.* alleged to have been advanced to him by Furber, and the indenture was registered as a bill of sale. On the 6th June 1867 Furber took possession of the furniture, and on that and the following days sold a large quantity of it under his power of sale, and received sums amounting to nearly 3000*l.* as the proceeds of the sale, of which he retained possession.

On the 7th June the inspectors gave notice to the auctioneers not to part with any portion of the proceeds of the sale of the furniture to any person other than the inspectors, but they took no further steps towards enforcing their title to the proceeds of sale of the furniture; and on the 18th and 20th March 1868, William P. Phillips and George Phillips, the plaintiffs in the present suit, were, by indentures of those respective dates, appointed inspectors in place of the original inspectors.

On the 6th Nov. 1867 John Bingham was adjudicated bankrupt, and Theodore Richard Schweitzer, a defendant to the present suit, was appointed creditors' assignee in the bankruptcy.

Furber had a balance in his hands after satisfying his own claim, and in June 1867 Bingham filed a bill against him praying for an account, and an injunction against selling or parting with, or disposing of any of the articles comprised in the bill of sale, which injunction was granted.

The present bill was filed by the new inspectors against Furber, Schweitzer, and a Mr. T. H. Smith, who made a small claim under a prior bill of sale.

The bill prayed for a declaration that, by virtue of the covenant contained in the deed of inspectorship, the plaintiffs were entitled to such furniture and other effects in Furber's possession, and to the proceeds of sale of such of the furniture as he had sold subject to Furber's security; for an account of what was due to Furber under the security of the 11th March 1867, and that directions might be given in relation to the dismissal of the suit of *Bingham v. Furber*, upon such terms as to costs, &c., as the court should think expedient.

The case made by the defendants was that the validity of the inspectorship-deed was not proved, the affidavit made on the registration of the deed not proving that the necessary assents had been given to the deed; that this was rather a case for the property to be administered by the Court of Bankruptcy than by the Court of Chancery, and was not a case in which the Court of Chancery would use its discretionary concurrent jurisdiction; and that the plaintiffs showed no title to the property, it not being proved that the debtor ever received notice of the demand on which the covenant to assign was conditional.

Sir Richard Baggallay, Q.C. and J. Napier Higgins, for the plaintiffs, submitted that the court had jurisdiction to administer estates under deeds of inspectorship; that the goods were not in the order and disposition of the bankrupt; and that, the registrar having signed the deed, it was not necessary for them to prove the actual assent of the creditors. They cited,

Douglas v. Archbutt, 2 De G. & J. 148;
Poynter v. Buckley, 5 Car. & P. 512;
Waddington v. Roberts, 18 L. T. Rep. N. S. 855;
L. Rep. 3 Q. B. 579;
1 Griffiths on Bankruptcy, 472.

W. W. Cooper, for the defendant T. H. Smith, submitted that this was a case for the Court of Bankruptcy, and that the Court of Chancery would not entertain it without some special reason, which did not exist here. He cited,

Ex parte Rawlings, 7 L. T. Rep. N. S. 582; 2 DeG. J. & S. 225;
Stone v. Thomas, 5 W. Notes, 28;
Riches v. Owen, L. Rep. 3 Ch. 820;
Martin v. Powning, 20 L. T. Rep. N. S. 133;
L. Rep. 4 Ch. 356.

Swanston, Q.C. and Cracknall, for the assignee in bankruptcy, supported the same contention. They cited,

Ex parte Wheeler, Buck, 25;
Hobson v. Jones, 22 L. T. Rep. N. S. 143.

Jessel, Q.C. and Graham Hastings, for Furber, were not called upon.

Sir Richard Baggallay, Q.C., was heard in reply.

Feb. 11. Lord ROMILLY.—In this case I am of opinion that the plaintiff fails on various grounds, but principally upon the ground that the jurisdiction of the Court of Chancery in these matters is a discretionary jurisdiction, and that it is not in this case made out to my satisfaction that it would be a wise exercise of the discretion of the court to allow the property in question to be administered in this court. It was observed by Sir Richard Baggallay, in his very able reply yesterday, with great truth, that this was not a suit for the administration of an estate, but that it was a separate and distinct suit which could not properly be joined with a suit for the administration of the estate. It is a suit by trustees or *quasi* trustees to acquire property for the purpose of having that property in their possession, and then it would be subject to the duties which they have to perform

ROLLS.]

PHILLIPS v. FURBER.

[ROLLS.]

upon it. But unless they are to administer under the jurisdiction of the court, it is obvious that it would be perfectly idle to give them the property over which they have no control whatever. It is, therefore, intimately connected with the question of the discretion of the court, whether the court shall think that this estate ought to be administered in this court, because if it does not it would be impossible to make any decree in a case of this description, which is merely ancillary for that purpose. This is also a remarkable circumstance that it is difficult to find a case—I do not remember ever to have seen a case myself—introduced with less attention to proving the things which were necessary to establish the case, which has certainly been a great advantage to the defendants. In the first place I am of opinion that it is quite settled by the case of *Ex parte Rawlings* (*sup.*), that when the fact of the assent of the creditors is contested it is necessary for them to give more proof of it than the mere fact of proving that the usual affidavit was made when the document was registered. The cases upon the subject are, in my opinion, quite conclusive. The case of *Waddington v. Roberts* (*sup.*), does not prove anything more than this, that the fact of registration is *prima facie* evidence that the officer has done his duty, and has required and obtained the proper and usual affidavit; but as to the contents of that affidavit being established thereby there is nothing in my opinion in that case to establish that that was the view of the court; and it appears to me to be directly contradicted by the case of *Ex parte Rawlings* (*sup.*). In *Ex parte Rawlings*, which undoubtedly was not a cause or a suit the court seems to have been disposed to say that it would have given leave to add that proof at the time of the hearing, and although considerable inconvenience arises from that course, I think I should have adopted it on the present occasion, as I stated to Sir Richard Baggallay, if in other respects I thought it was a proper case in which to exercise the jurisdiction of this court. But I am of opinion, as I stated before, that it is not a fit case in which to exercise the jurisdiction of this court. I will state some additional reasons for that opinion. In the first place, the whole of the essence of this case depends upon this foundation, that the ownership of these chattels is in the plaintiffs. I do not think that is established. Certainly I have heard no case to make that out at all. These are the facts which lead me to say that I cannot come to that conclusion. A common deed of inspectorship was executed by Mr. John Bingham on the 31st July 1866. As was very correctly observed in the course of the argument, I had to consider very fully the nature and character of these inspectorship-deeds in the case I had before me the other day of *Hobson v. Jones*, 22 L. T. Rep. N. S. 143; and certainly my disposition there was rather in favour of making the inspectors answerable for the misconduct of the receiver if I could have done so. But when I came to look into it carefully, and to examine it fully, I found that was not possible, but that the inspectors' functions and duties were quite separate from those of any trustees. In both cases there was a covenant on the part of the debtor to assign the property to the inspectors if he should be required so to do, and in that case no such demand had been made at all. The question is, had a demand been made in this case? What constitutes a demand? I take it to be this—it is when notice is served upon the debtor to make the assignment which he has covenanted to make in the deed. The inspectorship-deed, it will be remembered, contains a covenant by the debtor to assign the property in case he shall be called upon so to do. I think all the cases establish that that of itself does not convey any property at

all; there is no assignment at all, and no vesting of any property whatever. Indeed, it was not put so high as that either by Sir Richard Baggallay or by Mr. Higgins, but they contended that as soon as the demand was made then the contract became absolute, and the inspectors became owners in equity. I cannot find that the demand has been made. All that took place is this—a notice requiring him to make the assignment, after various attempts to effect personal service which failed, was given by leaving it with the servant at the door, but there is no evidence that the servant ever gave it to him, and it is perfectly consistent with that that he never knew of it. Surely the burden of proof lies on the plaintiffs to establish a fact of that description. Unquestionably he has broken no covenant, and been guilty of no laches at all. I think they should have proved that fact. That alone is not the thing which presses upon me most strongly. I do not think they have shown that this property vested in the plaintiffs, and certainly they have brought no case whatever that I have been able to find, which shows that such was the fact. In truth all the cases they alluded to, and all the cases they brought forward, begun with the assumption that the ownership of the property was in the plaintiffs, which the plaintiffs in this case have failed to prove. Then I was much struck with this circumstance. The inspectorship-deed was executed in July 1866. They see the necessity, and attempt to serve the debtor with notice to assign in Feb. 1867, about six or seven months afterwards, and they actually leave the notice at his door on the 8th March. On the 11th March he makes a bill of sale of all his property to Furber, and that is registered. It is a bill of sale to secure 750*l.* with interest. Were they not aware of that fact? How came they not to take some steps on that occasion? It was duly registered. It was the duty of the inspectors to know what was taking place on that subject; nothing was more easy than to know it, and there is no evidence that they did not know it. They took no step whatever, though they thought that the bill of sale was one by which the whole of the property became irredeemably vested in Furber by the 11th June following. During the whole of that time they took no step to obtain the assignment of the property, or to perform the functions which they say they desire now to undertake to perform. It is true that they are not the actual plaintiffs, because it is their predecessors who were the actual inspectors, but as was observed in argument, and I think justly admitted by the other side, they are bound by all the acts of their predecessors, and can only be in the same situation as the former inspectors. Then what takes place afterwards? The landlord issues an execution or distress for rent in the month of May; the broker is actually in possession, and they must have known that. They knew where he lived, because they had endeavoured to find him and to serve him, but they take no step on that occasion. The broker sells a considerable quantity of furniture to Mr. Furber for, I think, 240*l.*, or something like that, which they say is afterwards sold for nearly 600*l.* I do not go into that question for the very good reason that I stopped Mr. Jessel by saying I thought I should dispose of the case without going into the question affecting Mr. Furber, and if I did go into it I should unquestionably have heard him even though the other part of the case had been disposed of. But they must have known of this, and they took no step at all. The property is actually taken away; the whole of the very property which they want to have assigned to them is removed from the house, I do not know exactly at what time, but it must have been either in the last two weeks of May, or in the first week of June, and on the 6th, 7th,

ROLLS.]

Re THE ACCIDENTAL AND MARINE INSURANCE CORPORATION (LIMITED).

[V.C. S.]

and 8th of June the whole of the property is put up for sale by auction, and it is not until then that they take any step in the matter. The step they take then is very slight, for all that they do is to give notice to Mr. Furber that the property was claimed on behalf of the creditors of Bingham. They take no step after that. The first sale produced according to their statement sufficient to pay Mr. Furber everything due to him, and they take no step whatever. In the month of November following, that is five months afterwards, Bingham became bankrupt, and an assignee was appointed. Then in the following month it is thought fit to change the inspectors, and the present plaintiffs are appointed in the place of Mr. Cooper and Mr. Wintle. The present plaintiffs filed this bill in May following. Now is this a case in which they are entitled to come here and say that they have performed their functions diligently; for in inspectorship-deeds, especially when they involve property of this description, it is very necessary to act with diligence? Of course the duty of the inspectors is to realise the property for equal distribution among all the creditors, and if they allow one creditor to sweep off so much of the property as will be sufficient to pay his debt in full without taking any step whatever, I am of opinion that this is not a case in which they can come here afterwards and say that they will resume their functions, and perform that which they thought of performing in February or March 1867, but which they omitted to do, in fact, till May 1868—they cannot come here and say this when there is a proper tribunal which will fully and accurately administer the whole of the estate and the funds, and will dispose of all those questions which the Court of Bankruptcy is perfectly competent and fit to do. I am of opinion that in that state of the case the real question for the court to consider is, whether it shall exercise its discretion, considering the nature of these inspectorship-deeds and the conduct of the inspectors, to administer the funds here instead of in the Court of Bankruptcy. The case of *Stone v. Thomas* (*sup.*), to which I was referred by Mr. Cooper, is very conclusive and decisive on the subject, and the Lord Chancellor's judgment really reconciles the whole of the cases on the subject. He says that the jurisdiction of the Court of Chancery is not ousted at all by the statutes in bankruptcy. There is one case in which the judge stated that the Court of Bankruptcy was the proper tribunal, and another case in which the judge said that the Court of Chancery was the proper tribunal to enforce the administration. But they are by no means inconsistent. The fact is, that the exercise of the jurisdiction in Chancery is discretionary, and in one case it has been thought better to administer the estate in Chancery, and in another case in the Court of Bankruptcy. Unquestionably the Court of Chancery has this power, that it can perform the functions if it thinks fit, whatever may have taken place in the Court of Bankruptcy. The Lord Chancellor exercised his discretion in that case (*Stone v. Thomas*) and did not think that it was a proper case for the Court of Chancery, and dismissed the bill with costs. I do not think that this was a proper case for the Court of Chancery, and I must dismiss this bill with costs; and above all for this reason, because the inspectors have from the beginning not shown any desire to carry out their office, until the whole of the matter has become vested in the Court of Bankruptcy, who will do it infinitely better than any other tribunal. There are no doubt some very serious questions to be determined between the bankrupt's estate and Mr. Furber, but the Court of Bankruptcy is perfectly competent to determine those questions;

and I must say that there is no person in whose judgment I should have greater confidence, in matters relating to the subject, than the present Chief Judge in Bankruptcy, considering his great knowledge both in bankruptcy and equity. I am of opinion that the case of the plaintiffs wholly fails, and accordingly I shall make no order except to dismiss the bill with costs.

Solicitors for the plaintiff, *C. and C. R. Cuff*; for *C. Cheshire*, Northwich, Cheshire.

Solicitors for the defendants, *Deane and Chubb*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Thursday, March 10.

Re THE ACCIDENTAL AND MARINE INSURANCE CORPORATION (LIMITED.)

Company—Winding-up—Application of contributions of past members—Companies Act 1862 (25 & 26 Vict. c. 89), ss. 38, 133.

In the winding-up of a company the contributions received from past shareholders are distributable amongst the creditors generally, and not merely amongst those creditors whose debts were contracted before the respective times when such shareholders ceased to be members.

This was an adjourned summons on behalf of certain creditors of the above corporation (which was in the course of being wound-up), that the liquidators might be directed to divide the contributions received from past shareholders, amongst such of the creditors only whose debts were contracted before the respective times when such shareholders ceased to be members. The facts were as follows:—

The corporation was ordered to be wound-up, under the supervision of the court, on the 24th Oct. 1866. In the course of the winding-up, it having been found that the existing members were unable to satisfy the contributions required of them, certain past shareholders (Class B)—liable to contribute within sect. 38 of the Companies Act 1862, *i.e.*, those who had ceased to be members within one year before the winding-up—had been duly settled on the list, and had paid the contributions required of them.

The question was whether the contributions of these past shareholders were distributable generally amongst the whole body of the creditors of the corporation, or only amongst those creditors represented by the applicants, whose debts were contracted before the time when such past shareholders ceased to be members.

Before the commencement of the present proceedings a compromise had been entered into, with the concurrence of the creditors generally, between the liquidators and the past shareholders, to the effect that such shareholders were only to pay 10s. in the pound on the amount which the liquidators alleged they were liable for. This compromise was subsequently, by the order of the court, directed to be carried into effect. ●

Greene, Q. C., and *Holl* (of the Common Law Bar) in support of the summons, submitted that the case came within the provisions of the Companies Act 1862. By the 38th section of that Act, no past member was liable to contribute in respect of any debt contracted after he had ceased to be a member, and it therefore followed that as only past creditors could enforce contributions from past members, they alone ought to reap the entire benefit of those contributions. Moreover, the past creditors might

V.C. S.]

GRIMSTON v. TURNER.

[V.C. S.]

be said to have contracted with the company on the credit of the past members.

Hardy, Q. C. and Napier Higgins, for the liquidator, submitted that that question was not one between the contributories *inter se*, but between the company and its creditors. The 38th section of the Companies Act 1862 in no way affected the rights of creditors, it merely defined the liability of shareholders to contribute on the winding-up of the company. That liability had already been ascertained, and the contributions had been received from both classes of contributories. The 133rd section of the Act, however, provided that the property of the company was to be applied *pari passu*, and there was no provision that contributions of past shareholders were to be divided amongst any particular class of creditors.

Greene, Q. C. in reply.

The VICE-CHANCELLOR.—This is not a question as to what amount is to be contributed, but as to how contributions which have been received are to be applied. It has been contended on behalf of the creditors who support this summons that the contributions received from the contributories on the B list (the past members of the company) ought to be divided amongst those creditors only, whose debts were contracted before the respective times when such contributories ceased to be members. The 38th section of the Companies Act 1862, which has been referred to in support of the claim, gives no rights to creditors; it merely limits and defines the extent of the liabilities of past members, and it shows that no such shareholder shall be liable for debts incurred after the time when he ceased to be a member of the company. The creditors in question are not merely the creditors of past members, but of the company, and by the Act the contributions of past members are distributable amongst the whole body of creditors. There must, therefore, be an order to that effect. If, however, there was any doubt on the question, it would be removed by the fact that a compromise has been made, which in effect unites both classes of contributories. That compromise, no doubt, could have had no effect without the sanction of the court, but as that has been given, it is binding on all parties. Under these circumstances, the summons must be dismissed with costs.

Solicitors for the applicants, *Deane and Chubb*.

Solicitors for the liquidators, *Lewis, Munns, Nunn, and Longden*.

March 18 and 19.

GRIMSTON v. TURNER.

Jurisdiction—Motion for receiver—Impending litigation.

Where litigation is impending in the Court of Probate, the Court of Chancery, if the interests of all parties require it, will appoint a receiver.

This was a motion on behalf of the plaintiff in the above suit for a receiver of the real and personal estate of the late Mr. John Hutley, pending some contemplated litigation as to them in the Court of Probate. The facts were shortly these:—

In 1861 Mr. Hutley made a will bequeathing the residue of his property to his sister. She died prior to 1865. In Nov. 1865 the testator was induced to marry a young lady named Wilkins, and shortly afterwards he made another will by which he bequeathed one half of his residuary estate to his wife, and the other half to other persons. Mr. Hutley died at the age of sixty-one, on the 7th

Aug. 1866, and in October following his widow married a Dr. Timms.

Shortly afterwards a suit was instituted in the court of Malins, V. C., for the administration of Mr. Hutley's estate, and a decree was made and accounts taken under it. Subsequently, however, the plaintiff succeeded in upsetting the will of 1865 in the Court of Probate, on the ground that Mr. Hutley was at the time of its execution, and for some years previously, of weak mind. By this decision of the Probate Court, everything that had been done in the Chancery suit was rendered null and void, and there was no one now in existence who was entitled to the legal possession of Mr. Hutley's property, which was very considerable. Mrs. Timms was desirous of applying to the Probate Court for letters of administration to Mr. Hutley's estate, and a *caveat* had been entered against the probate of the will of 1861.

The question was whether the Court of Chancery, under the above circumstances, had power to appoint a receiver.

Karslake, Q. C. and Hanson, in support of the motion, submitted that the case was an urgent one. The property was wholly unprotected. It was said that Mrs. Timms was about to apply to the Probate Court for letters of administration; but as her former husband was found to be of weak intellect in 1865 her marriage with him must necessarily be ineffectual, and she would not be allowed to administer. The *caveat* entered in the Probate Court constituted pending litigation; but if it did not, the peculiar circumstances of the case fully justified the interference of this court.

Dickinson, Q. C. and Fitzroy Kelly, for Mrs. Timms, contended that the court had no jurisdiction. There was no pending litigation. The suit in Malins, V. C.'s court no longer existed, and the mere entry of a *caveat* in the Probate Court did not constitute litigation. At all events this suit ought to be transferred to the court of Malins, V. C.

Greene, Q. C. and Crossley, for the executors named in both wills, said the case stood thus: The will of 1865 was gone, and if the marriage was valid the will of 1861 was revoked by it. If the marriage was not valid, then that will would be good; but the executors could not proceed to prove it till some decision had been arrived at as to the marriage. Indeed the executors were anxious to have the opinion of the court as to what they ought to do.

The VICE-CHANCELLOR.—This is an application for the appointment of a receiver of the real and personal estate of the late Mr. John Hutley. The property has formed the subject of much recent litigation, and it is said that as there is at present no legal personal representative, a receiver is necessary for its protection. On the other side it has been contended that the court has no jurisdiction to accede to the application, and that even if it has it ought not to exercise it, because the widow of Mr. Hutley is about to apply to the Court of Probate for letters of administration. The jurisdiction of the court in cases of this kind is well settled, and there is no doubt that whether proceedings are pending or impending in the Court of Probate, this court, where the interests of all parties require it, has power to appoint a receiver. In the present case there is impending litigation. Something must be done with a view to having a decision as to who is to be the legal personal representative, and in fact a *caveat* has been entered in the Probate Court against the probate of the will of 1861. When the matter is again heard the question of testacy or intestacy must mainly depend upon the fact of the validity of the marriage between Mr. and Mrs. Hutley. Look-

V.C. M.] **PILLAR v. FRENCH—Re MUNTON'S TRUST—GIBSON v. MAYOR, &C. OF PRESTON.** [Q. B.]

ing at what has already taken place, the lady, who was Mr. Hutley's wife, and who is now one of the defendants in this suit, is probably not very anxious to embark upon another litigation in the Probate Court. However that may be, there is, in my opinion, quite sufficient in the evidence in support of this application to justify the court in appointing a receiver. There will, therefore, be a reference to chambers for the appointment of a fit and proper person as a receiver, and an order for an injunction to restrain the persons now in possession of the property from further intermeddling with it until a legal personal representative be appointed by the Court of Probate.

Solicitors: *Paterson, Snow, and Burning*, for A. M. White, Colchester; *J. A. Stuart*; *W. M. Wilkinson*.

V.C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.

Thursday, April 21.

PILLAR v. FRENCH.

Practice—Revivor—15 & 16 Vict. c. 86, s. 52.

Where a suit had become abated by the deaths of certain parties, and subsequent proceedings proved defective in consequence of persons taking interests by substitution for those who had died, not having been brought before the court,

A supplemental order was made, directing that the suit should be carried on against the substituted parties, who were adults, and that they should be bound by the previous proceedings.

In this case there had been a decree for the administration of a testator's estate. After the decree was made some of the parties to the suit died, and consequently the suit became abated. Certain proceedings subsequently took place, but proved defective, inasmuch as the persons who had become interested in the estate by substitution for those who had died had not been brought before the court. Under these circumstances,

Dauney applied, under the Act 15 & 16 Vict. c. 86, s. 52, for a supplemental order that the suit might be carried on against the substituted parties, who were adults, and that they might be bound by the previous proceedings. He referred to

Capps v. Capps, L. Rep. 4 Ch. App. 1; see also *Auster v. Haines*, L. Rep. 4 Ch. App. 445; 20 L. T. Rep. N. S. 152.

The VICE-CHANCELLOR made the order.

Solicitors: *Smith and Sons*.

Friday, April 22.

Re MUNTON'S TRUST.

Practice—Costs of trustees—Trustee Relief Act.

Where a fund had been paid into court by trustees under the Trustee Relief Act, and a petition was presented by the tenant for life for payment of the income, the costs of the trustees and of the petition were ordered to be paid out of income and not corpus.

This was a petition by a tenant for life for the payment to her of the income of a fund, which had been paid into court by the trustees of a will under the Trustee Relief Act, and the question was whether the costs of the petition and of the trustees, who had been served, should be paid out of the income or the corpus.

Everitt, for the petitioner, cited

Re Marner's Trusts, L. Rep. 3 Eq. 432; 15 L. T. Rep. N. S. 237;

Re Gordon's Trusts, L. Rep. 6 Eq. 335;
Re Whitton's Trusts, L. Rep. 8 Eq. 352;
Re Smith's Trusts, ante, 220.

Freeman, for the trustees.

His HONOUR made the order as prayed, and directed the costs of the trustees and of the petition to be paid out of the income.

Solicitors: *Lott and Rogers*, for Bell, Bourn.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Nov. 9, 1869, and Feb. 21, 1870.

GIBSON v. THE MAYOR, &C. OF PRESTON.

Public Health Act 1848—Local board—Surveyors of highways—Repairs of highways—Non-liability for accidents.

No action for damages sustained by an individual in consequence of the want of repair of a highway will lie against a local board constituted under the Public Health Act 1848.

Where, therefore, the plaintiff sustained a personal injury in consequence of a road, which was within the limits of the jurisdiction of the defendants, who were a local board, being out of repair, whereupon he brought his action for the recovery of damages:

Held, that such action could not be sustained.

The declaration in this case stated that the provisions of the Public Health Act 1848, were applied to the borough of Preston, and the defendants thereupon became the local board of health for the borough, and that there was within the borough and within the district for which the defendants are such local board, a public footway called Syke-road, which under the provisions of the statute and other statutes in that behalf, it was the duty of the defendants as such local board to level and repair, as and when occasion might require, and that the said footway was, for want of necessary levelling and repairing, ruinous and out of repair, and dangerous to persons lawfully using and passing along the same. And the defendants wrongfully permitted the same to be and remain so ruinous, out of repair and dangerous by reason whereof the plaintiff, whilst lawfully using and passing along such public footway, was thrown down and broke his leg, and sustained great injuries.

The defendants traversed the facts, and also demurred to the declaration. The case went down to trial upon the issues in fact, and the jury returned a verdict for the plaintiff, with 400*l.* damages, leave being reserved to the defendants to move to enter the verdict for them. A rule nisi was accordingly obtained, calling upon the plaintiff to show cause why the verdict should not be set aside, and a verdict entered for the defendants, or a nonsuit be entered on the ground that they were not liable to be sued. This rule came on for argument together with the demurrer.

By sect. 69 of the 11 & 12 Vict. c. 63 (The Public Health Act 1848), it is enacted—

That all present and future streets, being or which at any time become highways within any district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, shall vest in and be under the management and control of the said local board of health. And the said local board shall from time to time cause all such streets to be levelled, paved, flagged, channelled, altered and repaired as and when occasion may require. And they may from time to

Q. B.]

GIBSON v. THE MAYOR, &C., OF PRESTON.

[Q. B.]

time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and place and keep in repair fences and posts for the safety of foot passengers; and whosoever wilfully displaces, takes up, or injures the pavement, stones, materials, fences, or posts of any such street without the consent of the said local board, shall be liable for every such offence to a penalty not exceeding five pounds, and a further sum not exceeding five shillings for every such square foot of the pavement, stones, or other materials so displaced, taken up, or injured.

By sect. 13 of the 15 & 16 Vict. c. 42, it is enacted—

That the term "highway" in the sections of the Public Health Act 1848, numbered respectively 68 and 69 in the copies of the Act printed by the Queen's printers, shall mean any highway repairable by the inhabitants at large.

The *Solicitor-General* (Sir J. D. Coleridge), and *E. Williams* with him, appeared for the plaintiff.

Mellish, Q. C. (*Manisty*, Q. C. and *Kemplay* with him) appeared for the defendant.

The arguments and cases are so fully given and referred to in the following judgment that it is unnecessary to give them here.

Cur. adv. vult.

Feb. 21.—*HANNEN, J.*—This is an action against the mayor, aldermen, and burgesses of Preston, who are the local board of health within that borough, under the provisions of the Public Health Act 1848 (11 & 12 Vict. c. 63), for permitting a certain public footway in their district, which it was their duty to keep in repair, to be out of repair, whereby the plaintiff was injured. The defendants demurred to the declaration, and contend that it discloses no ground of action against them. By the Public Health Act 1848 (11 & 12 Vict. c. 63) s. 68, it is enacted that all streets being or which shall at any time become highways within any district, shall vest in and be under the management and control of the local board of health. By 15 & 16 Vict. c. 42, s. 13, it is enacted that the term "highway" in the above section, shall mean any highway repairable by the inhabitants at large. It was contended on the part of the defendants that it did not appear that the footway in question was a highway repairable by the inhabitants at large. We are of opinion, however, that the words repairable by the inhabitants at large are used in contradistinction to repairable by individuals *ratione tenuræ*, and that it must be taken on demurrer that the declaration, which alleges that it was the duty of the defendants to repair the footway, thereby sufficiently avers that it was a highway repairable by the inhabitants at large; as such duty could not otherwise exist. Secondly, it was argued that the defendants are not liable, otherwise than as a surveyor of highways would be; that against such officer no action can be maintained for an accident arising from his neglect to repair a highway. This argument was based upon sect. 117 of the Public Health Act, 1848; and the case of *Young v. Davis*, 7 H. & N. 760, 31 L. J. 250, Ex.; 3 L. T. Rep. N. S. 363, affirmed in the Exchequer Chamber, 2 H. & C. 197; 9 L. T. Rep. N. S. 145. By the section referred to it is enacted that the local board of health within the limits of their district shall exclusively execute the office of surveyor of highways, and have all such powers, duties, and liabilities as any surveyor is now or may be hereafter invested with or liable to. In the case of *Young v. Davis* it was held that no action lies against a surveyor of highways appointed under the 5 & 6 Will. 4, c. 50 for damage resulting from an accident caused by his neglect to repair the highway, upon the ground that although the Legislature imposed on the surveyor the duty of repairing the roads, yet that as this was only as the officer of the

parish, and no action could be brought against the parish, it could not be supposed that it was the intention of the Legislature that such an action should be maintainable against the officer, and this view was adopted by the Court of Exchequer Chamber. Willes J., in delivering judgment, says: "This Act of Parliament appears not to have been passed for the purpose of creating a new liability either in the parish or any other persons, but simply in order to provide machinery whereby the existing duty of the parish may be conveniently fulfilled." The case of *Parsons v. St. Matthew, Bethnal Green*, 17 L. T. Rep. N. S. 211; L. Rep. 3 C. P. 56, was cited to show that the immunity from action which the surveyor enjoyed belonged also to a corporate body to whom the duties and liabilities of surveyor are transferred. It was there held that an action for non-repair of a highway would not lie against a vestry appointed under the Metropolis Local Management Act (18 & 19 Vict. c. 120) on the ground that the liabilities of the parish were not transferred or taken away, although the right and liability of the surveyor (with additional powers) were transferred to the vestry (s. 96), and therefore it was held that as the surveyor had been previously exempt from action so the vestry continued. For the plaintiff it was admitted that if the duties of the local board were only those of the surveyor, the decision in *Young v. Davis* would be applicable, and the action could not be maintained; but it was contended that the local board was not merely in the place of the surveyor by virtue of sect. 117, but that it was also by virtue of sect. 68 in the place of the parish. It was further contended that the effect of sect. 68 was altogether to take away liability from the parish, and to transfer it to the local board, and that as the local board is a corporation, the technical difficulty which formerly stood in the way of surveying a parish or county (*Russell v. Men of Devon*, 2 T. R. 667), was removed, and an action might be maintained against the local board for the neglect of a statutable duty imposed upon it, as in the case of *Hartnall v. The Ryde Commissioners*, 4 B & S. 361; 8 L. T. Rep. N. S. 574. In support of this argument the case of *Henly v. The Mayor of Lyme*, 5 Bing. 91, was cited. That case is, however, distinguished by Martin and Channell, BB., in *Young v. Davis*, and does not affect the question we have now to consider, namely, what was the intention of the Legislature in enacting sects. 68 and 117 of the Public Health Act 1848. On consideration of that statute, in connection with the previous state of the law with reference to which it was passed, we are of opinion that the plaintiff is not entitled to recover. At common law no action could be maintained by one of the public in respect of an injury sustained through a highway being out of repair. It is true that in *Russell v. Men of Devon* the argument chiefly insisted on was that the action could not lie, because the inhabitants of a county are not a corporation, and therefore cannot be sued collectively; but the reason relied on by Lord Kenyon, C. J., and Ashurst, J., was not so much the technical one referred to as that which is expressed in Bro. Abr. tit. "Action on the Case," pl. 93. That passage is thus explained and paraphrased by Alderson, B., in *McKinnon v. Penson*, 8 Ex. 321, "That inasmuch as the highway ought to be repaired by the public, an injury arising from that neglect cannot be the subject of an action, but is only ground for the Crown interfering." But whatever the reason was the fact remains, that no action could be maintained for an injury arising from the non-repair of a highway by the parish, and the Legislature has not interfered by any general enactment to give a remedy by action to persons sustaining such a damage. It is therefore incumbent on the plaintiff who seeks to

Q. B.]

REG. v. THE DEAN AND CHAPTER OF HEREFORD.

[Q. B.]

establish that such a right is exceptionally given to persons sustaining an injury in a particular district to show distinctly that the Legislature had such an intention in passing the enactment to which such an effect is attributed. The Court of Exchequer held in *McKinnon v. Penson* that such an intention could not be inferred from the very comprehensive language of the 43 Geo. 3, c. 59 s. 4, which enacts that the county may be sued in the name of their surveyor. This was held not to create a new liability, but only to afford a more convenient remedy in cases, if any, in which the county would be liable, and this construction, founded on the presumed intention of the Legislature, though with difficulty to be collected from its language, was upheld by the Court of Exchequer Chamber (*McKinnon v. Penson*, 9 Ex. 609; 23 L. J. 97, M. C.) Again, in *Young v. Davis*, the Court of Exchequer confirmed by the Court of Exchequer Chamber 2 H. & C. 197, held that an intention to give right of action for injury resulting from non-repair could not be inferred from the language of the 5 & 6 Will. 4, c. 50. Again, in *Parsons v. St. Matthew, Bethnal Green* (*ubi sup.*), the Court of Common Pleas held that such an intention could not be inferred from the language of the 18 & 19 Vict. c. 120; and again, in *Wilson v. Marquis of Halifax*, L. Rep. 3 Ex. 114, 119, Kelly, C.B., while deciding the case upon another point, says: "Should a case arise in which the question shall be whether the 68th section of the Public Health Act 1848 imposes upon the local authority the liability to be sued in a civil action for damages by reason of a failure to perform a duty assigned to them by the Act, we should pause before we could hold that, in addition to the well-established remedy by indictment, every individual among the public would have a right of action for any and every injury resulting from such breach of duty." In the case of *Hartnell v. The Ryde Commissioners*, however, this court did draw the inference that the Legislature, by the language of the particular local Act, intended to give a right of action against the defendants for an injury resulting from a breach of their duty to repair streets; but the enactment in that case was peculiar, inasmuch as it provided, by sect. 49, that the commissioners should be deemed guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and should be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof or of any parish were liable before the passing of the Act. It was held that these enactments took away the liability of the parish to do the repairs, and cast it upon the new body, with all the ordinary incidents, including liability to be sued resulting therefrom. There is no such provision in the Public Health Act 1848. The enactment that the streets shall "vest in" the local board, whatever meaning may be assigned to that expression, does not seem to us to enlarge the liability resulting from the following words, that they shall be "under the management and control of the local board"—language similar to that used in the statute under consideration in *Rex v. St. George, Hanover-square*, 3 Camp. 222, where it was held that the imposing of the duty of repairing on a person or body other than the parish did not by implication exempt the parish from liability to indictment; and while this liability remains, the cases above referred to, *Young v. Davis* and *Parsons v. St. Matthew, Bethnal-green*, establish that no right of action is created against those to whom the management and control of the roads is given. For these reasons we are of opinion that the Legislature did not intend, by the Public Health Act 1848, to give to a person in the position of the plaintiff a right of action which did not pre-

viously exist, and our judgment must therefore be for the defendants.

Judgment for the defendants.

Attorney for the plaintiff: C. J. Allen.

Attorney for the defendants: E. W. Le Riche.

Jan. 26 and Feb. 21.

REG. v. THE DEAN AND CHAPTER OF HEREFORD.

Sect. 25 of 3 & 4 Vict. c. 113 enacts "that in the cathedral church of York, so soon as a vacancy shall occur in the deanery, and in the cathedral churches of Chichester, Exeter, Hereford, Salisbury, and Wells respectively, so soon as every person who was a member of the respective chapters of such churches at the passing of this Act, shall cease to be such member, all the said canonries shall be in the direct patronage of the Lord Archbishop of York, and of the bishops of the said respective sees, as the case may be, who shall respectively, upon the vacancy of any canonry in such churches respectively, collate thereto a spiritual person, who shall thereupon be entitled to installation as a canon of the church to which he shall be so collated."

At the time of the passing of this Act the "general chapter" of the cathedral church of Hereford consisted of a dean, five residentiary canons, and twenty-two canons non-residentiary, the latter being appointed by the bishop. Of these, the dean and the five residentiary canons constituted what was called "the close chapter." One of the cathedral officers, called the prelector, having certain spiritual duties to perform, was appointed out of the non-residentiary canons by the "close chapter," and succeeded, by customary right, to any vacancy which occurred amongst the residentiary canons. On the death of the last of the members of the "close chapter," who existed at the time of the passing of the Act, and whilst seven of the then existing members of the "general chapter" still survived, a prelector, who had been appointed since the passing of the Act, claimed to succeed to the vacancy:

Held, that the prelector was not entitled to succeed; for that "chapter" in the above section meant the "close chapter," and therefore, on the death of the last member of that body, existing at the time of the passing of the Act, the bishop was entitled to appoint to the vacancy.

A *mandamus* having been directed to the Dean and Chapter of the Cathedral Church of Hereford, commanding them to instal the Ven. and Rev. William Waring in the office of canon residentiary in that church, he having been collated to that office by the bishop of the diocese, the dean and chapter made a return, the allegations of which were traversed by a plea. Issue having been joined on the plea, a case was stated by consent of the parties, for the opinion of the court.

Jan. 26.—Sir J. B. Karlake, Q.C. (with whom were Dowdeswell, Q.C. and Herschell) argued for the prosecution.

Patchett (with whom was C. Stephens, Q.C.) for the defendants.

Cur. adv. vult.

Feb. 21. — The judgment of the court (from which the facts and arguments will fully appear) was now delivered as follows by

COCKBURN, C. J.—This is a special case, stated after a return made by the dean and chapter of the cathedral church of Hereford, to a *mandamus*, commanding them to instal the Ven. and Rev. Archdeacon Waring in the office of canon residentiary in that church, the said archdeacon having been collated to such office by the lord bishop of the diocese. The return of the dean and chapter

Q. B.]

REG. v. THE DEAN AND CHAPTER OF HEREFORD.

[Q. B.]

was to the effect that prior to the Act of 3 & 4 Vict. c. 113, the chapter of the cathedral church of Hereford consisted of the dean, the bishop's prebendary, four canons or prebends residentiary, certain dignitaries of the church, twenty-two canons or prebendaries non-residentiary; that of these the dean, the bishop's prebendary, and the four canons residentiary constituted the close chapter; that among the officers of the cathedral church was an officer termed the prælector, having certain spiritual duties attached to his office, which officer was by the constitution of the body appointed as of right by the close chapter out of the non-resident prebendaries, and that on a vacancy occurring among the canons residentiary other than in the case of the bishop's prebendary, who was always appointed by the bishop, the "prælector succeeded accustomably and of right" to the vacant residentiaryship. The return further proceeded to state, in order to show that the state of things had not arisen upon which by the 25th section of the Act of 3 & 4 Vict. c. 113, the right of appointing the canons residentiary was to be transferred to the bishop, that the Rev. Dr. Jebb, a non-residentiary prebend, had been appointed to the office of prælector before that all the persons forming the close chapter at the time of the passing of the Act had ceased to be members of it; and, secondly, that of the persons who at that time were members of the general chapter, seven still remained. The conclusion, therefore, was that the right of appointment had not passed to the bishop, and that the Rev. Dr. Jebb, who then claimed to be installed, was entitled to be so installed, while Archdeacon Waring was not. The statute in question, the 3 & 4 Vict. c. 113, by sect. 25, enacts that "In the cathedral church of York, so soon as a vacancy shall occur in the deanery, and in the cathedral churches of Chichester, Exeter, Hereford, Salisbury, and Wells respectively, so soon as every person who is a member of the respective chapters of such churches at the passing of the Act shall cease to be such member, all the said canonries shall be in the direct patronage of the Lord Archbishop of York and of the bishops of the said respective sees as the case may be, who shall respectively, upon the vacancy of any canonry in such churches respectively, collate thereto a spiritual person, who shall thereupon be entitled to installation as a canon of the church to which he shall be collated." The question for our decision is whether the event upon which, by effect of this enactment, the right of appointing a canon residentiary is to be transferred from the dean and chapter to the bishop of the diocese has arisen: and this, again, mainly turns on the construction which, with reference to the cathedral church of Hereford, is to be put on the word "chapter," as used in the foregoing section. It appears from the special case that, prior to the passing of the Act, the general chapter of the cathedral church of Hereford consisted of the dean and five prebends or canons residentiary, twenty-two prebends or canons non-residentiary, and the archdeacon, and an officer of the cathedral named the prælector. As distinguished from the general chapter, the dean and the five canons residentiary formed also for many purposes a distinct chapter, sometimes termed the "close chapter." The government of the body was regulated by certain cathedral statutes of the reign of Charles I., commonly called the Caroline Statutes, as also by certain customs and ordinances. The authority of the general chapter was exercised over certain matters affecting the general interests of the church. Thus, their consent was necessary to any alteration of the cathedral statutes, as also to the removal of the prælector. They met twice a year, at times appointed by the statutes. They

were also convened for the receipt of the royal *conge-d'elire*, and the election of a bishop, in pursuance of it, as well as for the installation of the dean, prebendaries, and other dignitaries of the church, and the election of proctors in convocation. On the other hand, the residentiaries exclusively managed the capitular property, and divided its revenues; they alone granted ecclesiastical leases, and confirmed the bishops' concurrent leases of the ecclesiastical property; they exclusively presented to all livings in the gift of the dean and chapter; they alone appointed the prælector and all the other officers of the cathedral except the dean, who was appointed by the Crown; they alone had the custody of the corporate seal, which they affixed to all documents, including those which issued from the general body. Next, as to the appointment of the members of the capitular body. The appointment of the non-resident prebendaries was vested in the bishop, and from this body the five residentiary canons were exclusively selected. One of the five, commonly called the bishop's prebendary, was appointed by the bishop. When a vacancy occurred among the other four, by the established custom, the prælector, an officer appointed by the close chapter out of the non-resident prebendaries, succeeded as of right, or, at all events, as of course, to the vacant prebend; and a new prælector was appointed in his place by the close chapter. Thus the appointment of the residentiary canons with the exception of the bishop's prebend, was practically in the close chapter. At the time of the passing of the 3 & 4 Vict. c. 113, one of the residentiary prebends was vacant, and was consequently, by the effect of sect. 14 of the Act, suppressed. Of the remaining four residentiary canons one only, Canon Huntingford, remained alive in the year 1863. In that year a vacancy having occurred in the office of prælector, the Rev. Dr. Jebb, a non-residentiary canon was appointed by the close chapter, to that office, which he still holds. In 1867 Canon Huntingford, the last of the canons residentiary holding office at the passing of the Act, died. Of the twenty-two non-resident prebendaries living at the passing of the Act, seven still survive. It follows that, according as the language of the Act, which provides for the transfer of the parsonage in respect of the residentiary prebends to the bishop, "so soon as every person who was a member of the chapter at the passing of the Act shall have ceased to be such member," was intended to refer in the case of the cathedral church of Hereford, to the general chapter, or to the close chapter, the event on which the transfer of the patronage is made to depend, will or will not have occurred. If the word "chapter" refers to the close chapter, viz., the dean and residentiary canons, none of the then existing body any longer remains. If it refers to the general chapter, several of that body are still alive, and retain their prebends. On the argument before us, it was insisted on the part of Archdeacon Waring, that all that was contemplated by the Legislature in thus preserving the rights of the "chapter" was to save the vested right of patronage to the existing members of the close chapter, to whom the right of appointment exclusively belonged; the right of eligibility, spread over so large an area, being, as it was said, too small to have received attention or to have been deemed of sufficient importance to stand in the way of a change thought to be desirable. On the other hand, on the part of Dr. Jebb, on whose behalf the return was made, it was urged that the purpose of the reservation was to preserve all vested rights, and that the right of eligibility to a valuable preferment in the members of a limited body, was an appreciable and valuable right, and one which Parliament might

Q. B.]

THOMAS v. THE RHYMNEY RAILWAY COMPANY.

[Q. B.]

well be presumed to have intended to respect. The term "chapter" used in the Act, being thus open to a twofold construction, and its meaning appearing to us open to doubt, it occurred to us before the close of the argument that as by the same enactment, in the case of the cathedral church of York, the appointment of the canon residentiary was directed to be transferred to the archbishop on the first vacancy in the deanery, without any reference to the chapter, if the fact should be, as we had reason to think it was, that the patronage had previously been in the dean alone, but that he, like the dean and chapter of Hereford, had been limited in his selection, to the non-residentiary canons, the provision in respect of the church of York would afford a solution of the meaning of the Legislature in respect of the church of Hereford, as showing that it was the vested right of patronage alone which the Legislature intended to preserve. We accordingly remitted the matter to the learned gentleman by whom the case had been stated, requesting him to ascertain and inform us as to the state of things existing in the cathedral church of York at the time of the passing of the Act. We have since been furnished with a further statement from the learned arbitrator, from which it appears that from the passing of a cathedral statute of the 8 Geo. 3, the appointment of the residentiary canons was exclusively in the dean, and that his choice was limited to the non-residentiary canons. It is plain, therefore, that all that the Legislature intended in postponing the operation of the 3 & 4 Vict. c. 113, to the next vacancy in the deanery was to preserve the existing right of patronage without any regard to the rights of the body out of which the selection was to be made we cannot suppose that there can have been any intention to make a distinction in this respect between the capitular body of Hereford and that of York, and with this indication of the intention of the Legislature before us, we are of opinion that on the death of the last of the canons residentiary living at the time of the Act passing, the enactment in sect. 25 took effect, and the canonries passed into the direct patronage of the bishop. It was, however, further contended that as by the terms of the statute the new right of patronage was only to be exercised on a "vacancy" occurring, there was in the present instance no occasion for its exercise, there being no vacancy, inasmuch as Dr. Jebb, having being elected to the office of prælector before the Act had come into operation, was entitled, as of right, to assume at once the office of residentiary canon. We should not have been sorry to give effect to this contention, had it been possible; for one cannot but feel the hardship to a reverend gentleman who, having filled for so many years an office which has always hitherto been as of right the stepping stone to a residentiary prebend, and who, if any other vacancy save that created by the death of Canon Huntingford had occurred, would of course have succeeded to the canonry, in being disappointed in his reasonable expectation. But we think the position thus taken by the defendant's counsel is untenable. The prælector was not a residentiary canon by virtue of his office; and, though he succeeded to the canonry as of right, still it was only on a vacancy occurring that by virtue of the custom he stepped into the vacant canonry, and was entitled to be admitted and installed. It is impossible, therefore, to say that there was not a vacancy created by the death of Canon Huntingford within the meaning of the statute. The result is, that a peremptory *mandamus* must go to the dean and chapter to admit Archdeacon Waring to the vacant residentiary prebend.

Judgment accordingly.

Attorneys for the prosecution, Jones and Starling, for Beddoe, Hereford.

Attorney for defendants, Annesley.

Wednesday, Feb. 2.

THOMAS v. THE RHYMNEY RAILWAY COMPANY.

Railway company—Negligence as carrier of passengers—Liability for negligence of another company over whose line it has running powers.

A railway company having given a ticket to a passenger for conveyance between two places, the latter part of the journey being performed over the line of another company over which it had running powers, and a collision causing injury to the passenger having occurred on this part of the journey owing to the negligence of the latter company, and without any negligence on the part of the company contracting with the passenger, it was

Held, on the authority of the Great Western Railway Company v. Blake, 7 L. T. Rep. N. S. 94, and Buxton v. The North Eastern Railway Company, 18 L. T. Rep. N. S. 795, that the company from whom the passenger obtained the ticket was liable for the injuries occasioned to him by the negligence of the other company over whose line it had running powers.

This was an action brought by the plaintiff against the defendants to recover damages for personal injuries sustained by the plaintiff from a collision which took place on the defendants' railway whilst the plaintiff was being carried as a passenger for hire. The declaration alleged that the plaintiff became a passenger to be carried by the defendants with due care on their railway, and that they so negligently conducted themselves that the train in which he was came into collision with an engine and van on the railway, whereby he sustained injury.

The defendants pleaded (1) not guilty; and (2) that the plaintiff was not a passenger as alleged. On these pleas issue was joined.

The case was tried at the Glamorganshire Spring Assizes 1869, before Kelly, C. B., when the following facts were proved: The plaintiff took a ticket of the defendants to be carried as a passenger from Caerphilly to Cardiff. The defendants' line joins that of the Taff Vale Railway Company at Llandaff, which is situated between Caerphilly and Cardiff, and the defendants have only running powers, on the payment of certain tolls, over that part of the line which goes from Llandaff to Cardiff, the whole of the traffic arrangements being under the sole control of the Taff Vale Railway Company.

The collision, which occasioned the injury to the plaintiff, occurred on the part of the journey between Llandaff and Cardiff, and was caused by the train in which he was travelling running into an engine and van belonging to the Taff Vale Railway Company, which was advancing on the same line of rails, and in the same direction with the train.

The jury found that the collision was caused by the negligence of the servants of the Taff Vale Railway Company in allowing the defendants' train to proceed too soon after the other, and without any warning to the driver, and also in omitting to have a proper tail light attached to their own train. The jury found that the defendants' servants who were in charge of the defendants' train were not guilty of any negligence.

The Lord Chief Baron directed the verdict to be entered for the defendants, but gave the plaintiff leave to move to enter the verdict for him for 450*l.*, if the court should be of opinion that the defendants were liable.

A rule *nisi* to enter the verdict for the plaintiff for that sum having been obtained by Giffard, Q. C., who cited the *Great Western Railway Company v. Blake*, 7 H. & N. 987; 7 L. T. Rep. N. S. 94.

Field, Q. C. and H. G. Allen, now showed cause on behalf of the defendants.—They contended that the

Q. B.]

THOMAS v. THE RHYMNEY RAILWAY COMPANY.

[Q. B.]

Great Western Railway Company v. Blake (*ubi sup.*) was distinguishable from the present case; the two companies in that case having entered into an arrangement whereby they were to share the profits, whereas in the present case the defendants have only running powers over the line of the Taff Vale Railway Company; they have no control over the traffic arrangements or over the servants of the latter company; they are merely in the position of a coach owner running over a turnpike road, over which any person may run on payment of tolls, in which case the remedy in case of an accident like the present, is against the trustees of the road, and not against the carrier. The contract of the carrier is only that he will not be guilty of any negligence, and the jury have negatived the existence of any negligence on the part of the defendants or their servants. Byles, J. was the only judge in the case of the *Great Western Railway Company v. Blake*, who expressly said that in his opinion the railway company would have been liable even if there had been no arrangement as to a division of profits between them and the other company. Mellor, J. declined to express an opinion on that subject, saying, "I do not say how it would be if the Great Western Railway Company had run over the line of the South Wales Company on payment of tolls. I do not dissent from what my brother Byles has said on that point; but I express no opinion upon it, as it is not necessary for the decision of this case." [LUSH, J.—The question comes to this, whether the Taff Vale Railway Company were your agents or servants. They were not so in fact, and the only point is whether they are not so in law.]

Redhead v. The Midland Railway Company, 20 L. T. Rep. N. S. 628;

Crofts v. Waterhouse, 3 Bing. 319; and

Aston v. Heaven, 2 Esp. 533,

were also referred to.

G. B. Hughes in support of the rule. By giving the plaintiff a ticket from Caerphilly to Cardiff, the defendants contracted to carry him safely to Cardiff. The case of a railway company which has running powers over the line of another company entering into such a contract is not analogous to that of a coach proprietor carrying over a turnpike-road; the passenger in the former case knowing nothing, as a rule, of the private arrangements with other companies, which the company contracting with him may have made; and difficulties would be interposed in his way, if he were obliged to find out to which of perhaps several companies the carriage in which he is at the time of a collision, happens to belong. [LUSH, J.—Such a difficulty arose in the case of *Quarman v. Burnett*, 6 M. & W. 499.]—The point raised in this case is in fact concluded by authority. *The Great Western Railway Company v. Blake* (*ubi sup.*); decided that where there is a division of profits, the one railway company is agent to the other, and there is no difference between the payment of agreed tolls and the division of profits. Cockburn, C.J., said, "It has been settled that where a railway company enters into a contract for the conveyance of goods to a distance extending not merely over their own line, but over the whole or some portion of any other line of railway with which it is connected, the company so contracting is liable not only for the loss of the goods upon their own line, but also in respect of the loss of the goods upon the line not their own. I think that position obtains in the case of passengers. If a railway company chooses to contract to carry passengers not only over their own line but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them if they had contracted solely to carry over their own line," and Byles, J. says, "The

express finding, that by arrangement between the two companies, the fares are apportioned between them, involves this proposition, that when the Great Western train comes upon the South Wales line, as the profits are divided between the Great Western and South Wales companies, for the purpose of this action the South Wales line became the Great Western line, and the Great Western Company were bound to take due care with respect to the machinery, that is, the engine, carriage, and line. It is sufficient to rest there; but if necessary I should go further and say that without the arrangement as to profits, the Great Western Company by their contract with the plaintiff below, were as much bound to take care of the machinery as if the whole line was their own." There is no special term whatever in the contract which the defendants entered into with the plaintiff, which limits their liability. Another case in favour of the plaintiff, and decisive of the point in question, is *Buxton v. The North-Eastern Railway Company*, 18 L. T. Rep. N. S. 795, in which Blackburn, J. says, "I think the first question raised in this case is settled by the case of *Blake v. The Great Western Railway Company*. I understand that case to go to this extent, that where a passenger contracts with a railway company to carry him from one terminus to another, so as to run over the line of an intermediate railway, it is part of the contract that whatever liability the intermediate line would have incurred as to one of its own passengers shall be incurred by the other. According to that decision, which is an extremely convenient one, the North-Eastern Railway Company when they gave the ticket in the present case did in effect contract that they would be responsible for everything for which the Midland Company would be responsible to one of their own passengers, and undertook all those duties which that company undertook on its own line;" and Lush, J. was of the same opinion, saying, "The first point raised is, I think, determined by the case of *Blake v. The Great Western Railway Company*." [LUSH, J.—The present point was not at all argued in that case.] The inclination of judicial authority has in other cases been in the same direction: (See the observations of Rolfe, B. in *Muschamp v. Lancaster, &c., Railway Company*, 8 M. & W. 430; and the case of *Birkett v. Whitehaven Railway Company*, 4 H. & N. 730.) [He was here stopped by the court.]

MELLOR, J.—I think we are bound by the case of *Buxton v. The North-Eastern Railway Company*, which we are unable satisfactorily to distinguish from the present case. At the same time I feel bound to say that I do not concur in it. I mean that if I were called on to decide the question on the state of facts now appearing, my opinion would be that the defendants are not liable for the accident which has occurred, having no control over the line of the Taff Vale Railway Company, and that the defendants are liable only for the negligence of those persons over whom they have control. I think it was assumed in the case of *Buxton v. The Great Northern Railway Company*, that the facts of that case were the same as those in *The Great Western Railway Company v. Blake*. This, however, is only a conjecture, it having been admitted by counsel that it could not be distinguished; and expressions are attributed to some of the judges that the point in which they are distinguishable made no difference. Therefore, as at present advised, it seems to me that we should not be justified in overruling that case, and that if the railway company wish to question its authority, they must for that purpose go into a court of error. But for myself personally I will say that I consider the case of the *Great Western Railway Company v. Blake* to be distinguishable on the ground that there there was a mutual arrangement

Q. B.]

BECHER v. THE GREAT EASTERN RAILWAY COMPANY.

[Q. B.]

between the two companies as to sharing the profits; there was an agency on the part of each of them for the other; and it seems to me that the majority of the Court of Exchequer Chamber rested their decision on that. I certainly did not concur in the further observations made by my brother Byles, but reserved to myself the right of holding that circumstances like the present might alter the case, and that is my present impression. I cannot, however, distinguish the case of *Buxton v. The North-Eastern Railway Company* from the present, and, therefore, if the defendants desire to call in question the authority of that case, they must go into error.

LUSH, J.—The distinction which has been pointed out between the present case and that of *The Great Western Railway Company v. Blake*, was not suggested in the argument of *Buxton v. The North Eastern Railway Company*; and certainly it was not present to my mind when I gave judgment in that case. However, when I look at that decision, fortified as it is to a certain extent by the general observations of the Lord Chief Justice and my brother Byles in *Blake's* case, I do not think we can now give a contrary decision. At the same time I cannot help saying that I hope the case will go into error in order that it may be determined whether there is or is not any substantial distinction between the two. The rule, therefore, must be made absolute to enter a verdict for the plaintiff.

HANNEN, J.—I am of the same opinion.

Rule absolute.

Attorneys for the plaintiff, *Field and Roscoe*.

Attorney for the defendants, *W. G. Ray*.

Friday, Feb. 11.

BECHER v. THE GREAT EASTERN RAILWAY COMPANY.

Railway company—Negligence as carriers—Passengers' luggage—Master's property carried as servant's luggage.

The owner of a portmanteau who allows his servant to carry it by train as his own personal luggage, the servant taking and paying for his ticket, and the owner travelling by a later train, cannot maintain an action against the railway company for the loss of the portmanteau.

This was a special case, stated by consent of the parties for the opinion of the court, as follows:—

The action is brought by the plaintiff against the defendants for the recovery of 56*l.* 16*s.* 3*d.*, the value of wearing apparel and a portmanteau, in which it was contained, belonging to the plaintiff.

The defendants are a railway company, incorporated by 25 & 26 Vict. c. ccxxiii., and are common carriers for hire by railway of goods and passengers from Newmarket to London.

In July 1868 the plaintiff and some friends arranged to go from London to Newmarket for the purpose of attending the races there, and they took a man servant of one of the party to attend on them in common during their stay at Newmarket.

On the last day of the races, the servant being about to return by an early train on the defendants' line, and the plaintiff being desirous of returning later in the day, the plaintiff entrusted his portmanteau and its contents to the servant, with directions to take it up to London with him. The plaintiff gave the servant 1*l.* for his attention during his stay at Newmarket.

The servant accordingly proceeded to the defendants' station at Newmarket, and obtained from the defendants, and duly paid them for a ticket from Newmarket to London. The servant delivered over

the portmanteau, with its contents, and his own luggage, as well as that of the other gentlemen, to the servants of the defendant at the Newmarket station as his ordinary luggage, and the same was received by the defendants as ordinary luggage for the purpose of being carried by the defendants as carriers as aforesaid, with the servant on his journey. The servant was carried by the defendants to London, but the portmanteau and its contents were lost during the journey by default of the defendants.

The plaintiff himself proceeded from Newmarket to London by a later train on the defendants' railway on the same day; and he also duly obtained and paid the defendants for his ticket for such journey, and took no luggage with him.

By sect. 228 of the Great Eastern Railway Act 1862 (25 & 26 Vict. c. ccxxiii.), every passenger travelling upon the railways may take with him his ordinary luggage, not exceeding 120*lb.* in weight for first-class passengers, 100*lb.* in weight for second-class passengers, and 60*lb.* in weight for third-class passengers without any charge being made for the carriage thereof.

The luggage taken with the servant on the journey was delivered to the company as not exceeding the weight he was allowed to take as luggage under the above section, and was not weighed by the company.

The court is to be at liberty to draw from the above facts any conclusions or inferences which in their judgment ought to be drawn.

The question for the court is whether the defendants are liable to the plaintiff for the loss of the portmanteau and contents.

Philbrick, for the plaintiff.—The question is whether the master can sue the defendants upon the contract made with his servant under the circumstances of the case. In Comyn's Dig. tit. "Action on the case for negligence" B. (B. 1), it is laid down that "the master may have an action for goods lost at an inn where his servant was a guest." [LUSH, J.—Suppose an accident had happened to the servant, could the master, under the circumstances of this case, maintain an action against the railway company for the loss of service?] No; that has been decided in the case of *Alton v. Midland Railway Company*, 19 C. B., N. S., 213, because the matter arose wholly out of the contract of carriage which was made with the servant. If, however, the wrong arose independently of contract, the master could recover; and the present case being stated without pleadings, if there is a liability of any sort, whether arising from contract or tort, the defendants are liable to the plaintiff for the loss which he has sustained. The contract here was not a strictly personal one with the servant, in which the master could not intervene. [LUSH, J.—The servant could only take the portmanteau as his own luggage.] Suppose the servant had told the railway company that the luggage he was carrying belonged to his master, surely the master could recover. [LUSH, J.—There is no evidence whatever of any contract being made with the servant.] There is a duty cast upon the defendants as common carriers by the custom of the realm, independently of contract.

Marriott, for the defendants.—If there is any liability it arises *ex contractu*, and the contract was made only with the servant, who in the present case was the servant of several persons, to each of whom, if the plaintiff's contention were sound, the defendants would be liable. [He was here stopped.]

MELLON, J.—I think we need not trouble you further. We are all satisfied that in this case no action will lie at the suit of the plaintiff against the

Q. B.]

Ex parte SAMUEL LLOYD JONES (an Articled Clerk).

[Q. B.]

defendants. It is clear on the facts as stated that the defendants received the portmanteau as the luggage of the servant. He takes the ticket, and says nothing to the company as to the position in which he stands in relation to these several masters, and the company takes and carries the luggage as his. It would be improper for us to say now what would be the result of the case if the servant, when he took his ticket, had said that the luggage was his master's, and the railway company had received it as the master's. That would have given rise to very different considerations, and would probably lead to a different result. But that is not the case here, where a person with whom the railway company had never any relation of contract whatever, brings an action against them for the loss of luggage carried by a servant as his own.

LUSH, J.—I am entirely of the same opinion. I think it would be most unjust to make railway companies liable for losses of this description. If the servant had told the company that the luggage was not his own, they probably would not have taken it. The person who allows his servant to take luggage as his own, must sue in the name of the servant. The matter is one resting entirely on contract, and the only person with whom a contract was made was the servant.

HANNEN, J.—I am of the same opinion.

Judgment for defendants.

Attorney for plaintiff, *Cavell*.

Attorney for defendants, *W. H. Shaw*.

Thursday, April 21.

Ex parte SAMUEL LLOYD JONES (an Articled Clerk).

Articled clerk—Binding for a less period than five years—Void articles—Refusal of the court to permit service under, to be reckoned under fresh articles.

By sect. 3 of the 6 & 7 Vict. c. 73, no person is to be capable of being admitted an attorney unless he shall have been bound by contract, in writing, to serve as clerk for and during the term of five years; and by sect. 5 of the 23 & 24 Vict. c. 127, certain of the judges may, by regulations, direct that the person having successfully passed any examination, now or hereafter to be established in any of the universities, and to be specified in such regulations, may be admitted after having been subsequently bound and served under articles for four years.

S. L. J. had successfully passed the middle-class examinations of Oxford and Cambridge, which, however, were not included in the regulations of the judges, and he was thereupon articled for a term of four years, which term he duly served:

Held, that the articles were bad; and the court refused to permit him upon entering into fresh articles to have the advantage of his four years previous service under such former articles.

This was an application on the part of a Mr. Samuel Lloyd Jones, an articled clerk, calling upon the Incorporated Law Society to register his articles of clerkship, and for leave for him to enter into fresh articles to serve for one year. The affidavit upon which the application was made was as follows:—

I, Samuel Lloyd Jones, of 29, Victoria-place, Bangor, in the county of Carmarthen, clerk to Henry Lloyd Jones, of the same place, attorney-at-law and solicitor in Chancery, make oath and say as follows:—

1. That I did, by articles of agreement dated the 13th Aug. 1864, now produced, and shown to me at the time of swearing this my affidavit, and marked (a), bind myself as clerk to my father, the said Henry Lloyd Jones, to serve him in the profession of an attorney-at-law and solicitor in Chancery, from the date of the said articles for the term of four years.

2. I had, previous to my entering into the said articles, passed the Cambridge Middle-Class Examination, held in the month of December 1862, as a junior candidate, and also passed the Oxford Middle-Class Examination, held in and for the year 1863, as a senior candidate, and obtained the usual certificate of associate of arts for the University of Oxford, and I was informed and then believed that this certificate or degree entitled me to the privilege of serving one year less under my articles, and the term was accordingly made for four years instead of five years.

3. The said articles were sent up within the usual period of six months, to be enrolled and registered, and I am informed and believe that they were so enrolled, but that after they had been presented for registration at the Law Institution, a question was raised there as to the term being for four years only, and the said articles were returned without, it would appear, such registration being perfected, for I was informed when I expressed a wish to pass my intermediate examination that an objection had been made at the Law Institution to my said articles being registered there, on account of the time being for four years, instead of five years, and I was not until then aware that there was anything wrong or irregular in reference to my said articles.

4. I am now, and have been for some time past, most desirous of having the registration of my said articles perfected, and of applying to pass my intermediate examination with as little further delay as possible; and that my past and present service should be taken into account without reference to the time of my passing the said intermediate examination, and that I should be at liberty to be articled to the said Henry Lloyd Jones for another year, to make up the full term of five years; and also that I should be allowed to go up for my final examination at the examination which will take place next after the first day of March, 1871, I having already served the full period of five years up to the 13th day of August last.

5. I was also for more than twelve months in the office of my father, the said Henry Lloyd Jones, previous to my entering into the said articles, and I am now in the said office and employed in his business.

By sect. 3 of the 6 & 8 Vict. c. 73, it is enacted—

That, except as hereinafter mentioned, no person shall, from and after the passing of this Act be capable of being admitted and enrolled as an attorney or solicitor, unless such person shall have been bound by contract in writing to serve as clerk for and during the term of five years to a practising attorney or solicitor in England or Wales, and shall have duly served under such contract for and during the said term of five years, &c.

By sect. 5 of the 23 & 24 Vict. c. 127 ("An Act to Amend the Laws Relating to Attorneys, Solicitors, Proctors, and Certificated Conveyancers") it is enacted that—

The Lord Chief Justices of the Courts of Queen's Bench and Common Pleas, and the Lord Chief Baron of the Court of Exchequer, jointly with the Master of the Rolls, may, if they think fit, from time to time, by regulations to be made by them, direct that the person having successfully passed any examination now or hereafter to be established in any of the universities hereinbefore mentioned, and to be specified in such regulations, may be admitted and enrolled as an attorney or solicitor, after having been subsequently bound by, and having duly served under articles of clerkship to a practising attorney or solicitor for the term of four years, and been examined and sworn as aforesaid; and the said judges may from time to time revoke or alter such regulations as they think fit, but not so as to allow a less period of service than four years.

In pursuance of the above section the judges by a rule, dated the 26th July 1861, ordered—

That from and after the first day of Hilary Term 1862 every person who before entering into articles of clerkship shall produce to the registrar of attorneys a certificate that he has successfully passed the first public examination before moderators at Oxford, or the previous examination at Cambridge, or the examination in arts for the second year at Durham, or the matriculation examination at the Universities of Dublin or London, and has been placed in the first division on such matriculation examination shall be entitled to the benefit of the 5th section of the Attorneys' Act, 23 & 24 Vict. c. 127.

M'Intyre now moved accordingly.—This gentleman has in fact served more than his full term of five years, and it was only by a misapprehension that he was entitled to deduct one year, that his articles were drawn up for four instead of five years. [COCKBURN, C. J.—Have we the power to comply with your application?] I submit that you have; all that the statute intended to enforce was the serving under articles for five years. He has already served for four years under his articles, and he now desires to serve under articles for another year.

Q. B.]

BRUMFITT (app.) v. THE OVERSEERS OF LIVERPOOL (resps.)

[C. P.]

[BLACKBURN, J.—The words of the statute are, “unless such person shall have been bound by contract in writing to serve as clerk for and during the term of five years.” Now he has not been so bound. COCKBURN, C. J.—Nor is he within the exceptions, and therefore he has not served under any good articles for five years.] The case may be put in this way. Let him enter into fresh articles for five years, and permit his previous service to be reckoned. His service need not be under one contract. [COCKBURN, C. J.—According to that a clerk may complete his service by five different bindings of one year each. Here the original contract was unlawful.] The court has heretofore extended the interpretation of the Act so as to prevent a hardship to the clerk. In *Ex parte Smith*, 1 Ell. & Ell. 928; 28 L. J. 263, Q. B., the clerk served under articles to an attorney and solicitor for four years six months and twenty-four days. He then with the consent of his master was absent for about three years, during part of that time serving as ensign in a militia regiment, and during the residue being employed as a surveyor of taxes in the Inland Revenue office. He then returned to his original master, and served him as a clerk, but not under articles for a period of five months and six days. It was held that the latter period of service as clerk could not be computed with the former period of such service so as to make the requisite period of five years’ service. But leave was granted to him to enter into fresh articles to be stamped with the same duty as was payable upon the original articles, and to serve under such fresh articles to complete the period of five years. [COCKBURN, C. J.—But in that case the original contract was good, although the service under it was insufficient.] Yet the words of the 3rd section of the 6 & 7 Vict. c. 73, are “shall have duly served under such contract for and during the said term of five years,” and the court has permitted a service of part of the time under other articles. [COCKBURN, C. J.—In those cases the service was under each contract of five years, and certainly we have gone very far in allowing any part of the service to be under a different contract. We must, however, go no further. The Act says the clerk must serve under a contract for five years. If I had power to remedy this difficulty I would use it.] I am only asking that this gentleman’s actual service of four years may not be wholly thrown away. [BLACKBURN, J.—The Legislature intended that there should be a binding contract for five years.] There was an error in supposing that passing the middle-class examinations would entitle the clerk to the benefit under the rules of one year’s remission.

COCKBURN, C. J.—We have not included in our rules any such examination. I wish I could help you, as I much sympathise with your client; but the language of the Act of Parliament is clear, and unless the case comes within the exceptions we cannot interfere. The statute requires that the binding shall be for five years, and although we have permitted two services under different articles, the articles themselves have been for the required period.

Application refused.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR and H. H. HOCKING, Esqrs.,
Barristers-at-Law.

REGISTRATION APPEALS.

Jan. 25 and Feb. 23.

BRUMFITT (app.) v. THE OVERSEERS OF LIVERPOOL (resps.)

Notice of appeal—Qualification of a county voter—Pew in church.

A claimant whose name had been retained upon the list of county voters declined to support the barrister’s decision upon appeal, and no other person interested consented to do so; the barrister accordingly named the overseers of the parish as respondents, and indorsed upon the special case the names of four persons who were, as he was informed, the overseers for the time being. Subsequently it was discovered that only one of the four persons was then an overseer, the period of office of the other three having expired. Notice of appeal was served upon the overseers, as well as upon the four persons named as respondents; the respondents did not appear:

Held, that the requirements of 6 Vict. c. 18, s. 64, were sufficiently fulfilled.

By a local Act, after reciting that the church of St. Mark’s, Liverpool, had been built by subscription and consecrated, certain of the subscribers were appointed commissioners and trustees, and empowered to let or sell, and transfer and convey, for the purpose only of attending divine service, all and every of certain pews or seats in the said church to the inhabitants of certain parishes; by a subsequent local Act it was enacted that the fee-simple and inheritance of and in the said pews or seats shall be vested in the said subscribers to the said church of St. Mark, or the proprietors for the time being of the pews and seats, their heirs and assigns for ever; and they are thereby authorised and empowered to sell, dispose of and convey all or any of the said seats or pews, together with the fee-simple and inheritance of the same respectively to any person or persons willing to become purchasers thereof.

*Two pews, the annual value of each being 5*l.*, were conveyed by the said commissioners and trustees to a person who claimed upon that qualification a vote for the county:*

Held, that the Legislature had not given to the owners of these pews or seats any freehold interest in the land which was covered by such pews or seats, or in any profit arising out of such land; therefore the claimant had no right to be registered.

Hinde v. Chorlton, L. Rep. C. P. 104; 15 L. T. Rep. N. S. 472 followed.

This was an appeal from the decision of one of the revising barristers for the south-western division of the county of Lancaster.

At a court held before one of the revising barristers appointed to revise the list of voters for the south-western division of the county of Lancaster, the appellant duly objected to the name of Matthew Redhead being retained in the list of voters for the south-western division of the said county.

The name of Matthew Redhead appeared on the list of claimants as follows: “Redhead, Matthew, 52, Great George-street, Liverpool, freehold pews, 72 and 72½, St. Mark’s Church, Upper Duke-street.”

The said Matthew Redhead produced a deed bearing date the 29th April, 1863, made between John Highfield of the one part, and the said Matthew Redhead of the other part. The deed, after reciting that the said Highfield was seised to him and his

C. P.]

BRUMFITT (app.) v. THE OVERSEERS OF LIVERPOOL (resps.)

C. P.

heirs of the said pews in the said church of St. Mark for an estate of inheritance in fee simple, witnessed that the said Highfield did thereby grant and convey unto the said Redhead and his heirs the said pews and the sole and exclusive right of using the same at all times when Divine service should be performed in the said church, and at all other reasonable times when the said church should be opened for the use of persons frequenting the same, together with all ways, privileges, and advantage of passage in and through the aisles of the said church, and all other advantages and appurtenances thereto belonging, and all the estate, right, title, and interest of the said Highfield therein or thereto, to hold the same unto and to the use of the said Redhead, his heirs, and assigns for ever, under and subject to the payment of such yearly rents, and such levies, assessments, and other sums of money as should thereafter become due or be lawfully charged or imposed upon the said pews or the owners or occupiers thereof, by virtue of the Act of Parliament relating to the said church. By the said deeds Highfield covenanted that he was well and absolutely entitled to the said pews, and had good right, full power, and lawful and absolute authority to convey the same to the said Redhead and his heirs in manner aforesaid, and that the said Redhead and his heirs and assigns should have quiet possession of the said pews, free from incumbrance by the said Highfield or any person whomsoever, except in respect of the said rents and assessments.

It was alleged by the said Redhead, and admitted by the appellant, that the said Highfield derived his title to the said pews from a deed made shortly after the passing of the Act of 2 & 3 Vict. c. xxxiii., hereinafter mentioned, by which the persons mentioned in the 4th section of the said Act as "the said subscribers to the said church of St. Mark," granted and conveyed the said pews to the said Highfield, and that the said last-mentioned indenture was in its terms in all respects similar to the indenture previously referred to in this case.

Before the said conveyance to the said Highfield, the said subscribers had not, nor had the commissioners and trustees mentioned in the Act of 56 Geo. 3, c. lxx., hereinafter referred to, granted or conveyed any interest in the said pews to any other person.

The said church of St. Mark was established by an Act of Parliament passed in the fifty-sixth year of the reign of King George III. (c. lxx.), entitled, "An Act for establishing a new Church, called the Church of St. Mark, situate in the Town and Parish of Liverpool, in the County Palatine of Lancaster."

The provisions of the Act relating to this case are sufficiently referred to in the judgment of the court.

The schedules to the said Act are in form as follows:—

The free list or schedule, &c., containing an account of the several pews or seats set apart for the minister.
Seats on the ground floor.

Number.	Value.	
1	60l.	
and	so on.	

The second list or schedule, &c., containing an account of the pews and sittings set apart for the use of the poor for ever.

Number.	Situation.	No. of Sittings.	Value.
177 to 190	Six pews, each containing four sittings, on the ground floor behind the pulpit, and so on.	24	200l.

The third list or schedule, &c., containing an account of all the pews and seats in the said church, save the pews and

seats contained or set down in the first and second schedule to this Act annexed.

Number.	Rent.
6 and 15 and	1l. 19s. 11d. so on.

The said pews in this case mentioned are pews contained in the third schedule to the said Act.

In the second and third years of the reign of Her present Majesty, an Act of Parliament was passed (cap. xxxiii.), which contains the following provision:—

Sect. 4:

And whereas doubts have arisen as to the estate and interest which the subscribers to and proprietors of the said church of Saint Mark took in the pews and seats set forth on the third list or schedule of the said recited Act: be it therefore enacted that from and after the passing of this Act, the fee simple and inheritance of and in the said pews or seats set forth in the third list or schedule to the said Act annexed, shall be vested in the said subscribers to the said church of Saint Mark, or the proprietors for the time being of the same pews and seats, their heirs and assigns for ever; and they are hereby authorised and empowered to sell, dispose of, and convey all or any of the same seats or pews, together with the fee simple and inheritance of the same respectively, to any person or persons willing to become purchasers thereof, anything in the said recited Act relating to the said church of St. Mark to the contrary thereof notwithstanding.

The said pews in the second paragraph of this case mentioned, are each of the annual value of 5l., after deducting all charges upon the same. Since April 1863, the said Redhead has been in the habit of attending divine service at the said church of St. Mark, and occupying one of the said pews during the time of service. No other person has at any time been allowed to use such pew without the permission of the said Redhead. The other of the said pews has been since 1863 occupied in the same manner by persons to whom Redhead let the same, and who have regularly paid rent to him therefor.

The barrister was of opinion that the said Redhead had a freehold estate in the said pews or one of them, sufficient to entitle him to have his name retained on the list of voters, and he retained his name on the list of voters.

The said Redhead in open court declined to support the said decision, and as no person interested in the matter of the said appeal consented to support the decision appealed against, the barrister named the overseers of the parish of Liverpool to be the respondents in this appeal.

The question for the opinion of the court was whether the said Redhead had a freehold estate sufficient to entitle him to have his name retained in the list of voters? Should the court be of opinion that Redhead had not such a freehold estate, his name was to be erased from the list of voters.

The appellant's points were as follows:—1. That the decision of the revising barrister was wrong, and that the name of Matthew Redhead ought not to be retained on the list of voters for the south-west division of the county of Lancaster 2. That independently of the private Act of 2 & 3 Vict. c. xxxiii, Matthew Redhead had not acquired the freehold of either of the pews, but only the right to go into them for certain purposes, and that such right was an easement and not a tenement within the meaning of 8 Hen. 6 c. 7. 3. That the effect of the said private Act is only to alter the interest of the subscribers or proprietors in the subject-matter thereof, and does not in any way alter the nature of that subject matter 4. That the said Act cannot have the effect of altering an easement or mere personal right into a tenement or land right, sufficient to give a vote within the meaning of 8 Hen. 6, c 7. That the proprietors of the said pews are only at liberty to use them for the purpose of attending Divine service,

C. P.]

BRUMFITT (app.) v. THE OVERSEERS OF LIVERPOOL (resp.)

[C. P.]

and are not at liberty to use them at any time they may like. 6. That the expression "pew or seat," mentioned in the said private Act, shows that the right was in the nature of an easement and not a tenement, within the meaning of 8 Hen 6, c. 7.

No one was instructed to support the barrister's decision.

Crompton appeared for the appellant, and produced affidavits to satisfy the requirements of 6 Vict. c. 18, s. 64, which provides that "no appeal shall be heard by the said Court (of Common Pleas) in any case where the said respondent shall not appear, unless the said appellant shall prove that due notice of his intention to prosecute, such appeal was given or sent to the said respondent ten days at least, before the day appointed for the hearing of such appeal." In this case the revising barrister endorsed the names of four persons who were, as he was informed, overseers of the parish of Liverpool, on the special case. Subsequently it was discovered that only one of these four persons was then an overseer, the period of office of the other three having expired. Notice of appeal was served upon the overseers, as well as upon the persons named as respondents, but the revising barrister considered that he had no power, after the conclusion of his appointment, to amend his nomination of respondents.

The court held this was sufficient.

Crompton then argued that the decision of the barrister was contrary to the authority of

Hinde v. Chorlton, L. Rep. 2 C. P. 104; 15 L. T. Rep. 472;

Mainwaring v. Giles, 5 B. & Ald. 356;

Chapman v. Jones, L. Rep. 4 Ex. 263; 20 L. T. Rep. 811.

and was not justified by the special provisions of these local Acts.

Cur. adv. vult.

Feb. 23.—The judgment of the court (Bovill, C.J., Willes and Brett, JJ.) was delivered by BOVILL, C.J.—In this case one Matthew Redhead claimed to be registered in the parish of Liverpool as a voter for the south-western division of the county of Lancaster, in respect of an alleged qualification thus described in his claim:—"Freehold pews, 72 and 72½, St. Mark's Church." In support of his claim Redhead produced a deed, bearing date the 29th April 1863, made between one John Highfield and the said Matthew Redhead, whereby, after reciting that Highfield was seised to him and his heirs of the said pews, &c., for an estate of inheritance in fee simple, it was witnessed that Highfield did thereby grant and convey unto the said Redhead and his heirs the said pews, and the sole and exclusive right of using the same at all times when Divine service should be performed in the said church, and at all other reasonable times when the said church should be opened for the use of persons frequenting the same. It was admitted that Highfield derived his title from a deed in the same terms, made shortly after the passing of stat. 2 & 3 Vict. c. xxxiii., between Highfield and the persons mentioned in the 4th section, as "the said subscribers to the said church of St. Mark's." The church of St. Mark's was established under the stat. 56 Geo. 3, c. lxxv. By sect. 1 of that statute it was recited, among other things, that several of the inhabitants residing in the parish of Liverpool had procured a lease of land from the Corporation of Liverpool, and had built a church or chapel thereon, with galleries, pews, seats, and other conveniences, accommodations, &c.; and that the subscribers to and promoters of the said church or chapel having purchased from the corporation the freehold reversion and inheritance in fee simple of the said church or chapel, had procured the said church or chapel to be consecrated, &c. The statute then enacted, by sect. 4, that certain persons and their successors were appointed commissioners and trustees, &c. By sect. 6, that two persons should be appointed annually to act as churchwardens, with power to collect seat and pew rents; and in case of nonpayment of rent the commissioners and trustees were authorised and empowered to enter upon and sell, or else to sue for and recover the rent by action. By sect. 11, the pews or seats in schedule 1 were for ever to become the sole and exclusive property of the incumbent, and the churchwardens were, out of the yearly rent of the pews and seats in the third schedule, to pay the incumbent of the parish the yearly sum of 250l. By sect. 13 it is enacted that all the pews and seats, save and except those in the first and second schedules (i.e., all the pews and seats in the 3rd schedule), shall for ever be subject to the yearly rents set opposite them in the third schedule; and all such pews or seats shall also be charged with such other rateable leys or assessments to be made as shall be necessary, &c. By sect. 15 it is provided that every purchaser, &c., of a seat or pew, &c., shall pay the rent charged thereon as aforesaid, and every such other rateable ley and assessment as aforesaid; and, in default, the churchwardens shall and may enter upon and hold such seat or pew, or let the same, or sell the same by auction; or the churchwardens may sue for and recover the said rent, ley, or assessment, by action of debt, or upon the case for the use and occupation of such pew or seat, to be brought against the owner, &c. By sect. 17, the commissioners and trustees, and their successors, are empowered to let or sell, and transfer and convey, "for the purpose only of attending Divine service," all and every of the pews or seats, &c., which are not by the Act otherwise appropriated, &c. By sect. 20 such sale can be made only to such as are at the time inhabitants of one of the two parishes which are named. By sect. 21 the seats in schedule 2 are free seats. Schedule 3 comprises all the pews in the church or chapel which are not in schedule 1 and 2. The pews in question are in schedules 3. In the stat. 2 & 3 Vict. c. xxxiii., sect. 4 is as follows:—"Whereas doubts have arisen as to the estate and interest which the subscribers to and proprietors of the said church of St. Mark took in the pews and seats set forth in the third schedule of the recited Act, be it enacted that the fee-simple and inheritance of and in the said pews or seats set forth in the third schedule shall be vested in the said subscribers to the said church of St. Mark's, or the proprietors for the time being of the pews and seats, their heirs and assigns for ever; and they are hereby authorised and empowered to sell, dispose of, and convey, all or any of the said seats or pews, together with the fee-simple and inheritance of the same respectively, to any person or persons willing to become purchasers thereof." Upon these facts and circumstances, it was contended for the claimant that, by virtue of the Acts of Parliament, or one of them, and of the deeds, he was possessed of the freehold, not only of the pews, but of the land on which they stood, and if not, but only of the pews, yet that he was entitled to them as free tenements, as being profits arising out of the land, and therefore entitled to vote as being owner of a tenement within the stat. 3 Hen. 6, c. 7. It was contended for the appellant that neither by the Acts of Parliament, nor by the common law, could the grantors to Highfield grant to him more than an easement, and that consequently they did grant only an easement, and therefore he (Highfield) could only grant an easement to the claimant; and it was further contended that if the original grantors could and

C. P.]

GREENWAY (app.) v. HOCKING (resp.)

[C. P.]

did grant more than an easement to Highfield, still he had only, by the terms of his deed, granted an easement to the claimant. The case depends, no doubt, entirely upon the construction of the Acts of Parliament, and the questions which arise are—first, did the Act of Geo. 3 empower the original grantors to grant to Highfield an estate of freehold in the land on which the two pews stood, or a tenement in the pews, in respect of which he might have voted, by virtue of 8 Hen. 6, c. 7; and secondly, if it did not, did the statute 2 & 3 Vict. c. xxxiii., give to the original grantors power to make grants of a freehold estate in the land, or of free tenements within the statute of Hen. 6 in the pews to Highfield. Now, in the first place it must be remembered that, unless the statutes do, or one of them does, expressly give the suggested rights, the ownership of a pew would not carry with it the freehold in the soil, nor more than an easement in the nature of an exclusive right to occupy the pew during Divine service and the times of other religious observances. By the common law there is no property in, nor any right to sell or let a pew or seat in the body of a parochial church or chapel; the freehold is generally in the parson, and the inhabitants have the right to use the church for Divine worship, though the right to use particular seats may have been acquired as appurtenant to particular messuages by faculty or prescription, or, for the time, by the appropriation of the churchwardens or the ordinary. The right in a pew is essentially a right to use it for the services of the church, and at times when it is open for use, subject to the regulations of the church; and there is no right of access to it, or to use it for other purposes, or in any other manner. The word "pew" is said to be derived from the Dutch "puye," and to signify "a seat inclosed in a church" (Johnson's Dictionary); and obvious inconvenience would arise if it were lightly held that each owner of a pew or seat was owner of so much of the site of a church as is comprised within the area of such pew or seat. And again, it is necessary, in order to determine this case in favour of the respondents, to distinguish it from the case of *Hinde v. Chorlton*, in which a similar claim to the present, made upon a statute at all events *prima facie* not dissimilar from the statute in this case, was disallowed. It lies strongly, we think, on those who rely upon the present Acts of Parliament, to show that they clearly enact the unusual consequences sought to be derived from them. Now, on examining the first Act, we find, in the first place, that the freehold and fee-simple in the church or chapel are recited to be in the original subscribers and promoters of the church or chapel, who, after having taken the lease for lives of the site, are said to have purchased the reversion thereof in fee. Secondly, we find that there are no words in the statute assuming to pass any interest in land, but only in terms "in pews or seats." Then we find not only that the pews and seats are subject to payment of rent, but that the churchwardens may assess upon them leys or assessments; and the churchwardens may sue for and recover the said rent, ley, or assessment by action for use and occupation, to be brought against the owner. And when the commissioners or trustees are empowered to sell and convey, it is only for the purpose of attending Divine service. It seems to us that upon a candid consideration of these enactments, it is impossible to say that the Legislature has given to the owners of these pews or seats any freehold interest in the land which is covered by such pews or seats, or in any profit arising out of such land. There are none of the recognised terms for passing such interests, and the incidents imposed on the ownership of the pews and seats, are inconsistent with the rights of ownership in the land. The interest which passes by the statute is in terms an

interest in "a pew or seat"—that is, an interest in the occupation of a pew or seat, to be enjoyed during Divine Service and other times of religious observances. Such an interest is not an interest in land, but an interest of a peculiar nature, created by the Act of Parliament, and more in the nature of an easement, though there are attached to it incidents of perpetuity of possession, which could only be attached to such a right by the power of legislation. The statute has created a special interest in the pews or seats not known to the common law, and such interest exists by force of the statute, but it is of a very peculiar nature, and does not, in our opinion, create such an estate or interest in the land as will confer a vote. In a similar manner this court recognised the creation of a new species of statutory property and interest in water, in case of *The Medway Navigation Company v. Romney*, 9 C. B., N. S., 575. Such being our view of the true interpretation of the statute of Geo. 3, we must next consider the effect of the statute 2 & 3 Vict. c. xxxiii. That statute has, no doubt, very strong words referring to the extent of the interests of owners of some of the pews and seats—namely, those in the third schedule; but it does not seem to us to alter in any way the nature of the subject-matter in respect of which, or in which that interest exists. The subject-matter is still a pew or seat, and not land, or any free tenement, such as was known to the common law, so as to be within the statute of 8 Hen. 4, c. 7. The present case is, as it seems to us, governed by the case of *Hinde v. Chorlton*, for in that case, although the freehold in the church was in the rector, the contention was that the freehold in the land on which the pews were placed, or a freehold in a free tenement, passed to the owners of pews by virtue of certain Acts of Parliament. In those statutes the pews or seats were to be held by the proprietors, their heirs, executors, administrators, successors, and assigns; and the trustees were empowered to sell the pews or seats, and the fee-simple and inheritance thereof; and by the sale and conveyance, the pews or seats were to be vested in the purchasers and their heirs and assigns for ever. Yet the court held that such purchasers were not entitled to be registered. We think that the statutes in the present case in like manner have not the effect suggested by the respondents, and are of opinion that, upon the true construction of the statutes, the decision of the revising barrister cannot be supported, and that it must be reversed.

Judgment for appellant.

Attorneys for appellant, *Beale, Marigold, and Beale* for *R. W. Biggs*, Liverpool.

GREENWAY (app.) v. HOCKING (resp.)

Qualification of a county voter—Pew in church.

By a public Act, 27 Geo. 3, c. 17, after reciting that the chapel of *East Stonehouse, Devon*, was decayed and was not large enough for the inhabitants, it was enacted that certain persons holding offices in the neighbourhood for the time being, and every person who should subscribe 50*l.* or upwards towards erecting a new chapel should be trustees for erecting a new chapel; and by sect. 9 the said trustees were required to set out and appropriate certain pews or seats unto or for the several persons who should subscribe money towards building the said new chapel; and such persons should respectively be deemed proprietors of such numbers of the said pews or seats as should be proportionable to the sums by them respectively subscribed; and such pews or seats should be vested in such proprietors respectively, their heirs, and assigns for ever.

A pew in the said church, exceeding in value 40*s.* a year,

C. P.]

GREENWAY (app.) v. HOCKING (resp.)

[C. P.]

had been duly appropriated to a subscriber and conveyed to a person who claimed upon that qualification a vote for the county. The revising barrister held that he was entitled to have his name on the list of voters:

The court, in accordance with the preceding case, Brumfitt v. The Overseers of Liverpool, reversed the barrister's decision.

At a court held for the revision of the list of voters in and for the southern division of the county of Devon John Greenway duly objected to the following claim to be entitled to vote in respect of property within the parish of East Stonehouse: "Cox, George, Manor-house, Emma-place, Stonehouse, freehold pew No. 74, St. George's Chapel, Stonehouse."

The pews were in St. George's Chapel, within the parish of East Stonehouse, which had been rebuilt under a public Act (27 Geo. 3, c. 17), entitled, "An Act for rebuilding the Chapel of East Stonehouse, in the County of Devon."

By that Act, after reciting that the chapel of the chapelry of East Stonehouse, in the county of Devon, was a very ancient building, and was become much decayed, and was not sufficiently large for the inhabitants of the said chapelry to attend divine service therein, and that the vicar of the parish of St. Andrew, Plymouth, in the said county for the time being, had in right of the said vicarage the nomination and appointment of the curate of the said chapelry, and the Reverend James Formeaux was the then curate thereof, and that the building of a new chapel within the said chapelry sufficiently large for the inhabitants would be a great convenience to them, and would lead to the encouragement of religious worship within the said chapelry, it was by sect. 1 enacted that certain persons therein named, and every person who should subscribe the sum of 50*l.* or upwards towards erecting a new chapel in pursuance of the said Act, and also the lord of the manor of East Stonehouse aforesaid for the time being, the Mayor of Plymouth for the time being, the commandant of the marines in the barracks at East Stonehouse aforesaid for the time being, and the curate and two chapelwardens of the said chapelry for the time being should be and were thereby appointed trustees for taking down the then chapel within the said chapelry, and erecting a new chapel instead thereof, and for carrying the said Act into execution.

And it was thereby further enacted by sect. 4 of the said Act that it should be lawful for the said trustees, and they were thereby authorised and empowered to cause the then chapel of the said chapelry to be taken down at such time as they should think fit, and the materials thereof should be and were thereby vested in the said trustees, and they were thereby authorised and empowered to sell or otherwise dispose of the same for the purposes of the said Act; and it should also be lawful for the said trustees, and they were thereby authorised and empowered by contract or otherwise to cause a chapel to be erected or built upon the site of or near to the present chapel of the said chapelry after such model of such dimensions, and in such manner as the said trustees should think proper, and also to cause such pews or seats and galleries, and also such furniture, ornaments, and conveniences to be made, erected, and placed in the said new chapel as the said trustees should think proper or necessary; which said pews or seats should be built as uniform as conveniently might be, and should be numbered in such manner as the said trustees should think proper.

And it was thereby further enacted by sect. 9 that it should be lawful for the said trustees, and they were by the said Act required, to set out and

appropriate a pew or seat in the said new chapel unto or for the said curate of the said chapelry; and the same should for ever afterwards belong to the curate of the said chapelry for the time being without his paying anything for the same: provided he or any of his family should reside within the said chapelry; and that all other the pews or seats in the said new chapel should be respectively set out and appropriated by the said trustees unto or for the several persons who should subscribe money towards building the said new chapel; and such persons should respectively be deemed proprietors of such number of the said pews or seats as should be proportionable to the sums by them respectively subscribed, and should respectively have the preference in the choice of the situation of their pews or seats according to the amount of their respective subscriptions; and such pews or seats should be vested in such proprietors respectively, their heirs and assigns for ever.

The pew in question was set out and appropriated by the trustees to a subscriber to the building of the chapel, and had been conveyed by such subscriber to the person who had conveyed to George Cox.

It was admitted that the pew exceeded 40*s.* a year in value.

George Cox occupied the pew by himself and family.

No evidence was given to show in whom the freehold of the soil was vested previous to the passing of the Act.

On behalf of the appellant, who quoted *Hinde v. Chorlton*, L. Rep. 2 C. P. 104, it was contended that the voter was not entitled to vote, the Act having only conferred an easement upon him.

On behalf of the respondent it was contended that the Act conferred a freehold interest to subscribers to whom pews were appropriated by the trustees. That the present case was distinguishable from *Hinde v. Chorlton*, the vicar of the parish of St. Andrew not being made a trustee under the Act; that the money was subscribed for the purpose of building the church and not paid for pews after the church had been built; and that the Act contained no restriction from parting with the pews to other than parishioners.

The revising barrister held that the voter was entitled to have his name on the list of voters.

If upon the facts stated the court should be of opinion that the Act conferred such an interest as to entitle the holder to vote in the election of knights of the shire, then his name was to remain on the list of voters.

If the court shall be of a contrary opinion, it was to be erased.

Mellish, Q. C. (with him *Charles*) for the appellant.—The freehold in the pews or seats must be in the parson unless it is otherwise shown, and there is nothing in this Act to vest in the proprietors more than a right to occupy at certain times: (*Hinde v. Chorlton*, L. Rep. 2 C. P. 104; 15 L. T. Rep. N. S. 472.) Various inconveniences would arise from extending the right to a vote upon the occupation of a pew; e.g. widows and single ladies, who want the seats in churches most, would have to pay more for the indulgence of their piety, if men could obtain votes by renting pews.

Lopes, Q. C. (with him *Bosanquet*) for the respondent.—Sect. 9 of the local Act in clear language creates a property in the subscribers, and the fact that no person is limited to the possession of one seat shows that it was not intended to create a mere personal right. By 8 Hen. 6, c. 7, a chooser of knights of the shire must "have free land or tenement to the value of 40*s.* by the year;" and tenement is defined (Co. Litt. 6a and 19b) to be "a large

[NISI PRIUS.]

CHAPMAN v. POLE, P. O.

[NISI PRIUS.]

word to passe not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprender out of lands, and the like, wherein a man hath any franktenement, and whereof he is scised *ut de libero tenemento*;" also "it includeth not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure." What is the claimant's right to this pew but a tenement? The case of *Hinde v. Chorlton* is distinguishable from this, because there the freehold was found to be in the vicar, and the conveyance was limited in its form, and could be made only to parishioners.

Mellish, in reply.—The passages in *Co. Litt.* relate only to profits *a prendre*, and there is no authority for holding an easement in gross to give a right to a vote.

Cur adv vult.

Feb. 23.—BOVILL, C. J.—In this case, acting in accordance with the judgment we have given in the preceding case of *Brumfitt v. The Overseers of Liverpool*, and also with the judgment in *Hinde v. Chorlton*, we are of opinion that the decision of the revising barrister must be reversed.

Judgment for appellant.

Attorneys for appellant, *Pattison, Wigg, and Co.*
Attorneys for respondent, *W. Harris, for J. Kelly, Plymouth.*

NISI PRIUS.

KINGSTON SURREY SPRING ASSIZES— CIVIL COURT.

March 28, 29, and 30.

(Before COCKBURN, C. J.)

CHAPMAN v. POLE, P. O. (a).

Contract—Insurance—Nature of—Contract of indemnity—Fraud.

A policy of insurance against fire is, in its nature, a contract of indemnity, and the insured is not entitled to recover more than such an amount as will indemnify him against the actual loss or damage sustained according to the real quantity and value of the goods at the time of the fire. An honest claim is not, under the condition against fraud, invalidated on account of error, or even some degree of exaggeration or over estimate; and in such a case the insured will be entitled to recover according to the real value and the amount of actual loss sustained. But if the claim is wilfully and intentionally excessive that will amount to such fraud as will under the ordinary condition against fraudulent claims, invalidate the claim altogether, and disentitle him to recover at all.

Action against the public officer of the Sun Insurance Company on a fire policy. Declaration upon a policy of insurance by the plaintiff in the Sun Fire Society, the insurance being from loss or damage by fire on his household goods, wearing apparel, printed books, and plate in his then dwelling-house, 380*l.*, china and glass therein, 30*l.*, pictures and prints therein 40*l.*, stock utensils, fixtures, 100*l.*, from 10th Feb. 1866, till 25th March 1867, the company agreeing to pay all damage which the plaintiff should suffer by fire not exceeding upon each head of insurance the sums above mentioned, amounting in the whole to no more than 500*l.* according to the terms of the printed proposals, the conditions of which were, *inter alia*, that the persons insured sustaining any loss or damage by fire are

forthwith to give notice thereof at the office, and as soon as possible afterwards deliver in as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their solemn declaration, and by their books of account, or such other proper vouchers as shall be reasonably required until the production of which the loss money shall not be payable; and if there appear any fraud or false swearing, or that the fire shall have happened by the procurement or wilful act, means, or contrivance of the insured, he shall be excluded from all benefit from the policy. Averment that the plaintiff at the time of making the policy, and thence until the time of the damage and loss, was interested in the premises insured to the amount insured thereon respectively, and while the policy was in force the goods and premises insured were burnt and destroyed by fire, whereby the plaintiff suffered damage and loss on the furniture, goods, and premises respectively, and all conditions were fulfilled. Breach, nonpayment of the loss and damage.

Pleas, 1. That the plaintiff was not interested as alleged. 2. That the goods and premises insured were not, nor was any part thereof, burned and destroyed as alleged. 3. That the plaintiff did not, as soon as possible, after sustaining the said loss or damage, deliver in as particular an account of his loss or damage as the nature of the case would admit of, as required by the said conditions. 4. That the plaintiff did not, although required so to do by the company, make proof of his loss and damage by solemn declaration, as required by the conditions. 5. That the plaintiff did not make proof of his said loss and damage by his books of account, or by such other proper vouchers as the company reasonably required. 6. That there appeared to be, and was fraud in the claim made by the plaintiff upon the company, for and in respect of the said alleged loss and damage, &c., on account of the said loss or damage delivered to the company's office.

M. Chambers and J. Thompson for the plaintiff.

Ballantine, Serjt. and F. M. White for the company.

The policy was effected in Feb. 1866. The fire occurred on the following Sept., and the claim was made forthwith for 418*l.* as for a total loss, but no particulars were delivered until required under the conditions. The particulars of the claim when delivered appearing—on comparison with the salvage and debris—grossly exaggerated, payment was refused. In Nov. this action was brought, and in Feb. 1867 interrogatories were delivered to the plaintiff, which, not being answered, the action was stayed until, in Jan. 1870, they were answered, and the action proceeded.

After the plaintiff made a claim of damage to the amount of 418*l.*, further particulars being required, in October particulars of claim were delivered, claiming large sums for specific articles to each room. The plaintiff also made a statutory declaration in the usual form "that the said estimate or account contains, to the best of my knowledge and belief, a true and faithful account of the loss and damage sustained by me in my said goods and chattels, all of which were my own property, and were in and upon the said house when the fire happened, and were burned, lost, or damaged by the fire; and that my real and just loss on the said goods and chattels occasioned by the fire amounts to 418*l.*; and I make this solemn declaration conscientiously believing the same to be true." It had appeared, however, on the report of the inspector as to salvage and debris, that it was impossible there could have been the quantity and value

[NISI PRIUS.]

CHAPMAN v. POLE, P. O.

[NISI PRIUS]

of the goods represented, and in one of the rooms remaining unconsumed, the contents, valued at 30*l.*, were not worth 3*l.*; and in the bedrooms the remains of cheap iron bedsteads, worth a few shillings, were found in the place of mahogany, stated as worth 15*l.*; while the debris of crockery, &c., found would only represent a few shillings' worth, instead of 33*l.*, the value stated; and other heads of claim were found in the same proportion to exceed the real value.

The company, however, having disputed the claim, and having in this action interrogated the plaintiff as to the mode in which he had acquired the goods insured, he stated in his answer that he had purchased the greater part of them at sales, and had them many years before the policy, though some of them were given to him, and some by one Bennett, an attorney, now dead. Being cross-examined as a witness, he stated that he had purchased them nearly all from Bennett, and had given him between 300*l.* and 400*l.* for them. He also stated that in July he had assigned the goods to one Walker for advances to the amount of 400*l.* The plaintiff was called, with Walker, in support of his claim, but could give no particulars or vouchers. Strong evidence, however, was given on the part of the company to show that the furniture was of the poorest description, not worth above 50*l.*; that a great part had been removed in June, so that at the time of the fire the things in the house were not worth more than 30*l.* The brokers, from whom the plaintiff had purchased the furniture were called, and the amount and nature of the purchase proved; and, in addition to this, the servants were called and gave similar evidence. Altogether, the case for the defence was of the strongest kind.

Chambers, however, in reply on the part of the plaintiff, insisted that it was a case of mere exaggeration or over estimate in the amount of the claims, that there was no evidence to show such fraud as would invalidate the claim *in toto*; that therefore it was the duty of the company to make an offer of what they considered to be the real amount, and pay it into court upon the claim; and that it was unfair to hold the claimant at arm's length, treat it as a case of fraud, and dispute the claim *in toto*.

COCKBURN, C. J., to the jury.—In consequence of the observations which have been made upon the conduct of the Insurance Company, I feel it to be my duty to say that I consider that in insisting on a full and searching examination into the case in a court of justice, the defendants, the Sun Fire Insurance Society, have only discharged their duty to their shareholders and the public. Beyond all doubt this is a case deserving of such an examination and inquiry; for, whatever may be its result, from beginning to end the case presents itself under circumstances of grave suspicion, and calling for searching inquiry. The issue for you to determine in substance upon this case is whether the plaintiff has made an honest or dishonest claim—the issue is fraud or no fraud. If the defendants have failed to satisfy you that the claim was fraudulent, the plaintiff is entitled to recover, and in that case the only question will be, what was the real value of the goods destroyed? for that is all he is entitled, in any event, to recover. But if you think the defence is made out, and that, in point of fact, with reference either to the quantity or value of the goods, the plaintiff knowingly preferred a claim he knew to be false and unjust, then he is entitled to recover nothing. That is one of the conditions in the policy, and the company are entitled to stand upon the defence. And considering how exposed they are to deception, and how rarely they are able to establish it

by proof, in my opinion when they have a case in which they are honestly convinced that fraud has been perpetrated, and that they have sufficient evidence of it to submit to a jury to establish it, then they are not only fairly entitled, but they are bound to do so. For you will do well to bear in mind that the rate of insurance is calculated upon the average of losses as compared with profits; and the more the company is subjected to deception and fraud the higher the rate of premium which they are obliged to charge. Therefore, the public have an interest in such cases, and the company is bound to defend them when they have fair ground for so doing, as they certainly have in this instance. We must start in such a case with certain principles. It is not certainly a question of mere accuracy or inaccuracy. A man may make a mistake in his claim, and it may be quite honestly. If, for instance, a man either fails to recollect the precise quantity of goods he has on his premises at the time of the fire, or mistakes the value of those of which he was in possession, and thus he presses a claim according to what he believes honestly to be true, but which may, in the end, turn out to be mistaken, the only consequence which ensues is, that inasmuch as the contract of insurance is simply a contract of indemnity, he can only recover to the extent of the real value of the goods he has actually lost. You must not run away with the notion that a policy of insurance entitles a man to recover according to the amount represented as insured by the premiums paid. It is essentially a contract of indemnity. If a man chooses to insure goods worth 100*l.* at a rate of premium which represents a value of 500*l.*, he can only recover the real and actual value of the goods. The law will not allow of gambling in the form of insurance. Insurance companies are subject to fraud enough as it is, and if persons were allowed to insure goods to a greater amount than the real value, it is obvious that a door would be open to fraud and wickedness of the most abominable description. Therefore, in all the cases the only question—supposing the claim to be honest—is, what was the real and actual value of the goods destroyed. But beyond that—although the insured has not caused the fire—yet, if he has made a fraudulent claim, then, on such a condition as is contained in this policy, he must fall by the fraud he has thus attempted to perpetrate, and is not entitled to recover at all. Such being the legal principles on which the question to be determined arises, it is for you to determine upon the evidence. If you believe the evidence for the defence it is clearly established, and it is a gross and scandalous case of fraud. According to that evidence the claim was grossly excessive, not only in point of value, but as to the quantity and character of the furniture insured; and it is not easy to conceive of such gross exaggeration being honest. A man may be somewhat mistaken as to the exact value or the precise number of the articles of furniture he possesses, but he can scarcely be so grossly ignorant of the furniture of the rooms in which he lives and sleeps as honestly to represent articles worth a few shillings or pounds as worth large sums of money. If, then, you believe the evidence for the defence, it is your duty to find for the defendant, as in that view a more scandalous fraud never was attempted.

Verdict for the defendant.

Attorney for plaintiff, Hicklin.

Attorneys for defendants, Randall and Angier.

PROB.]

In the Goods of ANDERSON—KELLY v. KELLY.

[Div.]

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Feb. 8.

(Before LORD PENZANCE.)

In the Goods of ANDERSON.

Will—Codicil—Revival—Mistake in date.

In preparing a codicil to the last will and testament of a testator, the solicitor by mistake referred by date to a former will which was revoked by the will subsequently executed. The court on affidavits explaining how the mistake had arisen, negatived the presumption that the testator intended to revive the former will, and granted probate with the codicil of the latest will.

George Anderson, deceased, duly executed a will on Feb. 13, 1864. On June 24, 1865, he executed another will, revoking all former wills, and on June 21, 1869, he executed a codicil which commenced thus: "This is a codicil to the last will and testament of me, George Anderson, of Keelby, in the county of Lincoln, grazier. Whereas by my will dated 13 Feb. 1864, I gave and devised my real estate in Keelby, in the county of Lincoln, devised to me by my father, unto my son George Anderson, his heirs, executors, and assigns, for ever. And, whereas, since the date of my said will, my said son, George Anderson, has departed this life. Now I do declare this to be a codicil to my said will, and do hereby revoke the said devise so far, and so far only, as regards the house and premises in which I now reside." The codicil then went on to devise the said house and premises to his daughter charged with the payment of 550*l.*, and it concluded thus: "in all other respects do ratify and confirm my said will."

Both wills were prepared by the testator's solicitors, Messrs. Marris and Smith, and were by them deposited in an iron chest. In June 1869, the testator sent for Mr. Marris to make a codicil to his will, and gave him the following instructions in writing: "I wish for the house in which I live, and the property connected therewith, left by my will to my late son, George Anderson, to be given to my daughter, Fanny Anderson, for which she shall give me an equivalent out of my other property." Mr. Marris on his return home prepared the codicil, and in order to insert the date of his will, he told one of his clerks to get the will of George Anderson out of the will chest. The clerk by mistake brought the will of Feb. 13, 1864, and its date was inserted in the codicil under the supposition that it was the last will of the testator. Both the wills contained a devise of the real estate at Keelby, devised to the testator by his father, to his son George Anderson.

Dr. Tristram now moved for probate of the will of June 24, 1865, and of the codicil of June 21, 1869, as together constituting the last will and testament of George Anderson. He cited:

In the goods of Steel, L. Rep. 1 P. & M. 575;

In the goods of Wilson, L. Rep. 1 P. & M. 575.

LORD PENZANCE:—In this case the court has got to say whether under the words of the statute this codicil shows an intention to revive the first will, and whether the court can go into evidence to show that a blunder was made. I can find no such intention. It alludes to the death of the son, which is an event which occurred after the second will. In this view I think the court ought to grant probate of the second will with the codicil.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Feb. 1, 2, and 9.

Before the full Court (Lord PENZANCE, J. O., CHANNELL, B., and HANNEN, J.)

KELLY v. KELLY.

Judicial separation—Cruelty—Undue exercise of marital authority.

Held, by the full court (confirming the judgment of the Judge Ordinary), that mere moral coercion, if systematically exercised for a sufficient time and to a sufficient degree to injure the health of the wife, and to bring her to the brink of a serious malady, amounts to legal cruelty, and entitles the wife to a judicial separation.

This was a suit for judicial separation on the ground of cruelty instituted by Mrs. Frances Kelly against her husband, the Rev. James Kelly, incumbent of St. George's, Liverpool.

The case was tried before the court on the 19th, 20th, 24th, 25th, 26th, and 27th Nov., and Dec. 7, 1869, and the Judge Ordinary, after taking time to consider his judgment, pronounced a decree of judicial separation: (21 L. T. Rep. N. S. 564.)

The respondent appealed to the full court, and the case was argued on Feb. 1 and 2.

Dr. Deane and Inderwick for the petitioner.

Mr. Kelly conducted his own case.

Cur. adv. vult.

Feb. 9. CHANNELL, B.—This is an appeal to the full court from a decision of the Judge Ordinary. Lord Penzance is desirous that my brother Hannen and myself should first state our views. I proceed, therefore, to deliver our joint opinion. The appeal is by the Rev. James Kelly against a decree whereby the Judge Ordinary, on the petition of the appellant's wife, Frances Kelly, decreed in favour of the petitioner for a judicial separation from her husband on the ground of cruelty. Mr. and Mrs. Kelly were married in Ireland in the year 1841. There was issue of the marriage a child, deceased, and a son, now living, who was born in 1845. With the exception of a visit made by Mrs. Kelly to Wales and Ireland, Mrs. Kelly lived under the same roof with Mr. Kelly from the time of the marriage until Jan. 1869. Since that time Mr. and Mrs. Kelly have ceased to cohabit, Mrs. Kelly having left her husband's home, and claimed from this court the decree for judicial separation now appealed against. There is some evidence that on one or two occasions Mr. Kelly laid hands on Mrs. Kelly against her consent. But the evidence is so slight on this head that we think it safer to treat the case (as it was considered by the Judge Ordinary) as one on which there is an absence of any proof of such physical violence towards the wife on the part of the husband as would justify a decree. The question then arises whether the decree is erroneous in holding that, although there was not such actual physical violence on the part of the husband towards the wife, there is shown to be that cruelty which will entitle her to ask this court for a decree for a judicial separation. The appellant seeks the reversal of the decree on two grounds—first, that the Judge Ordinary has erred in point of law in the definition which he has given of cruelty; and, secondly, that the evidence does not establish that the appellant has been guilty of legal cruelty. The passages in the judgment of the Judge Ordinary in which he has laid down the principles upon which his decision is based are the following: "The peculiar

[Div.]

KELLY v. KELLY.

[Div.]

and distinguishing feature of this case is the adoption by the respondent of a deliberate system of conduct towards his wife with the view of bending her to his authority. If force, whether physical or moral, is systematically exerted for this purpose in such a manner, to such a degree, and during such a length of time, as to break down her health and render serious malady imminent, the interference of the law cannot be justly withheld by any court which affects to have charge of the wife's personal safety." "Moreover," says his Lordship, "the decisions have imparted this further proposition as a condition of the court's interference, that the troubles of the wife are not owing to her own misconduct." We are of opinion that the above cited passages contain an accurate and, so far as was necessary for the determination of the case, a complete statement of the law on the subject. It would be difficult to frame a definition of legal cruelty which should be applicable to all the cases which may arise. The object of the Matrimonial Court in exercising its jurisdiction in decreeing for judicial separation for cruelty is to free the injured consort from a cohabitation which has been rendered, or which there is imminent reason to believe will be rendered, unsafe by the ill-usage of the party complained of. It is obvious that the modes by which one of two married persons may make the life or the health of the other insecure are infinitely various, but as often as perverse ingenuity may invent a new manner of producing the result the court must supply the remedy by separating the parties. The most frequent form of ill-usage which amounts to cruelty is that of personal violence; but the courts have never limited their jurisdiction to such cases alone, as will be clearly seen by reference to some of the authorities. His Lordship then cited several decisions on the question of cruelty, and afterwards referred in detail to the evidence in the case, which he said had satisfied the court that the acts imputed to Mr. Kelly as amounting to legal cruelty were established. The court adopted the view of the evidence taken by the Judge Ordinary, and dismissed the appeal.

LORD PENZANCE, J.O.—The appellant has loudly complained that the subordinate facts of this case, and especially the numerous charges made by him against his wife, did not find a place in the judgment now under appeal. It was not needful that they should have done so, and for several reasons. First, these charges of impropriety, or such of them as were established, were, in my judgment, either justified, or, at least, rendered pardonable, by the appellant's own conduct. Secondly, they were wholly insufficient if they had been all true, and without excuse or palliation, to justify the treatment of which the petitioner complained. And, lastly, because they could not (if the quarrel in reference to Mr. Kelly's son and to Colonel Thornbury be excepted) have made the cause of the "affectionate discipline," as Mr. Kelly called it, which he pursued towards his wife, inasmuch as the commencement of that discipline preceded their occurrence. I do not venture to hope that the views of others, however dispassionate, may suggest to the appellant that he can possibly be wrong in his estimate of all that his wife did. But after the appeal he has made to the court for the expression of its opinion on this topic, I think it is not right to be wholly silent. [His Lordship then referred to the various grounds of complaint alleged by Mr. Kelly against his wife, and remarked that Mr. Kelly appeared, from first to last, to have kept out of sight the inevitable results of the course he was pursuing towards her. His wife had, in his opinion, done wrong, and it was his duty to make her repent; but the question what should happen if repentance did

not come seemed never to have disturbed his serenity.] There never was a case (his Lordship continued), of matrimonial dispute which ultimately depended so little upon the truth or falsehood of the evidence of the parties themselves. It is due to the respondent, and equally to the appellant, to say that in my opinion they neither of them willingly deviated from the truth in the account of the facts upon which the decision of the court must rest; nor, indeed, upon those facts is there any essential contradiction. Thus far upon the facts. On the legal principles involved in this case I have nothing to add to or withdraw from the expressions used in the judgment under appeal. I forbear to cite cases. In my judgment the principles of every case in which the court has decreed separation on account of cruelty apply to this case. But as conclusions wide of the truth, and much broader than the judgment warrants, have been sought in argument to be drawn from the words there used, I would add something by way of fuller and further expression. In determining whether a case is made out for the interposition of the court, reliance is not to be placed on any one feature of the case to the exclusion of the rest. It is not to be said from anything which the court has here decided that this or that is denied to the husband or permitted to the wife. The health and safety of the wife is, no doubt, the leading consideration. Still, it is necessary that due regard should be had, not only to the degree in which that safety or health appears to have been compromised or placed in jeopardy, but to the clearness with which this fact is established in evidence. So, again, it is necessary that the acts of the husband, by which the wife's health or safety is said to have been thus threatened, should not only be proved, and the alleged consequences plainly deduced from them, but their motives examined and their causes considered. And, finally, the conduct of the wife herself by way of provocation, must not only be taken into the account, but her demeanour under even unmerited oppression or unprovoked cruelty, must be studied by the court. It is upon the sum of these considerations that the court can alone decide whether a case is made for a decree. The appellant affirms that a new law has been made to meet his case, and that it will form a dangerous precedent. I hope not. To the best of my judgment it is the case which is new, and not the law. I have searched the recorded decisions of the Matrimonial Courts in vain for a case the features of which in any considerable degree resemble the present. It has no parallel in the past, and as to becoming a precedent it is hardly likely to find one in the future. So much injustice, so much perversion of mind, so much abiding rancour for so trifling a cause, so much deliberate oppression under provocation so slight, moral chastisement so severe administered with so much system, maintained with such tenacity up to the brink of so perilous a danger to health, with so utter a disregard of consequences, and all to extort confession of acts never committed, and force repentance without consciousness of wrong will probably never be exhibited again. That such a case should recur it would be necessary that to an inflexible will should be added the power of self-deception in an inordinate degree, so that the promptings of angry resentment should be mistaken for the voice of duty, and that while religion should be put forward to sanction and even enjoin a harsh and cruel retaliation, the leading precepts of religion, humility, and forgiveness should be altogether forgotten or but little heeded.

Appeal dismissed with costs.

Attorneys for petitioner, Gregory and Co.

BANK.]

Re —. WATHEW AND ANOTHER v. MAVROJANI AND OTHERS.

[EX. CH.]

COURT OF BANKRUPTCY.

Reported by JOHN LEVY, Esq., Barrister-at-Law.

DUBLIN.

Tuesday, March 15.

Re —.

Goods sent by English manufacturers to Irish holders.

Although goods may be "sent on sale" by English manufacturers to Irish traders, where the words "or return" do not appear, and that no commission ever appeared by the account between the parties to have been paid, upon the bankruptcy of the trader the goods will not be given back to the manufacturer.

Woodlock, in this case, applied on the part of an English agricultural implement manufacturer that certain goods which remained unsold should be returned. In the invoice sent with the goods the words "sent on sale" appeared, and the manufacturer made an affidavit that the goods were sent on sale or return; the trader made an affidavit denying that fact, but he, counsel, relied on the facts of the case. The custom appeared to be that whatever remained on hand at the end of the season were to be held over for the manufacturer or owner until the following season; but it was quite clear that having been merely "sent on sale," the property still remained in the original owner, and it would be great injustice to compel him to take a small composition on his debt, instead of getting back his property. It was a matter in which English manufacturers in that line were much interested. If the words "or return" were added, there could be no doubt about it; but such was not necessary. The simple question was, did the property still belong to the original owner? The question of reputed ownership did not arise in this case.

Houston for the creditor.—The application is untenable. There was an affidavit by the trader that there was an absolute sale, and in confirmation of that view of the case there did not appear, after a long series of dealings, to ever have been any charge for commission.

HARRISON, J. said:—It would appear at first sight that the property still belonged to the manufacturer, but upon looking over the whole account it did not appear that any commission was ever charged, or any of the goods sent on sale returned. The case might be said to be important to English manufacturers, but they could protect themselves by having the contract, that if the goods were not sold they should be returned. He would refuse the application, but he would not give costs.

Attorneys for the English creditor, *P. A. Smith.*Attorney for the trader, *Molloy and Waters.***EXCHEQUER CHAMBER.**

Reported by H. LEIGH, Esq., Barrister-at-Law.

ERROR FROM THE COURT OF EXCHEQUER.

Feb. 8 and 9.

(Before BOVILL, C. J., MEILLOR, M. SMITH, LUSH, HANNEN, and BRETT, JJ.)

WATHEW AND ANOTHER v. MAVROJANI AND OTHERS.

General average—Perils of the sea—Stranding of ship—Landing of cargo—Expenses of floating ship—Liability of cargo to—Benefit of shipowner—Common peril and common benefit—English and American authorities contrasted.

The doctrine of general average depends upon the general

principle that there must be a common danger, actual or impending, affecting all parties, and an extraordinary expenditure or a voluntary sacrifice on the part of some or one of the subjects to avert the general peril, and then all must contribute their apportioned share.

A vessel, lying moored in port at Calcutta, with a cargo on board on freight for England, was, on the 5th Oct., blown by a cyclone from her moorings, and driven, in a damaged condition, upon a mud bank in the river, where she grounded. Under the advice of surveyors, the ballast and cargo were discharged in order to lighten the ship, and by the 19th Oct. the whole of the cargo had been taken in flats from the ship, and was safely warehoused at Calcutta, under the superintendence and control of the agents of the shipowners. The surveyors then recommended extraordinary means to be employed to prevent the ship becoming a constructive total loss, and, under that advice, operations under a contract were commenced for that purpose by the said agents, and continued until the 24th Nov., when the contractors, failing to float the ship, abandoned their contract. Another contract was then, under the like advice, entered into by the agents with other contractors to float the ship for 2300l., the operations under which proved successful, the ship being, on the 31st Dec., floated off the bank, and taken into dock at Calcutta to be repaired; and, the repairs being completed by the 15th March, the cargo, which had remained warehoused at Calcutta in the possession of the agents of the shipowners from the 19th Oct., was reshipped on board, and was carried to England and safely delivered to its owners.

Held (affirming the judgment of the Court of Exchequer below, and adopting the principle laid down by the Court of Queen's Bench in *Job v. Langton*, 6 E. & B. 779; 26 L. J. 97, Q. B.; and *Moran v. Jones*, 7 E. & B. 523; 26 L. J. 187, Q. B.) that, the cargo being in safety when the contract for floating the ship was made, there was no common peril and no common benefit, and the principle of general average did not apply; and therefore the owners of the cargo were not bound to contribute towards the expenses incurred by the shipowners in floating the ship; the latter alone being benefited by such expenditure by being thereby enabled to continue and complete the voyage; it being a matter of indifference to the owners of the cargo whether the ship floated or sank, or whether the cargo were forwarded by the same ship or another.

But, *semble* (per M. Smith and Hannen, JJ.), under exceptional circumstances as e.g., if the cargo or goods should be unshipped on a desolate island, or could not be otherwise carried on to their destination, or could only be so carried on at an increased cost, or after long delay and consequent deterioration in value, the expenses of floating a stranded vessel may be the subject of general average as against the cargo owner:

Hallett and others v. Wigram and others, 9 C. B. 580; 19 L. J. 281, C. P.; and *Kemp v. Halliday*, 13 L. T. Rep. N. S. 256; 34 L. J. 238, Q. B.; 6 B. & S. 764, discussed and approved of.

The difference between the English and American doctrine and authorities on the subject of general average pointed out, and the English view preferred.

Error from a judgment of the Court of Exchequer on a special case.

This was an action to recover 670l. 5s. 8d., claimed by the plaintiffs from the defendants, under the circumstances hereinafter mentioned, and by consent of parties and a judge's order the following special case was stated, without pleadings, for the opinion of the Court of Exchequer.

The plaintiffs are the owners of the ship *Southern Belle*, and the defendants are merchants carrying on business in London, under the firm of *Ralli and Mavrojani*, and having agents in Calcutta.

Ex. Ch.]

WATHEW AND ANOTHER v. MAVROJANI AND OTHERS.

[Ex. Ch.]

Prior to the 5th Oct. 1864 the defendants had by their aforesaid agents shipped on board the *Southern Belle*, then lying safely moored in the port of Calcutta, a cargo of linseed for conveyance to England, on freight payable on delivery of the cargo in England. On the said 5th Oct. the port of Calcutta was visited by a cyclone of extraordinary violence, which drove the *Southern Belle* from her moorings ashore in a damaged and disabled condition upon a mudbank in the river. From the 7th to the 19th Oct. the crew, with a number of coolies, were employed in partly dismantling the ship, and in discharging her cargo and ballast, in accordance with the recommendation of surveyors, who advised that all means should be adopted to lighten the ship forthwith, and to dismantle her, as it would, in their opinion, be otherwise impossible to remove her from the position in which she lay.

Before the 19th Oct. the whole of the cargo had been unladen, and taken in flats to Calcutta, and there safely warehoused, under the superintendence and control of the agents of the shipowners. On the 19th Oct. a surveyor examined the ship, at the request of the agents of the shipowners, and made the following report:

Calcutta, 19th Oct. 1864.

I hereby certify to having this day, and at the request of Messrs. W. C. Stuart and Co. examined the ship *Southern Belle*, lying stranded on the bank at Ramskistopere, and declare as follows:—That I sounded round the vessel at high water, and found only three feet aft, increasing along the port bilge, and the same quantity at the starboard side, increasing to seven feet at the stern. The nature of the bank was, originally, soft, and nearly a level before her stranding, but it has been much altered since by obstructions in the shape of a wreck, jettisoned coals, and other property likely to assist the silt forming a higher embankment, and which appears to be rapidly increasing. From the circumstances above noted, it is my conviction that the vessel will not float on the coming spring, and without extraordinary means are employed to get her off the strand, the ship will become a constructive total loss. I therefore recommend that public tenders be invited without delay for the purpose of floating the ship, the *Southern Belle*.

N. HICKFORD, Member of Lloyd's, Surveyor of Shipping and for Local Insurance Offices.
ROBERT CARR, Master of ship *Gem*.

In accordance with that recommendation public tenders were invited for the purpose of floating the ship, and shortly afterwards Messrs. Browning and West contracted with the agents of the shipowners to launch and float the ship for the sum of 15,000 rupees; but on the 24th Nov., their efforts proving to be of no avail, they declared their inability to perform their contract, and abandoned the same accordingly. Thereupon, at the request of the agents of the shipowners, surveyors again surveyed the ship, and recommended that further means should be taken to float her, and accordingly the said agents entered into a contract with Messrs. Burns and Co. to float the ship for 2300*l.*, in pursuance of which contract Burns and Co. proceeded to make an embankment, and to construct a dock round the vessel, which dock was, by means of a steam pump, filled with water, and in this manner they succeeded, on the 31st Dec., in floating the ship, and in mooring her safely in the river.

The ship was then taken into dock at Calcutta and repaired, and the repairs being completed on the 15th March, the defendants' cargo, which had remained warehoused at Calcutta in the possession of the agents of the shipowners since the 19th Oct. as aforesaid, was, on the 22nd March completely reshipped on board the vessel, and was then conveyed to England, and there safely delivered to the defendants. According to the estimate of the surveyors the ship in her damaged condition was worth 35,000 rupees, and would, upon being repaired, be worth from 85,000 to 90,000 rupees at Calcutta.

The shipowners, the plaintiffs, contended that the amount of 2800*l.*, paid by them to Messrs. Burns

and Co. for floating the ship as before mentioned, constituted general average expenditure, towards which the defendants as owners of the cargo were bound to contribute their proportionate share, and they brought this action to recover such share from the defendants. The court was to be at liberty to draw all inferences of fact which a jury would be justified in drawing.

In Trinity term 1867 the Court of Exchequer, after argument had been heard, gave judgment in favour of the defendants, and thereupon the plaintiffs brought error.

Grounds of error on the part of the plaintiffs: First, that the expenses in question are the subject of general average, and that the cargo was liable for contribution thereto. Secondly, that the expenses in question were part of a continuous operation for the common benefit of ship and cargo. That the judgment of the Court of Exchequer was erroneous in law.

Points argued on the part of the defendants:—1. The expenditure of the 2300*l.* was incurred only for the safety of the ship and freight, and the completing the adventure, and not for the purpose of saving any part of the cargo. 2. That saving the ship and cargo was not one continuous operation within the meaning of the rule laid down in *Moran v. Jones*, 7 El. & Bl. 523; 26 L. J. 187, Q. B.

Aspinall, Q.C. who (with *Little*) appeared to argue on the part of the plaintiffs, contended that the judgment of the Court of Exchequer below was erroneous, and that the expenses incurred in floating the vessel were properly general average expenses. What was done from the first moment of the vessel getting fixed on the bank to the time when she was floated off and moored in safety in the river, including the unloading of the cargo, and taking it in flats to Calcutta where it was warehoused, under the superintendence and control of the agents of the shipowners, formed one continuous transaction or operation. It was one adventure in which the whole cargo was at risk. It was necessary to lighten the ship in order to get her off the bank on which, in a disabled condition, she had grounded, and where she lay in imminent peril to both the ship and cargo. In order to lighten her, and so to save both ship and cargo, the latter was unshipped and taken on shore. Being thus lightened, after one unsuccessful effort to float her, the ship was at length gotten off the bank and safely moored in the river. The necessary repairs being complete, the cargo, which had never been out of the control of the shipowners, was reshipped on board, and the voyage was then completed, and the cargo duly delivered. The whole adventure was at risk, and what was done to get the ship off was done, and the expenses *bonâ fide* incurred, for the common benefit of ship and cargo, which were both in peril. The decision of this court in the present case will be either for or against the plaintiffs, according to the view which the court may take of the doctrine laid down in the two cases in the Court of Queen's Bench of *Job and another v. Langton*, 6 E. & B. 779; 26 L. J. 97, Q. B.; and *Moran v. Jones*, 7 E. & B. 523; 26 L. J. 187, Q. B. It is contended, on the part of the present plaintiffs, that the decision of the Court of Queen's Bench in *Job v. Langton* is erroneous and inconsistent with the decision of the same court in the subsequent case of *Moran v. Jones*, in which it is submitted that the more accurate and correct rule is laid down. That latter case very closely resembled the present case in its facts. The true test in the matter was, whether or not the voyage had been abandoned. Now there had been no abandonment here. The liability to general average continues, it is submitted, until the property has been completely separated from the rest of the cargo, and

EX. CH.]

WALTHER AND ANOTHER v. MAVROJANI AND OTHERS.

[EX. CH.]

from the whole adventure, so as to leave no continuity of interest remaining. That complete separation had not taken place here, and the continuity of interest remained. The enterprise was not abandoned, and the property, though removed from the ship for the purpose of lightening the latter, and to enable her to float, was still under the control of the captain and shipowners, and was liable to be, and was, in fact, again taken on board for the purpose of the voyage being prosecuted. A common interest, therefore, remained, and what was done in floating and saving the ship was done for the protection and benefit of the cargo as well as of the ship, and so was done at the common expense. [BOVILL, C. J.—Would not that general proposition apply equally to repairs for enabling the ship to complete her voyage?] It may not be easy to draw the line between them, but practically the rule may be confined to extraordinary expenses, such as the cost of raising and floating a submerged or stranded ship: (See *Moran v. Jones*.) [Cohen, for the defendants, *contra*, referred to *Kemp v. Halliday*, in the Queen's Bench, 6 B. & S. 764; 13 L. T. Rep. N. S. 256; 34 L. J. 233, Q. B., and the observations of Blackburn, J., in his judgment there, upon the case of *Moran v. Jones*.] The American courts and authorities, which on such a question are worthy of respectful consideration, strongly favoured the view now submitted on the part of the plaintiffs: See

Parsons on Shipping, 392, *et seq.* :

2 Parsons on Maritime Insurance, 264, *et seq.* ;

Macandrew v. Thatcher, 3 Wallace, 347 ;

Nelson v. Belmont, 5 Duer, 310; on appeal,

7 Smith's N. Y. Rep. 36; and

Beavan v. The United States Bank, 4 Wharton, 301.

In giving his judgment in the Court of Appeal in the case of *Nelson v. Belmont*, 7 Smith N. Y. Rep. 36, Selden, J. discusses, at great length, the English cases of *Job v. Langton*, and *Moran v. Jones*, and in the course of his judgment he says: "The case of *Moran v. Jones* was, I think, rightly decided; but I cannot resist the conclusion that the idea of a continuous operation, commenced before and completed after the removal of the goods, was resorted to in order to reconcile the decision with that of the previous case of *Job v. Langton*." [M. SMITH, J.—In *Moran v. Jones*, the goods were the goods of the shipowners themselves. BRETT, J.—Is not the difference or break between the English and American doctrine this—that they hold that all the expenses, which are necessary to the completion of the voyage, are the subject of general average, whilst we hold only such to be the subject of general average as are necessary to save the cargo, and has not that distinction been strictly observed by our courts since the cases before Lord Ellenborough and the Court of Queen's Bench, of *Plummer v. Wildman*, 3 M. & S. 482, and *Power and another v. Whitmore*, 4 M. & S. 141? M. SMITH, J.—The question in every case is how we are to apply the principle to the particular facts. Even in America it is held that there must be a common danger and a common benefit.] He cited also

Hall and another v. Janson, 4 E. & B. 500;

24 L. J. 97, Q. B.;

Hallett and others v. Wigram and others, 9 C. B. 580; 19 L. J. 281, C. P.

Abbott on Shipping, 457;

Cohen for the defendants, *contra*, was not called upon.

BOVILL, C. J.—I am of opinion that the judgment of the Court of Exchequer in this case must be affirmed. There is no doubt at all that the costs of all repairs, which are rendered necessary to a ship by the ordinary perils of navigation, and which

are needful in order to enable her to prosecute and complete the voyage and adventure, must be borne by the shipowner, who has undertaken, under the usual conditions and exceptions, to carry and deliver the cargo to its port of destination. Such repairs are costs incurred for the benefit of the ship only, and are not, therefore, the subject of general average. But, where extraordinary costs, losses, or risks, are incurred, in order to save the cargo as well as the ship, a different rule is then applicable; such costs, losses, or risks, being incurred for the common benefit of all parties interested, all such parties, being exposed to a common danger, must contribute their proportionate share towards the payment of them. That is the general principle; and that is not disputed by the defendants in the present case. From time to time, however, it has been attempted to introduce exceptions to the rule. Thus in *Hallett v. Wigram*, 9 C. B. 580; 19 L. J. 281, C. P., an attempt was made to cast a portion of the costs of repairs of the ship upon the owner of the cargo, and upon the very same grounds as those upon which Mr. Aspinall has, to-day, contended that the owners of the cargo in the present case are liable; and, in order to test the principle of law involved in the matter, the point was expressly raised, by the defendants in that case, upon the pleadings. That was an action, by the owners of the cargo, to recover from the shipowners the value of a part of the cargo, which had been sold for the purpose of raising money wherewith to pay for repairs, which were rendered necessary by tempestuous and stormy weather. The pleas there alleged that "on the occasion of the ship so being, by the force and violence of the winds and waves, and by means of stormy and tempestuous weather, damaged and injured, as in the first count mentioned, the ship became and was, in consequence of the said injury and damage—the same then being dangers and accidents of the seas and navigation—broken, leaky, dangerous, and incapable of further prosecuting her voyage, and that it became and was necessary, for the preservation of the ship and her cargo, and to enable her to complete her voyage, and to prevent the ship and her cargo from being wholly lost and destroyed, and for the common benefit and advantage of the plaintiffs, and all persons interested in the cargo, or in the completion of the voyage, that the ship should put and sail back, as in the first count mentioned, to have the cargo unloaded and taken from on board, and the damage and injury repaired." There were further allegations in the plea, "that the ship did sail and put back, for the purposes before mentioned to the most proper and convenient port, &c.; that the cargo was then unloaded, and the ship repaired for such common benefit and advantage as aforesaid, and not for the exclusive benefit or advantage of the defendants, or for the benefit or advantage of the defendants or owners of the ship, more, or in a greater degree, than of the owners of the cargo; that such repairs were necessary and requisite for the completion of the voyage, and such costs and expenses were then incurred for the said repairs, and in and about the unloading of the cargo as aforesaid; and that such costs greatly exceeded the value of the ship when repaired, and that the said repairs were such as ought not to have been done except for the purposes of conveying the cargo to the port of delivery, and the same would not have been done if the cargo could otherwise have been conveyed to such port." In that case, therefore, by the most precise and distinct allegations that the repairs, which were rendered necessary by the damage done to the ship by the violence of the winds and waves, were necessary or were done for the common benefit and advantage of both the ship and the cargo, it was sought to establish the principle, which Mr. Aspinall has

Ex. Ch.]

WALTHER AND ANOTHER v. MAVROJANI AND OTHERS.

[Ex. Ch.]

argued for before us to-day, that repairs which are necessary to enable the ship to carry forward the cargo, and which, but for that purpose, would not have been required, and so are done for the common advantage of both cargo and ship, are general average repairs, towards which the cargo owner must contribute. But the Court of Common Pleas decided against any such principle. In delivering his judgment in that case, Wilde, C. J., at p. 601 of 9 C. B., and pp. 288, 289, of 19 L. J., C. P., says, "It is in respect only of the incapacity of the particular ship to carry the goods forward to their destination that the pleas show that the cargo was in danger of being wholly lost. It is difficult to see how the repair of the ship could be for the benefit or advantage of the plaintiffs. The plaintiffs' goods were of a description not to be deteriorated to any great extent. The pleas allege that the cargo could not be conveyed to its port of destination by any other ship; but it appears, both from the declaration and the pleas, that the cargo consisted of other goods besides those of the plaintiffs, and there is no allegation that the plaintiffs' goods might not have been forwarded by another ship, or that they were in any immediate peril. This is, therefore, the case of ordinary sea damage, which the shipowner must repair at his own expense. The claim for general average arises where a part of a shipper's goods is sold or destroyed for the purpose of relieving the rest from some impending peril." Again, his Lordship says, "If, during a voyage, by stress of weather or otherwise a vessel is in immediate danger of being lost, and part of the cargo is thrown overboard, or a mast is cut away, as a means of preventing the total loss of vessel and cargo, that loss, being incurred for the common benefit of all concerned, shall not be sustained by the owners of the ship alone, but by a general contribution from all. There is no analogy between such cases and the present, where the injury arose from the ordinary perils of the sea, and the whole cargo was landed in safety." And in another part of his judgment, the Chief Justice, after referring to the cases which had been cited, quotes the following observations of Lord Tenterden, from his work on shipping (Abbott on Shipping, p. 497, 5th edit.). "It seems to result from these decisions that, if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, the necessary expenses of port charges, wages, and provisions during the stay, are to be considered as general average. But if the damage were incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner to keep his vessel tight, staunch, and strong during the voyage for which she is hired." And in a subsequent part of the same judgment the Chief Justice says, "It seems to me that the fair import of what Lord Tenterden lays down is to exclude from general average damage like this, and I therefore think that the sale of part of the cargo, under the circumstances stated in the plea, does not give any right to general average." Now, nothing could be stronger than the allegations in the plea in that case on which to establish the principle sought to be there established, yet the Court of Common Pleas, notwithstanding the clear and express allegations that the repairs were done for the safety of the cargo, distinctly and deliberately declined to adopt the principle contended for. A similar attempt was afterwards made in the Queen's Bench, in the subsequent case of *Job and another v. Langton*, 6 E. & B. 779; 26 L. J. 97 Q. B., to charge, against the owners of cargo, expenses incurred in getting a vessel off a shoal, after

the goods had been removed and were in safety. It was there said, as it has been said here to-day, that there was a distinction between the actually repairing a vessel, and the raising and getting her off a shoal or bank and placing her in safety in a place where the repairs could be effected; and that in the latter operation there was a community of interest, the ship and cargo being both in peril, and a joint benefit accruing to both parties; that the goods, although transshipped, were still under the control of the shipowner, and the adventure was not abandoned; that the taking the ship off the shoal was necessary for the completion of the voyage, and that the subsequent repairs were an exception only. The Court of Queen's Bench, however, repudiated that argument, and the principle sought to be thereby established, on the ground that the cargo was safe, and the vessel only was in peril, and that, according to all the authorities in such cases, the owners of the cargo were not liable, the expenses incurred not being extraordinary expenses incurred for the joint benefit of ship and cargo, and not being distinguishable from the costs of ordinary repairs. The facts of that case appear to be undistinguishable from those of the case now before us, and the principle laid down in that case is applicable here. The only distinction which Mr. Aspinall could point out between the two cases was that another and subsequent case, in the Queen's Bench, of *Moran v. Jones*, 7 E. & B. 523; 26 L. J. 187, Q. B., was, as he contended, inconsistent with that of *Job v. Langton*, and that we must decide between them and follow the decision in *Moran v. Jones* rather than that in *Job v. Langton*. The case of *Moran v. Jones* was a peculiar one certainly. The facts there are very similar, though not quite so similar, to those of the present case as the facts in *Job v. Langton* are. We must, however, in judging of the decision, take not only the facts which are stated, but the inferences which are drawn from them. In *Job v. Langton*, the Court of Queen's Bench, after a very learned argument, took time to consider before delivering judgment, and in *Moran v. Jones*, the same court not only did not interfere with but, on the contrary, expressly adhered to the principle laid down by them in *Job v. Langton*, and I find nothing in *Moran v. Jones* to throw the slightest doubt on the decision in *Job v. Langton*. In *Moran v. Jones* the case turned on a different state of facts, and on the inferences drawn from these facts by the court. It was an action for freight by the owner of the ship against the underwriter, but the question raised in the case was the principle on which contribution ought to take place, the defendant (the underwriter) desiring to make the cargo liable for general average. But, on looking at the case itself, and the facts there stated, it appears that the goods in question which had been removed were not the general cargo, but a small quantity only of goods belonging to the shipowner himself. The vessel was chartered by the plaintiff, the owner, out and home, to bring a cargo of guano from Callao, and, by consent of the charterers, liberty was given to the plaintiff to ship on freight, on his own account, on the outward voyage, a small quantity of goods for Callao; in accordance with which arrangement goods to the value of 600*l.* were shipped on board, with which, and some 800 tons of ballast, the vessel set sail from Liverpool to Callao in performance of the voyage mentioned in the charter-party. The freight under the charter-party, on the completion of the voyage, would amount to about 6750*l.* Shortly after leaving Liverpool, and on the same day, the vessel encountered a heavy storm, and was forced to anchor near the Hoyle bank, when, the foremast being cut away, she drove and got firmly fixed on the bank. In the narrative of what followed, as given in the average-stater's

EX. CH.]

WALTHER AND ANOTHER v. MAVROJANI AND OTHERS.

[EX. CH.]

adjustment, nothing particular was said about the goods; but there is the following passage:—"The sea made a complete breach over her, and she continued to strike heavily, straining and twisting very much. At noon on the 8th she floated and drove further on the bank, and struck very heavily, the decks rising about 2ft. each time that she struck. On the 9th, the weather being more moderate, assistance was procured from Liverpool, and men were employed in moving the wreck from alongside, and the materials of the ship, which, with some goods belonging to the shipowner, had been intrusted to the master, were all sent in lighters to Liverpool. On the 14th a stream anchor was carried out. The ship was afterwards scuttled, and about 300 tons of ballast were thrown overboard, and then the ship, being kept free by pumping, floated. The stream anchor and cable were then slipped, and the vessel was taken in tow by two steamers, and was anchored in the river Mersey. . . . When the repairs were completed the vessel was again fully ballasted, the goods were re-shipped, and she again set sail on her voyage." The only goods, therefore, stated to have been unshipped and reshipped were this small lot of goods of the shipowner; and it is not at all surprising that, with the above statement before them, and having to draw inferences, the court came to the conclusion, although the goods were landed before the expenses were incurred, that it was all one continuous transaction and operation. *The goods and the materials of the ship were saved together, at one and the same time, and by one and the same operation.* The case therefore proceeded entirely on the particular facts. Lord Campbell, C. J., in delivering the considered judgment of the court, therein says (at p. 533 of 7 E. & B., p. 191 of 26 L. J. Q.B.) "The goods had been taken from the ship and put on board a lighter before these expenses were incurred; and if this had been a separate operation, by which they were intended to be saved, for the benefit of the owner of the goods, we should have thought, as in (*Job v. Langton*) that the goods were not liable to contribute to the expenses subsequently incurred. Looking, however, to the facts stated in this special case, it seems to us that the act of putting the goods on the lighter was only part of one continuous operation, viz., getting the ship off the bank on which she was stranded, and sending her to Liverpool, where she might be repaired with a view to prosecute the original adventure. When she got to Liverpool the operation of saving her from shipwreck was completed, but the expense of this continuous operation for the common benefit of ship, goods, and freight, are the subject of general average. In *Job v. Langton*, we considered that the goods had been saved by a distinct and completed operation, and that afterwards a new operation began, which could not be properly distinguished from the repairs done to the ship to enable her to pursue the voyage. The steam-tug did not work at the ship, and does not appear to have been engaged till after the cargo was landed, and the coals and ballast had been taken out of her. In giving judgment in that case (*Job v. Langton*), the court then observed, 'The employment of the steam-tug and the cutting of the channel by which the ship was rescued, cannot, as was contended for, be part of the same operation as the unloading of the cargo. Under the circumstances stated, after the cargo had been safely discharged and landed, it does not even appear that it was for the advantage of the owner of the cargo that the ship should have been got off the strand and repaired. The owner of the ship, after the cargo was discharged, appears to us to have done nothing, except in the discharge of his ordinary duty as owner, and for the exclusive benefit of the ship.' But in the case on which we have now to adjudicate (*Moran v. Jones*) the

goods were put into a lighter by the master of the ship, along with materials of the ship saved from the wreck, and they remained in the custody and under the control of the master till the ship was repaired, when they were reloaded in the ship and carried forward, without any interference by the owner of the goods, to their destined port. Unless it had been intended that an operation should be undertaken and completed, by which both ship and goods should be rescued from the peril to which they were exposed, nothing might have been done, and the goods might have perished. Because the goods happened to be saved in the earliest part of the operation, this can be no sufficient reason for saying that they ought not to contribute to all the expenses of the operation, which contemplated the benefit of all the interests imperilled by the stranding." In my opinion the decision in the case of *Moran v. Jones* does not at all interfere or clash with the doctrine laid down in the case of *Job v. Langton*. If there were any inconsistency between them, we are prepared to abide by the decision in *Job v. Langton*; but that is not necessary, for we think that the same principle was affirmed in each case. It is true that the American courts have adopted a different rule, but there is nothing new in that, as their books and authorities show. Their wish and aim are to increase the fund for general average. We, on the other hand, from the date of the case before Lord Ellenborough (*Plummer v. Wildman*, 3 M. & S. 482), have held strictly that there must be a common danger, to which both the ship and the cargo are alike exposed, and a voluntary sacrifice or an extraordinary expenditure incurred for the common benefit of both ship and cargo, in order to bring the latter under a liability to a claim of general average. Let us apply that principle to the present case. What, in the first place, is the plaintiff's claim? It is for the apportioned share which the defendants are, as the plaintiffs contend, bound to contribute towards the amount paid by the plaintiffs to the contractors for floating the ship from off the bank on which she had stranded, and getting her safely moored in the river for repairs, that amount constituting, as the plaintiffs allege and contend, *general average* expenditure. Now it appears that the ship had been driven on shore by the cyclone, and grounded on the bank upon the 5th Oct. By the 19th Oct. all the cargo had been unladen from on board her, and had been taken on shore at Calcutta, and was there safely warehoused, under the superintendence and control of the agents of the shipowners. What, at that time, was the state of the ship? She was still on the bank, and in great peril, and, according to the opinion of competent persons, she would not float. The cargo was then safe, and had the vessel been then overwhelmed by the tide and gone to the bottom, the loss would have been the loss of the ship alone, and would have made no difference whatever to the owners of the cargo. On the 19th Oct. extraordinary means were adopted to save what? why the ship, not the goods. A contract was entered into to save what? not the goods, for they were already safe on shore, but the ship. That effort failed, and the contract was abandoned. After the failure of the first contractors, Messrs. Burns and Co. made a contract to float the ship for 2300*l.*, and it is in respect of that sum alone that the question now before the court arises. Messrs. Burns and Co. succeeded in floating her off the bank on the 31st Dec. when she was taken into dock at Calcutta and repaired; and the repairs being completed by the 15th March the cargo was reshipped on board her from the warehouse, in which it had remained from the 16th Oct., and was then conveyed to England, and there safely delivered to the defendants. Now the general principle upon which the doctrine of general average

Ex. Ch.]

WALTHER AND ANOTHER v. MAVROJANI AND OTHERS.

[Ex. Ch.]

depends is, that there must be a common danger, actual or impending, affecting both ship and cargo. There must be an extraordinary expenditure or a voluntary sacrifice on the part of some or one of the subjects to avert the general peril, and then all must contribute their apportioned share. Here we fail to see who or what was benefited save the shipowners, who, when the ship was repaired, would be able to continue and complete the voyage. The cargo was in safety when the contract for floating the ship was made, and it was a matter of positive indifference to the owners of the cargo whether the ship floated or sank. The cargo was no longer connected with the ship when these expenses were incurred, except that, if the ship were floated and repaired, she might be able to carry it forward. The case fails to show that any advantage would have resulted to the cargo owners from that having been done, over and above that which would have resulted to them from its being carried forward in any other vessel. No expenses were incurred by the shipowners in order to save the cargo, nor has any benefit to the cargo, as derived from the expenses which were incurred, been pointed out by Mr. Aspinall. It has, indeed, been argued that it was all one adventure which was not complete until the goods were in the custody and under the control of their owners, until which event all parties had a common interest in carrying out the adventure. But, in answer to that, it may be said, that repairs are equally necessary to enable the ship to pursue her voyage, and so to complete the adventure, and yet such repairs are not the subject of general average. The contention fails also signally in this respect, that the case is altogether void of the ingredients necessary to constitute general average, namely, a common peril and a sacrifice or expenditure to secure a common benefit. The case is governed by the principle laid down in the case of *Job v. Langton*, and also in that of *Moran v. Jones*. That the principle in the latter case is correct I take for granted from the observations of Blackburn, J. in the case of *Kemp v. Halliday*, 6 B. & S. 764; 34 L. J. 233, Q. B.; 13 L. T. Rep. N. S. 256; affirmed in error, 35 L. J. 156; 14 L. T. Rep. N. S. 752; L. Rep. 1 Q. B. 520. In that case the learned judge, in the course of his judgment in the court below, said, "In order to give rise to a charge of general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy; but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether the shipowner sacrifice a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire the extra services which get her off. It is quite true that, so long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duty, as shipowner it cannot be general average; but the expenditure in raising a submerged vessel with cargo is extraordinary expenditure, and is, if incurred to save the cargo as well as the ship which *prima facie* is the object of such expenditure, chargeable against all the subjects in jeopardy saved by the expenditure. In the last edition of Arnould on Insurance, vol. 1, pp. 231-2, sect. 340, it is said, "A stranded vessel is in most cases in danger of being lost unless speedy steps are taken for her preservation, either by unloading the cargo to lighten her, or by endeavouring to float her by means of lumps, &c., with the cargo in her. The remuneration, which the shipowner is obliged to pay for the services thus rendered, gives a claim to general average contribution, provided such services shall appear to have been incurred for the joint benefit of

the ship and cargo, which will be the case if ship and cargo are both exposed to a common danger, and both saved from it by the exertions employed for their rescue." Blackburn, J. proceeds to say, "This I apprehend is a perfectly accurate statement of the law. In the present case" (*Kemp v. Halliday*) "the greater part of the cargo was on shore and safe before the ship was submerged, but the extraordinary expenditure necessary to save the ship and the portion of the cargo on board would have been chargeable as general average as against them, though not against the part that was safe: See *Moran v. Jones* (*ubi sup.*) I do not mean to say that in every case where a ship with cargo is submerged, and the two are, in fact, raised together by one operation, the expenditure incurred must necessarily be for the common preservation of both. I think it is in every case a question of fact whether it was so; and if the cargo could be easily and cheaply taken out of the ship and saved by itself, it would not be proper to charge it with any portion of the joint operation which, in that case, would not be incurred for the preservation of the cargo." Now in the present case we have the power to draw inferences of fact, and the inference which I draw is, that there was here no common peril and no common benefit; the goods were safe when the expense was incurred, and the principle of general average does not apply. The judgment of the court below must, therefore, be affirmed.

MELLOR, J.—I am of the same opinion.

M. SMITH, J.—I am entirely of the same opinion. I only wish to add that I think there may be cases where, although the goods may have been landed and be safe before the floating expenses have been incurred, yet they might still be in peril in one sense, and so be still a part of a common adventure and liable to general average; as, for instance, if they should be perishable goods, or goods landed on a desolate island in a distant hemisphere. In the present case, however, the goods were safely warehoused in Calcutta; and it was, as we are at liberty to infer, utterly immaterial to the owners of them whether they were forwarded to England by the plaintiff's ship the *Southern Belle* or by any other vessel. No portion of the defendants' adventure was in peril, or risk of loss, or damage of any kind by the delay in waiting to be carried on by the plaintiff's vessel, and therefore the defendants are not liable to general average in respect of their cargo.

LUSH, J.—I am of the same opinion.

HANNEN, J.—I also agree with the rest of the court in thinking that the judgment below should be affirmed. As between the two doctrines, English and American, relating to this matter, I prefer the English, and the principle on which general average is founded, as laid down by our own authorities. I think the English doctrine is the true one. As has already been observed by my brother, M. Smith, it was in this case immaterial to the goods owners whether their goods were forwarded by the same ship or by another: and it generally is so, except, of course, where they could not otherwise be carried on at all, or only at a much greater cost or after a damaging and deteriorating delay, and then the cargo would fairly be liable to general average. But, as a rule, expenses incurred subsequently to the removal of the cargo are incurred for the advantage of the ship alone. In the present case they were incurred, not in order to save both ship and goods from a common impending danger but, after the goods had been removed and were in safety, and, therefore, they were incurred for the benefit of the shipowners alone, and solely

SOMERSET ASSIZES.]

REG. v. HAMILTON KINGLAKE AND LOVIBOND.

[SOMERSET ASSIZES.]

to enable them to prosecute and complete the voyage and adventure they had undertaken.

BRETT, J.—I am of the same opinion. It is unnecessary for us to decide where the precise dividing line here is. I think the judgment of the court below is to be affirmed on the simple ground that, at the time when these expenses were incurred, the goods were safe. I think we ought to stand by the English rule, and hold that where there has been no joint peril and no joint benefit the goods cannot be the subject of general average.

Judgment affirmed.

Attorneys for the plaintiffs, Wright and Venn, 2, Paper-buildings, Temple, E.C.

Attorneys for the defendants, Field, Roscoe, Field, and Francis, 36, Lincoln's-inn-fields, W.C.

SOMERSETSHIRE LENT ASSIZES.

March 29 and 30.

(Before HANNEN, J., and a Special Jury.)

REG. v. HAMILTON KINGLAKE, AND LOVIBOND.(a)
17 & 18 Vict. c. 102, s. 9—*Crimination—Privilege of witness—Pardon.*

A witness who has received a pardon under the Great Seal is not privileged from answering questions, the replies to which may criminate him, on the ground that actions for penalties under the Corrupt Practices Prevention Act are pending against him.

This was an *ex officio* information by the Attorney General against Doctor Hamilton Kinglake, and Mr. Henry Lovibond, containing various counts charging them with bribery, and conspiracy to bribe, at the election for Bridgwater, held in November, 1868.

The *Solicitor-General* (Sir J. D. Coleridge), Cole, Q.C., Kingdon, Q.C., Archibald, and J. F. Collier, for the Crown.

Sir John Karlake, Q.C., Pinder, A. Charles, and Kinglake, for the defendants.

A *nolle prosequi* was entered against Mr. Lovibond, and he was called as a witness by the *Solicitor-General*.

Mr. Lovibond having been sworn, on being asked a question connected with his participation in the last election for Bridgwater, sought the protection of the court on the ground that his reply might criminate him. The *Solicitor-General* thereupon tendered him a pardon under the Great Seal. The witness then appealed to the court to sustain his privilege, on the ground that two actions were pending against him for penalties for what took place at the election, and stated that he had been advised that a pardon could not obliterate the offence as regarded penalties.

The *Solicitor-General*.—I apprehend that a *qui tam* action does not affect this case, the witness cannot refuse to answer because it may act on his position in an action between a subject and himself in respect of money, of course we cannot stop the action of an informer, all we can do is to give Mr. Lovibond a pardon under the Great Seal for any criminal offence of any kind that he may have committed.

Sir J. Karlake.—These *qui tam* actions were both commenced before the pardon.

The *Solicitor-General*.—A *qui tam* action is an action for penalties for money, and I apprehend he cannot object any more than he could if called himself in the *qui tam* action by the informer. If

called, I apprehend he could not refuse to answer because his answer might help the plaintiff in the action.

Sir J. Karlake.—I do not know whether we are entitled to say anything on the subject, but I apprehend the authorities are clear to show that a *qui tam* action is a penal action—they were actions pending before the date of the pardon; they are actions for 500*l.* penalties and more.

The *Solicitor-General*.—I do not think my learned friend has any right to be heard.

HANNEN, J.—I think not, but I shall be obliged to Sir John Karlake if he will give me any assistance.

Sir J. Karlake.—It occurred to us in the investigation, where a person who is a co-conspirator is called, and a *nolle prosequi* is entered, how far a pardon can affect this question. As I understand, the *qui tam* action is for penalties, and severe penalties, under the Act of Parliament. They are brought, it is true, by an informer, but I believe an informer who sues on behalf of himself and the Crown, and the *qui tam* actions were commenced before the pardon. I believe under the circumstances, where a *qui tam* action is commenced and is pending, a pardon has no effect upon it, and the witness is not bound to answer any question that may criminate him. The law affecting him in a *qui tam* action under the head of "Pardon" in Comyn's Digest, vol. 5, is this: "The king cannot by his pardon relieve a man from the consequences of an action commenced *qui tam* upon a penal statute except for the king's moiety or part. He cannot relieve him from the penalty due to the party aggrieved." That has been followed in certain cases, and it has been held to be that a pardon where another person has an interest in that which is the creature of an Act of Parliament, but is of a highly penal character, cannot be in any way affected by a pardon under the Great Seal granted after the action is commenced, and cannot affect the question as to the person who as an informer sues in that penal action, and does not exempt the witness from the consequences of answering, so far as that penal action is concerned. I only cite that for your Lordship's information.

The *Solicitor-General*.—I should submit to your Lordship that the authority my learned friend has read is conclusive against him.

Sir J. Karlake.—Then there is *Dandridge v. Corden*, 3 Car. & P., where Lord Tenterden held that "in an action upon a bill of exchange, if a person called to prove the consideration says that the bill was accepted for value received, but refused to say of what the value consisted, on the ground that it might render him liable to a *qui tam* action, he cannot be compelled to answer." There is also the case of *Rawlings v. Hall*, 1 Car. & P., and *Thomas v. Newton*, 2 Car. & P., which bears upon the subject, and there is the Stock Jobbing Act in *Roberts v. Allnat*, 1 Moo. & M. Rep., where it seems also to be assumed that the witness was privileged, where the question arose under the Stock Jobbing Act, and that Act, which is now repealed, is similar in language as to penalties to the 17 & 18 Vict. c. 102, namely, that the parties committing offences specified shall forfeit and pay the sums mentioned to be recovered by action on debt, bill, plaint, or information. I believe the authorities will be found to be conclusive.

The *Solicitor-General*.—I apprehend the authorities, which I am not going to dispute, are against my learned friend, because they all show so far

(a) Reported by H. F. PURCELL, Esq., Barrister-at-Law.

as the Crown is concerned, the pardon would obliterate the offence, and that the moiety, which would be due to the Crown under the *qui tam*, is foregone by the pardon. Then it remains an action of debt for the penalty, and I apprehend that, as far as the action of the subject is concerned, there being no crime in respect of which Mr. Lovibond can be called upon to answer, the fact that he says it may be an advantage to the subject, cannot affect the Crown, and the cases my learned friend referred to are referable to the same principle in a *qui tam* action. An unpardoned man might expose himself to certain proceedings at the suit of the Crown. The pardon puts an end to all crime, there remains only the civil action; it is not a *qui tam* action, but a civil action for penalties between subject and subject, which, I apprehend, on no principle, can set free the witness from the duty of answering. The Act says: "Any person so offending shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine and imprisonment, and shall also be liable to forfeit the sum of 100*l.* to any person who shall sue for the same, together with full costs of suit." It appears in this case it is not a *qui tam* action, it is for the benefit of the informer himself; it is an action for a penalty at the suit of any person who chooses to bring the action, and I apprehend under no view can the witness be relieved from answering questions, because in that action by somebody that somebody can sue.

Sir J. Karlake.—My learned friend should see that this is treated as a penalty in the 9th clause, where it says, "The pecuniary penalties hereby imposed for the offence of bribery, treating, or undue influence respectively, shall be recoverable by action or suit by any person who shall sue for the same in any of Her Majesty's courts." I only read that from Comyn's Digest as showing the Crown courts only relieve the half of the penalty where it had half. Here the whole goes to the person, and that is treated in the Act exactly as it was under the Stock Jobbing Act.

HANNEN, J.—I confess that I had not anticipated this question, otherwise I would have applied my mind more to it. The difficulty I feel is, that it is a matter that affects the witness himself. It is not a point that can be reserved, and therefore it is necessary I should make up my mind upon it now, because the mischief will be done, if at all, when once my decision is given. [His Lordship retired to consider, and after an absence of an hour, returned into court and said:] I do not know whether you are in a position to give me any further assistance. I have only another question to ask—is it possible that this question can in any way be reserved for the consideration of the court? [The Solicitor-General.—Reg. v. Boyes seems to say your Lordship must decide it, and you alone.] I have not any doubt it is my duty to decide it. [The Solicitor-General.—Your Lordship's own court protested against its being reserved, and said they would decide it, but hoped it would not be drawn into a precedent.] If I could see my way to doing it I should, notwithstanding that intimation of the members of the court at that time, be anxious to have the matter considered more fully than I have been able to do. However, unless the counsel engaged in the case can see their way to it, of course I would not do it. [The Solicitor-General.—I apprehend with great respect it would be matter for new trial.] I do not think it would; I think it rests with the decision. If I thought so I should have very much less hesitation than I have if my decision were not final. But I am afraid that it is final as far as respects the interests of the witness.

HANNEN, J.—If I cannot get any assistance, I must take upon myself what I believe to be my duty, and give my decision now. I repeat that I greatly regret that I had not the opportunity of considering this point further; it is one which, though I have ventured to forecast the questions which might arise, I did not anticipate; but now, having taken time to consider, I have arrived at the conclusion that the witness is bound to answer; and, without travelling through all the stages by which I have arrived at that conclusion, I will state broadly this, that I come to the conclusion that this action, to which only after the pardon the witness can remain liable, is a liability to a debt, or a liability to a civil suit. And I am confirmed in that view by the fact that the Legislature has made the witness liable in the event of this action being proceeded with against him, to give evidence himself in that very case. Therefore it seems to me to confirm the view I take, that a proceeding of this kind is to be regarded only as a proceeding for a civil debt, and therefore I require the witness to answer.

Solicitor for the Crown, the *Treasury Solicitor*.
Solicitors for defendant, *Gregory, Rowcliffes, and Co.*

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Dec. 10 and 18, 1869.

CURRIE AND CO. (apps.) v. THE BOMBAY NATIVE INSURANCE COMPANY (resps.).

Marine insurance—Total loss—Notice of abandonment what sufficient as to terms and time—Duty of captain to cut up wreck to save cargo—Disbursements—Discretion as to transshipping cargo.

Insurances, against total loss only, were effected by the appellants with the respondents upon the cargo and disbursements respectively of the ship Northland for a voyage from Moulmein to Madras. The Northland set sail on June 1st 1867, and on the same day ran aground, and could not be got off. On June 6th surveys were made at the instance of the captain and underwriters respectively, and the surveyors reported, recommending that the ship should be dismantled with all despatch, and that immediate steps should be taken to save the cargo, consisting of heavy timber, padouk and teak. The captain, between June 6th and 10th, dismantled the ship, but did not attempt to discharge the cargo. On June 10th the appellants wrote to the underwriters, stating that the ship was a total wreck, and giving notice that they should claim payment of the policies. On June 11th the same surveyors made a second survey, and reported that it would be impossible to save the cargo without cutting the ship's decks and beams. The captain then sold the wreck and cargo. The purchasers saved nearly the whole of the cargo, discharging it through the hatchway and the timber ports:

Heid (on appeal from the judgment of the Recorder of Rangoon): First. That the letter of June 10th was sufficient notice of abandonment, since, though not containing the word "abandon," it expressed the intention of the assured to give up to the underwriters the property insured on the ground of its having been totally lost. (The dictum of Lord Ellenborough in Parmeter v. Todhunter, 1 Campb. 541, disapproved.)

Secondly. That the notice of abandonment was given in a reasonable time, the delay after the first survey having been a suspense of judgment fairly exercised on the part of the assured, in order to determine whether the circumstances were such as to entitle them to abandon.

Thirdly. That there was no total loss of the cargo; because

PRIV. CO.]

CURRIE AND CO. v. THE BOMBAY NATIVE INSURANCE COMPANY.

[PRIV. CO.]

part, at least, of the cargo might have been saved before or after the second survey, had the captain made proper efforts for that purpose.

Fourthly. That, the ship being a hopeless wreck, it was the duty of the captain to cut up the ship if the cargo could not otherwise be saved; for where a ship and cargo are in peril of loss, the captain must act for the benefit of all concerned, and not prefer the interests of one party to those of another.

The disbursements insured were advances made by the charterer to the captain, to be paid out of freight on the arrival of the ship at the port of discharge:

Held, that there was a total loss of the disbursements, the possibility of freight being earned, having been at an end when the ship became a wreck, and sufficient notice of abandonment having been given: (The Karnak, 21 L. T. Rep. N. S. 159, approved.)

A captain is not under an absolute obligation to transship a cargo when a vessel is disabled from pursuing the voyage insured, but may exercise his discretion upon the subject.

This was an appeal against the judgment of the Recorder of Rangoon, by which he dismissed with costs a claim preferred by the appellants for rupees 40,000, due on two policies of insurance on the cargo and disbursement of the ship, *Northland*, dated 1st June 1867.

The point in dispute was whether the appellants were entitled to recover from the respondents rupees 40,000, insured by the appellants by two policies of insurance dated 1st June 1867, on the cargo and disbursements of the ship *Northland*, viz.:—

One policy, No. 1275, dated 1st June 1867, at Rangoon, effected on the cargo as therein described of the ship <i>Northland</i>	Rupees 38,400
One other policy, No. 1276, also dated 1st June 1867, at Rangoon, described as part insurance on disbursements of the above vessel	Rupees 1,600
Total rupees	40,000

The following is so much of policy No. 1275 as relates to the present appeal:—

The said goods and merchandises, or treasure laden thereon, for so much as concerns the assured, by agreement between the assured and the company in the policy, are and shall be rated and valued at rupees thirty-eight thousand and four hundred only, and declared to be on timber marked and described as per margin, payable in case of total loss only, which shall be proved in case of loss, &c.

The policy also contained the usual saving and labouring clause.

The following is so much of policy No. 1276 as relates to the present appeal.

The said goods and merchandises, or treasure laden thereon, for so much as concerns the assured, by agreement between the assured and the company in the policy, are and shall be rated and valued at rupees one thousand six hundred only, declared to be part insurance or disbursements of the above vessel, described and valued as per margin, payable in case of total loss only, which shall be proved in case of loss, &c.

The policy also contained the usual saving and labouring clause.

The charter-party, dated March 18th, 1869, between the appellants and Captain Howard, the master of the *Northland*, contained the following clause as to disbursements:—

Charterers to advance the master what money he requires for the necessary disbursements of the ship at Moulmein (for the due appropriation of which they shall not be held responsible), not exceeding rupees 8,000, for which he will give his receipt on bill of lading or charter-party, at shipper's option, including agency commission at five per cent. and cost of insurance, and at current rate of exchange for sixty days' sight bills on Madras, the amount to be deducted from freight on settlement thereof, together with the cost of insurance.

Captain Howard gave a receipt for the disburse-

ments indorsed on the charter-party in the following terms:—

Moulmein, 29th May 1867. Received from Messrs. M. R. Currie and Co. the sum of rupees 8,300 only, being disbursements at this port, the amount to be deducted from freight on settlement thereof, as per terms of charter-party.

The other facts of the case are sufficiently stated in the judgment.

Sir R. Palmer, Q. C. and Grantham (Pollock, Q. C. with them), for the appellants. The ship and cargo were sold by the captain, acting on the best advice, for the benefit of all parties, and as an uninsured owner of the ship and cargo would have done. The right to abandon depends upon the fact, whether the sale was or was not justifiable under the circumstances of the case. See

Kidstone v. Empire, &c., Insurance Company, 16 L. T. Rep. N. S. 119; L. Rep. 2 C. P. 357;

Roux v. Salvador, 3 Bing N. C. 266;

Tudor's Lead. Cas. in Merc. Law 139;

Cambridge v. Anderton, 2 B. & C. 691.

In *Farnworth v. Hyde*, 15 L. T. Rep. N. S. 395; L. Rep. 2 C. P. 204, the cargo was of a different character to that in the present case. The cargo was here timber of a peculiarly heavy kind, which would not float, and so could not be rafted. There was sufficient notice of abandonment in the letter of 10th June. Though the word "abandon" was not used; the intention to abandon was clear: (*King v. Walker*, 3 H. & C. 209; 9 L. T. Rep. N. S. 259.) And the notice was in sufficient time. See

Read v. Bonham, 3 Brod. & Bing. 147;

Gernon v. Royal Exchange Assurance Company, 6 Taunt. 383.

Delay in giving notice is important when cargo is of a nature that its value is liable to rise and fall in the market. But here such a consideration could have no place. Further, even had the notice been insufficient, yet the conduct of the respondents shows that they waived the right to a formal notice, and accepted the cargo insured as a constructive total loss. It is therefore submitted that the appellants are entitled to recover the amounts insured under the policies as for an actual, or for a constructive total loss. As to the disbursements, the recorder was wrong in saying, in his judgment in the court below, that they "appeared to be money advanced to the captain for the purposes of the ship, to pay her dues for the port, wages, stores, outfit for the voyage, &c." The payments made by the appellants to the captain for disbursements were moneys paid by them at the time for and on behalf of the captain and owners, and not in any way payments on account of cargo or freight. The right to recover them consequently does not depend on whether freight could have been earned or not, but on those payments being lost. And as the freight out of which the appellants would have paid themselves, and out of which they were to have been paid, was lost, the respondents are liable to pay the amount claimed. [Lord CHELMSFORD referred to the *Karnak*, L. Rep. 2 Priv. Co. 516; 21 L. T. Rep. N. S. 159, where certain advances obtained by the application of the captain to the charterer were held under the circumstances to be "advances of freight to be repaid by deductions from freight, if earned; and if not earned then to be lost by the charterer, unless he should have used the stipulated premium in insuring."]

Sir J. D. Coleridge, Q. C. (Solicitor-General) and Watkin Williams for the respondents.—We admit that the letter of June 10th would be in terms sufficient notice of abandonment. But we contend that the notice was insufficient—first, because not made at the proper time; secondly, because not made under proper circumstances. The object of an early notice is to give the underwriters an opportunity of saving as much as possible. [Lord CHELMSFORD.—

PRIV. CO.]

CURRIE AND CO. v. THE BOMBAY NATIVE INSURANCE COMPANY.

[PRIV. CO.]

Yes, that is the object of requiring a prompt notice rather than the one suggested by Mr. Grantham, viz., to prevent speculations on the rise and fall of markets.] The assured must give notice within a reasonable time, the question as to what is a reasonable time, depending "upon the certainty of the news of the disaster, and upon the nature of the casualty itself. . . . The assured may wait a reasonable time for more accurate information as to the nature of the loss, or the actual extent of the damage. For these two purposes alone can any delay be allowed him. He may not delay in order to observe the state of the markets; nor can he lie by and treat the loss as an average loss until the recovery of the property becomes hopeless, and then give notice of abandonment:" (Arnould on Marine Insurance, vol. 2, p. 858, 3rd edit.) Here the delay in giving notice had not the excuses above suggested. Notice might well have been given on June 5th or 6th; and the difference of a few days was most material in such a case as the present. Next, the circumstances under which the notice was given made it insufficient. The captain did nothing to save the cargo after the survey on June 6th till the 11th of the same month. The captain in his evidence says that he "proceeded to strip the ship," and the "work of dismantling continued, and we went on saving what we could until the 10th." But these exertions were to save the ship, not the cargo. It is clear from the report of the survey on June 6th that there was then no total loss, but that the cargo or some of it might have been saved. Boats were available for discharging purposes, and the cargo was practically imperishable; and after the survey on June 11th, the cargo might have been saved by cutting up the ship. [Sir JOSEPH NAPIER.—The object of the policy was to have the cargo safe at the end of the voyage. Was the captain bound to cut up the ship, and so prevent the possibility of the completion of the voyage?] Yes; where, as here, the ship was a hopeless wreck, and so damaged as to be incapable of repair. The assured cannot recover as for a total loss here, because the cargo existed in specie, and was practically capable of being sent in a marketable state to the port of destination. The question is, whether doing so would have cost more than the value of the cargo. But here the cargo was not damaged, and the only expense would have been in re-shipping the cargo. The expenses to be taken into account are stated in the judgment of the Exchequer Chamber in *Farnworth v. Hyde* (L. Rep. 2 C. P. 225; 15 L. T. Rep. N. S. 396), where Channell, B. said, "Where goods are in consequence of the perils insured against lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury are to determine whether it is practically possible to carry them on, that is, according to the well-known exposition in *Moss v. Smith*, 9 C. B. 94; 19 L. J. 235, C. P., whether to do so will cost more than they are worth; and in determining this the jury should take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but they ought not to take into account the fact that if they are carried on in the original bottom, or by the original ship-owner in a substituted bottom, they will have to pay the freight originally contracted to be paid; that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not." It is, on the whole, therefore submitted that there was no constructive total loss, and that there was no valid notice of the abandonment of the cargo. As to the disbursements, they stand on the same footing as the cargo, and if there

was no right to abandon the latter, there was none to abandon the former. Reference on this point was made to

Hall v. Janson, 4 E. & B. 500;

Flint v. Flemyng, 1 B. & Ad. 45;

Shipton v. Thornton, 9 A. & E. 314;

Manfield v. Maitland, 4 B. & Ald. 582;

Moss v. Smith, 9 C. B. 94; 19 L. J., C. P. 225.

Sir R. Palmer, Q. C., replied.

Cur. adv. vult.

Dec. 18. — Judgment was delivered by Lord CHELMSFORD.—This is an appeal from the judgment of the Recorder of Rangoon dismissing the suit of the appellants brought to recover the amount of two policies of insurance effected by them with the respondents upon the cargo and disbursements respectively of the ship *Northland* upon a voyage from Moulmein to Madras. The policies, which were dated 1st June 1867, were against total loss only. The *Northland*, with a cargo consisting partly of teak and partly of padouk and other timber (of great specific gravity), set sail from Moulmein on the insured voyage to Madras on the 2nd June 1867. She proceeded in charge of a pilot down the Moulmein River in tow of a tug steamer, and came to an anchor about half-past five in the evening of that day. In consequence of the strength of the tide the *Northland* dragged her anchors and went aground about nine o'clock. Endeavours were made during the night to get her off, but without success; and in the morning, the tide having left her, she was found (in the language of the pilot and the captain) "broken," or "almost broken in two." And the captain added, "if there had been any means by which she could then have been got into deep water she would most probably have gone down." The captain procured a survey of the ship, and on the 6th June three surveyors reported that they found her lying ashore on the sands perfectly upright, but hogged to the extent of four feet; and after describing particularly other injuries which she had sustained they concluded their report in these terms:—"In consequence of the vessel being loaded with a cargo of padouk and teak timber we would recommend that she be stripped and dismantled with all despatch, and steps taken to save as much of the cargo and stores as possible for the benefit of all concerned." The underwriters had a survey made on their behalf by a Mr. Peche, upon whose evidence in other respects their Lordships are not disposed to lay any stress, but upon this occasion he substantially agreed with the other surveyors, and reported as follows:—"Her hull is so seriously injured that I recommend prompt and decisive steps to be taken to dismantle and discharge for the benefit of all interested." The captain, in accordance with the recommendation of the surveyors, proceeded to dismantle the vessel, and "sent down spars and sails, and everything above water which they could move." This work of dismantling continued until the 10th June, the day on which a notice of abandonment was given, but nothing was done or attempted towards discharging the cargo, which, according to the evidence of Mr. Dodd, one of the surveyors, by employing extra hands, might have gone on simultaneously with the work of dismantling the vessel. The grounds upon which the captain thought it would be useless to attempt to get out the cargo were stated by him to be that, "at the time the vessel was aground the weather was nasty and squally up to the 10th or 11th June; that at that time of the year bad and heavy weather is to be expected, that he did not think he could have got out a single log of the cargo without destroying the ship by cutting her open. That if the ports (meaning the openings through which the timber was shipped,

PRIV. CO.]

CURRIE AND CO. v. THE BOMBAY NATIVE INSURANCE COMPANY.

[PRIV. CO.]

and under ordinary circumstances would have been taken out of the vessel) had been opened she would have filled with sand; and that if he had attempted to get at the cargo by cutting the ship, with the weather such as it was at the time, he did not think he should have saved any of the ship or cargo." There is some contradictory evidence as to the state of the weather between the 6th and the 10th or 11th June. The pilot, without specifying the exact time to which he was speaking, said, "The weather was very dirty, blowing hard with rain. There was a heavy sea on at high water. At low water it was smooth enough." The notarial protest made by the captain, however, does not state that there was any stormy weather between the time of the vessel grounding and the 10th or 11th June. His description of the weather on each day is, "Thursday, 6th June, commenced with light cloudy weather and variable winds." He gives no account of the state of the weather on the 7th June. On the 8th June he describes it as "squally weather and rain." But on Sunday, the 9th June, this is his description—"Throughout these twenty-four hours fine clear weather and moderate breeze from S.W." On Monday, the 10th June, he states it to have been "fine all day, clear weather, and very hot." And on Tuesday, the 11th June, that the "first and middle part was fine clear weather, and very hot, with fine S.W. breeze." This protest of the captain tends strongly to confirm the evidence of the witness Bodeker, who is the agent of the respondent, and who swore that "there had been unusually fine weather for some time before the second survey." With respect to the reason given by the captain for not making any effort to save the cargo, that none of it could be got out without cutting the ship open, this was not the opinion of the surveyors at the time of the first survey, but on the contrary, they recommend "steps to be taken to save as much of the cargo as possible." And at the trial, Mr. Dodd, the Government Surveyor, said, "On the second occasion on which I visited the ship I did not think it was possible to save the cargo without cutting the ship." And, "When I saw the *Northland* first I think she could have partly discharged her cargo and come up to Moulmein." Another of the surveyors, Mr. Carruthers, said, "It was on the second survey that I came to the conclusion that the cargo could not be got out except by cutting the ship's decks." Before this second survey was made, and while it was the opinion of the surveyors that steps ought to be taken to save the cargo, the assured, the appellants, on the 10th June 1867, wrote to the underwriters in these terms: "With regard to the *Northland*, we regret to say that she is a total wreck, and we have hereby to give you notice that we shall claim payment of the policies we hold against her cargo and disbursements." On the following day, the 11th June, another survey took place by the same three surveyors who had made the former one, and they reported as follows: "The ship is hogged to a fearful extent, and broken amidship, the water flowing and ebbing in and out and through her as the tide rises and falls, and the bow ports under water at high tide. We are of opinion it would be impossible to save the cargo, which consists of Padouk and teak, without cutting the ship's decks and beams, on account of the logs of timber being so severely jammed, which is caused by the vessel being so fearfully hogged and out of shape." After this second survey the captain, on the 14th June, advertised for sale by public auction the wreck of the British ship *Northland*, together with her cargo of timber, in one lot, and on the following day the ship and cargo were sold for the sum of 13,000 rupees. The purchasers immediately after the sale proceeded to discharge the timber, and succeeded

in obtaining all of it except sixty logs. There were two timber ports at the side and one on the deck. These were opened, and the timber was got up through the hatchway and out of the ports, but the greater part was lifted through the hatchway. The person employed by the purchasers to discharge the cargo stated in his evidence that the vessel remained in the same position all the time they were discharging, and that they found no difficulty whatever in getting it out. They worked for thirty-five days uninterruptedly, but on the thirty-sixth day there was a strong wind, and the vessel became a wreck, and thereupon they ceased working and left her. Under ordinary circumstances the cargo could have been discharged in twenty-one days. Upon this evidence the recorder was of opinion that there was no total loss, actual or constructive, within the terms of either of the two policies, and that even if the assured had a right to abandon, there was no sufficient notice of abandonment. Upon the argument before their Lordships, the Solicitor-General for the respondents very properly admitted that the notice of abandonment was in its terms sufficient. The case upon which the Recorder founded his judgment of the insufficiency of the notice was a *Nisi Prius* case of *Parmeter v. Todhunter*, 1 Camp. 541, in which there having been a verbal notice that the ship insured had been captured, recaptured, and carried into Grenada, and that the underwriters were required to settle as for a total loss, and to give directions as to the disposition of the ship and cargo, Lord Ellenborough said "the abandonment must be express and direct, and I think the word 'abandon' should be used to render it effectual." But whatever strictness of construction may have been applied to notices of abandonment in former times, it never could have been absolutely necessary to use the technical word "abandon;" any equivalent expressions which informed the underwriters that it was the intention of the assured to give up to them the property insured upon the ground of its having been totally lost, must always have been sufficient. There can be no doubt that the letter of the 10th June from the assured to the underwriters was a sufficient intimation of the intention of the assured to divest themselves of the property in the *Northland*, and to vest it in the underwriters, subject, of course, to the question of their right to abandon, upon the ground of either an actual or a constructive total loss. The respondents confined their answer to the appellants' case to the denial of there having been a total loss of the cargo, and to the objection that if there were a total loss the notice of abandonment was not given within a reasonable time. What is a reasonable time in a case of this description must depend upon the particular circumstances of each case. On the one hand, the assured is not to delay his notice when a total loss occurs, in order to take his chance of doing better for himself by keeping the subject insured, and then when he finds it will be more to his advantage to do so, throwing the burden upon the underwriters, while, on the other, the underwriters cannot complain of a suspense of judgment fairly exercised on the part of the assured, to enable him to determine whether the circumstances are such as entitle him to abandon. In the present case, assuming the loss to be a total one, there appears to have been no unreasonable delay in giving the notice of abandonment. At the time of the first survey on the 6th June, there was no reason for supposing that the timber would be totally lost. The surveyors at this time recommended steps to be taken which they must have supposed would have been effectual to save some, at least, of the cargo. But at the time when the notice was given (as sufficiently appears by the surveyors' report of the following day), things had assumed a

Priv. Co.]

CURRIE AND CO. v. THE BOMBAY NATIVE INSURANCE COMPANY.

[Priv. Co.]

much more serious appearance, so as to justify the apprehension that the cargo would be entirely lost. Whether the vessel was brought into the condition described in the second survey, suddenly, or gradually between the 6th and the 10th June is not in evidence, but in either case their Lordships think that there was no unreasonable delay in giving the notice of abandonment, and that supposing there was a total loss of the subject insured it would entitle the appellant to recover the amount of the policies. We arrive then at the question whether there was a total loss under the policies. And here we must distinguish between the policy on the timber, and that upon the disbursements, as different considerations are applicable to them. Taking first the policy on the timber, does the evidence show that the assured were entitled to treat the case as one of total loss? It cannot be contended that at the time of the first survey the timber, or at all events some part of it, could not have been saved; and if part might have been saved, the loss, of course, could be only partial. The surveyors were all of opinion that endeavours should be made to get the timber out of the ship, and at the first survey they did not think it would be necessary to cut the decks to effect this object. It was the duty of the assured, or of the captain of the *Northland* (to whom everything appears to have been left), to take some steps in accordance with the recommendation of the surveyors to try and save the cargo. But towards this object the captain literally did nothing. As far as dismantling the ship went he acted upon the report of the surveyors, and continued this particular work down to the 10th June, but according to Mr. Dodd this need not have interfered with the discharge of the cargo, for although the crew could not have assisted in that service, "by employing extra hands both operations might have been conducted together." The excuse offered by the captain for not attempting to get out the timber is that not only at that time of the year "bad and heavy weather" might be expected, but that the weather was actually "nasty and squally," by which he must be understood to mean that it was of such a character as to render it impracticable to make even an attempt to get at the timber. But his evidence as to the state of the weather from the 6th to the 11th June, both inclusive, is positively contradicted by his own notarial protest, to which reference has been already made. It is impossible, therefore, to believe that the state of the weather prevented even the smallest attempt to save any portion of the timber, the weather having been, on the contrary, peculiarly favourable for that season of the year for at least making the experiment. At the time of the second survey things had materially altered for the worse, and from what the surveyors call "the fearful extent" to which the vessel was hogged, the timber had become "so severely jammed," that, in their opinion, it was impossible to save it without cutting the decks. Now, assume for the moment that the cargo was in such a condition at this time that it might be regarded as totally lost, if previously a portion of it, at least, might have been saved by the exertions of the captain acting for the assured, and he chose not to make the slightest attempt to save it, how can the assured recover from the underwriters a loss which was made total by their own negligence? This, in itself, would be an answer to the claim of a total loss upon the policy on the timber. But it is very doubtful whether, at the time of the second survey, there really was a total loss. It is true that it was the opinion of the surveyors that the cargo could not be saved without cutting the ship's decks and beams, and the captain said, "If they had attempted to get at the cargo by cutting the ship, with the weather they had at the time, he didn't think they

would have saved any of the ship or cargo." The captain here again makes the state of the weather an obstacle to doing what was necessary for saving the cargo, but it has been clearly shown that this excuse cannot avail him. If there was nothing in the state of the weather to prevent the operation of cutting open the decks, what reason was there for not resorting to it? When a ship and cargo are in peril of being lost, the captain is called upon to act for the benefit of all concerned, and he is not at liberty to prefer the interests of one of the parties to those of another. In this case, his tenderness to the ship might have arisen from his being a part-owner uninsured, but, at all events, there was no reason why she should have been spared if her sacrifice were necessary to the safety of her cargo. She was a hopeless wreck, and was sold at the auction in that character and by that description. Can it be said that the captain was doing his duty, either to the owners of the cargo or to the underwriters, by not opening this wreck in order to obtain access to the cargo, by the only mode in which it was supposed at this time that it could be saved? But even at the period of the second survey, if any effort had been made by the captain to get at the cargo, some portion of it might have been saved without cutting open the decks. He states, indeed, in his evidence, that "he didn't think he could have got out a single log of the cargo without destroying the ship, and that if the timber ports had been opened she would have filled with sand." But, after the auction, the purchaser, according to the evidence of the person employed by him, discharged almost the whole of the cargo through the hatchways and out of the ports, without apparently experiencing any extraordinary difficulty, except that a longer time was occupied in unloading the timber than would have been required under ordinary circumstances. Whether the timber was taken out of the hatchways without cutting open the decks is not stated. It is said that during the thirty-six days employed on the work the weather was unusually fine, but this has been abundantly shown to have also been the case between the first and second surveys. Their Lordships are of opinion that there was no time between the grounding of the *Northland* and the sale by auction, at which the assured were entitled to treat the cargo as having been totally lost. They have already adverted to the absence of even the smallest attempt on the part of the captain after the first survey to save the cargo, and to the extreme probability that with the favourable weather which occurred afterwards and before the ship was hogged to such an extent as that the timber became "severely jammed," a considerable portion of it would have been obtained. This omission of the captain to take any steps towards saving the cargo, at a time when it was probable that his endeavours would be successful, in their Lordships' judgment, precludes the assured from claiming for a total loss of the cargo into whatever condition it might have been brought afterwards. But even at the time of the second survey, as the *Northland* had then become a perfect wreck, there was no reason for sparing her, and if the timber could not be got out without cutting up the decks, their Lordships think that the captain, who is bound where there is danger of loss of ship and cargo to act for the benefit of all concerned, ought to have treated the ship as utterly lost, and to have regarded only the interests of the owners of the cargo and of the underwriters. As far, therefore, as the judgment of the Recorder applies to the policy upon the cargo, their Lordships are of opinion that he came to a right conclusion that the assured were not entitled to recover. With respect to the policy on disbursements their Lordships cannot agree with

[CHAN.]

Re THE WESTERN LIFE ASSURANCE SOCIETY.

[CHAN.]

the Recorder's judgment. The disbursements were advances made by the charterer to the captain of the *Northland*, to be paid out of freight which would not be earned except by the arrival of the vessel at Madras. There can be no doubt, upon the authority of the case of *Droege v. Stuart and Simpson* (The *Karnak*, 21 L. T. Rep. N. S. 159; L. Rep., 2 Priv. Co., 505), decided by the Judicial Committee on the 15th July last, that the sums borrowed by the captain from the charterer at the port of loading, to be repaid by deductions from the freight, must be considered as advances of freight, and that the charterer had therefore an insurable interest. The possibility of freight being earned by the *Northland* was of course at an end when she was reduced to a wreck, and the case became one of total loss. It was argued, on the part of the respondents, that the captain might have hired another vessel and forwarded the timber to its destination, and so have earned freight out of which the disbursements might have been paid. But even supposing that the advances made upon the original freight would attach upon the freight thus acquired, the captain is not under an absolute obligation to transship a cargo when a ship is disabled from pursuing the voyage insured, but may exercise his discretion upon the subject. And while the ship was unquestionably a wreck, and utterly incapable of conveying the goods to their destination, and so earning freight, the assured gave notice of abandonment to the underwriters (which their Lordships have determined to be a good notice), and at this time there is no doubt there was a total loss of the disbursements which were to be paid out of freight. Their Lordships therefore will recommend to Her Majesty that the judgment appealed from be varied so far as relates to the policy on disbursements, and that it be declared that the appellants are entitled to recover on that policy, with so much costs of suit as according to the course of the court below he would have been entitled to if the judgment had been given for him on that policy, and that in respect of the other policy the judgment be affirmed, and that the cause be remitted to the court below in order that a final decree be made in accordance with the above declarations. Their Lordships think there should be no costs of the appeal on either side.

Judgment varied.

Agent for the appellants, *Upfill*.Agents for the respondents, *Uptons, Johnson, and Upton*.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by THOMAS BROOKSDANK and E. STEWART ROCHE, Esqrs., Barristers-at-Law.

Thursday, Feb. 17.

(Before LORD JUSTICE GIFFARD.)

Re THE WESTERN LIFE ASSURANCE SOCIETY;
Ex parte WILLETTS.

Winding-up—Amalgamated companies—Official liquidators—Advisability of appointing the same person for all.

The *A.* company having amalgamated with the *W.* and several other companies, was ordered to be wound-up. Claims against the *W.* Society remaining unpaid, a creditor obtained an order that that society also should be wound-up by the court. Notwithstanding that conflicting claims and interests must arise between the *A.*, the *W.*, and the other amalgamated companies, or some of them, an order of James, V.C. appointing the official liquidator of the *A.* to be official liquidator of the *W.* was affirmed, on the ground of probable saving of expense.

In all independent and adverse questions between the companies, separate solicitors ought to represent the several companies.

On 17th Sept. 1869 the Albert Life Assurance and Family Endowment Society, which had under various titles carried on business in London since the year 1835, was ordered to be wound-up by James, V.C., and two gentlemen were duly appointed official liquidators for that purpose. That company had during its existence formed amalgamations with several other companies carrying on life assurance and kindred business, and amongst these was the Western Life Assurance Society, which had been at the date of the winding-up of the Albert absorbed in that company for several years. Policies and liabilities of the Western had been taken over by the Albert, and when this latter passed into liquidation the claims thence arising were not paid. A petition was then presented by a creditor for the winding-up of the Western, and the usual order was made by James, V.C., who appointed one of the gentlemen acting as official liquidator of the Albert to be the sole official liquidator of the Western.

Such an order was opposed by the petitioner who had procured the winding-up of the Western, on the ground that, as between that company, the Albert, and the numerous other companies which had been so amalgamated, there would of necessity arise a great conflict of interests, and that therefore it was not advisable that the same person should act as official liquidator for any two of them, and on the order being made he now appealed.

Kay, Q.C. and *Waller* supported this appeal for the reasons stated, which appear more fully from the judgment of the Lord Justice.

Cracknall, for the official liquidator, the Western Society.

Sir Roundell Palmer, Q.C., Eddis, Q.C., and Higgins in support of the order, were not called on.

Fry, Q.C. and *Solomon* for other parties.

LORD JUSTICE GIFFARD—I will not trouble you Sir R. Palmer. This is an appeal against the appointment of a liquidator, the Vice-Chancellor having exercised his discretion as to that appointment. I have listened with a great deal of attention to the reasons which have been given why that discretion has not been well exercised, but I confess I cannot accede to those reasons. In point of fact, if those reasons were good for anything, there would be a multitude of liquidators appointed for these different companies to begin with, beyond all doubt. In the next place there must be an immense mass of ordinary administrative business, irrespective of litigation altogether, applying to all these companies and very much mixed together, and whatever gentlemen make themselves masters of the affairs of the Albert Company, must to a great extent, be masters of the affairs of all the other companies also. Therefore for that reason alone there will be a great saving of expense, if the same liquidators are appointed both of the Albert and all the other companies. The argument is that there are independent and adverse questions between the companies interested. That, no doubt, is true. But then, first of all it is to be observed, that all proceedings are in the names of the companies, and not in the names of the liquidators; in the next place, the liquidators are officers of the court; in the next place, it is very easy to appoint separate solicitors who, in point of fact in cases of this sort, would take care of the interest in respect of which they are appointed, and, besides that, the whole matter is under the direction and control of the Vice-Chancellor in Chambers; and

[CHAN.]

Re NICHOLL'S TRUSTS—*Ex parte* PALMER; *Re* PALMER.

[CHAN.]

have no doubt whatever that when James, V. C. appointed one and the same liquidator he also gave directions, and will give such directions, with respect to the raising of these particular questions, as will enable these separate solicitors who will have been appointed, to bring these independent questions properly and fairly and completely before the court. That being so, I have no hesitation whatever in affirming this order, and dismissing this application with costs. I may add that if the parties are dissatisfied it cannot be helped, but I do not think that there will be any ground for dissatisfaction. I think there would be great and grave ground for dissatisfaction if any other course had been adopted than that which the Vice-Chancellor has thought fit to adopt.

Saturday, Feb. 26.

(Before Lord Justice GIFFARD.)

Re NICHOLL'S TRUSTS.

Practice—Trustee Act 1850, s. 24—Vesting order—Surviving trustee—Executors—Refusal by two executors to transfer to person entitled—Third executor lunatic.

There were three executors of the surviving trustee of a settlement. One of them was a lunatic. The other two, when requested by the person who was absolutely entitled to some shares which were included in the settlement to transfer the shares to him refused to do so:

Held, that there was no jurisdiction under sect. 24 of the Trustee Act 1850, to make an order vesting the shares in the person absolutely entitled to them, but that it would be necessary to present a petition entitled in lunacy.

Even if the lunatic executor had been of sound mind, the refusal of two of the executors to make the transfer would not have given the court jurisdiction under sect. 24 to make a vesting order.

This was an application under sect. 24 of the Trustee Act 1850, for a vesting order. That section enacts that where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said court may appoint jointly with such other trustee or trustees.

In the present case some Oxford Canal shares were vested in the one surviving trustee upon settlement, on the trusts of the settlement. He died, having by his will appointed three executors. One of those executors was a lunatic. A request, in writing, was made to the other two by the persons absolutely beneficially entitled to the shares to transfer the shares to them.

The two executors, for twenty-eight days afterwards, refused to make this transfer, and a petition in Chancery was presented by the persons beneficially entitled, asking that the shares might be ordered to vest in them. James V. C., thought that sect. 24 of the Act gave him no jurisdiction to make the order, but he suggested that the matter should be at once mentioned to the Lord Justice.

Edmund Cutler now mentioned the matter, and

argued that as at law the two executors, without the concurrence of the third, could dispose of their testator's personal estate, the vesting order might be made under sect. 24 of the Act, without the necessity of entitling the petition in lunacy, so as to bring the matter under those sections of the Act which gave a jurisdiction in lunacy.

Lord Justice GIFFARD thought that a petition entitled in lunacy must be presented, for, even if the third executor had been of sound mind, the refusal to transfer would not have given the Court of Chancery jurisdiction to make the vesting order now asked for.

Monday, March 28.

(Before Lord Justice GIFFARD.)

Ex parte PALMER; *Re* PALMER.

The Bankruptcy Act 1869 (32 & 33 Vict. c. 71), ss. 71, 78, 130—Appeal—Where to be brought—Bankruptcy commenced before the Act came into operation—Proceedings transferred to a County Court—Order made by the County Court judge—The Bankruptcy Repeal Act 1869 (32 & 33 Vict. c. 83), sect. 20—General Rules in Bankruptcy, Jan. 1, 1870, Nos. 143, 144, 319.

An adjudication of bankruptcy having been made under the B. A. 1861 in a district court of bankruptcy, the proceedings in the bankruptcy were, when the B. A. 1869 came into operation, transferred by an order of the Lord Chancellor, made under the authority of that Act, to the County Court of the same district. The bankrupt applied to the judge of the County Court for his order of discharge, and the judge being of opinion that the bankrupt had, within the meaning of sect. 159 of the B. A. 1861, incurred debts without reasonable or probable ground of expectation of being able to pay them, granted him only a conditional order of discharge. The bankrupt presented an appeal to the Court of Appeal in Chancery:

Held, that the appeal was properly brought to that court, and that it was not necessary to appeal in the first instance to the Chief Judge in Bankruptcy, as would have been the case if the order appealed from had been made in a bankruptcy commenced under the B. A. 1869.

On the 5th Oct. 1869 an adjudication of bankruptcy was made in the Bankruptcy Court for the Manchester District against Thomas Palmer. When the Bankruptcy Act 1869 came into operation the bankrupt had not obtained his order of discharge. Under the powers conferred by that Act the Lord Chancellor made an order transferring (*inter alia*) the proceedings in Palmer's bankruptcy to the Manchester County Court. On the 16th Feb. 1870, Palmer applied to that court for his order of discharge, and the judge being of opinion that the bankrupt had contracted debts without reasonable or probable ground of expectation of being able to pay them, within the meaning of sect. 159 of the Bankruptcy Act 1861, granted to him only a conditional order of discharge, the condition being that he should out of his income or earnings during the next three years pay to his creditors' assignees, for the benefit of the creditors under the bankruptcy, the sum of 225*l.*, in three equal instalments of 75*l.* each. The bankrupt appealed against the order, the appeal being brought directly to the Court of Appeal in Chancery. The notice of motion of appeal, dated the 17th March 1870, was not served till the 21st March, more than twenty-one days after the making of the order appealed from.

De Gex, Q. C. and *Jordan* (of the Common Law Bar) opened the appeal.

CHAN.]

Ex parte WIELAND; Re WIELAND.

[CHAN.]

Roxburgh, Q. C. and *C. W. Bardswell*, on behalf of the respondent, raised a preliminary objection to the competency of the appeal, viz., that it ought to have been brought in the first instance to the Chief Judge in Bankruptcy. The order appealed from was one made in pursuance of the Bankruptcy Act 1869, and sect. 71 of that Act provides that any person aggrieved by any order of a local bankruptcy court made in pursuance of that Act may appeal to the Chief Judge in Bankruptcy; and that any order made by the chief judge, whether in respect of a matter brought before him on appeal or not, shall be subject to an appeal to the Court of Appeal in Chancery. The appeal also, according to Rule 143 of the General Rules in Bankruptcy of Jan. 1, 1870, ought to have been brought within twenty-one days from the order appealed from. Consequently this appeal was too late.

De Gex, Q. C. and *Jordan*, in support of the competency of the appeal, urged that sect. 71 of the Bankruptcy Act 1869 had no application to bankruptcy proceedings commenced under the Bankruptcy Act 1861. They were to be regulated by the old practice. This was evident from No. 319 of the General Rules of Jan. 1, 1870, as well as from sect. 20 of the Bankruptcy Repeal Act 1869, which preserved all existing rights under the Bankruptcy Act 1861. Moreover, under the Act of 1861 thirty days was the time allowed for presenting an appeal with regard to an order of discharge, and it could never have been the intention of the Legislature to cut down that time in the case of bankruptcies commenced under the Bankruptcy Act 1861 without any express enactment to do so.

Roxburgh, Q. C. in reply, said that the Bankruptcy Act 1861 was altogether repealed by the Bankruptcy Repeal Act 1869, except so far as existing rights were preserved; but it was meant that the procedure in bankruptcies commenced under the old Act should be regulated according to the provisions of the Bankruptcy Act 1869.

Lord Justice GIFFARD was of opinion that as this was a bankruptcy the proceedings in which were commenced under the Bankruptcy Act 1861, the appeal was properly brought directly to the Court of Appeal in Chancery. It was to be observed in the first place that there was in the language of Rule 319 a manifest distinction made between proceedings commenced after the Bankruptcy Act 1869 came into operation, and those which had been commenced before that Act came into operation. In the next place, sect. 20 of the Bankruptcy Repeal Act 1869 provided that the repeal of the Bankruptcy Act 1861 should not interfere with the prosecution or affect the course of any legal proceeding pending in bankruptcy or otherwise under any enactment contained in that Act, but subject to the provisions of the Bankruptcy Act 1869 and the Debtors Act 1869, such proceedings should be prosecuted as if the repealing Act had not passed. The proceedings under this bankruptcy were in no sense proceedings under the Bankruptcy Act 1869, except so far as they had under the powers conferred by that Act been transferred by the Lord Chancellor's order to the County Court. His Lordship was of opinion that an order made by a County Court judge in a bankruptcy commenced under the Act of 1861, and transferred to him under the provisions of the Act of 1869 that he might wind it up, was not an order made in pursuance of the Act of 1869 within the meaning of sect. 71 of that Act. The appeal was therefore properly brought to this court; and another reason for so holding was, that otherwise the thirty days within which an appeal in relation

to an order of discharge might have been brought would have been cut down to twenty-one days.

The arguments on the merits were then heard, the result being that the appeal was allowed, and an unconditional order of discharge granted to the bankrupt.

Solicitor for the appellant, *A. D. Smith*.

Solicitors for the respondents, *Fawcett, Horne, and Hunter*.

Ex parte WIELAND; Re WIELAND.

Bankruptcy — Petitioning creditor's debt — Creditor proving his debt under an adjudication, and after petitioning for another adjudication against the bankrupt — Transfer of proceedings from one court to another — The B. A. 1869, s. 80, c. 3.

There is no reason why a creditor who has proved his debt in an adjudication of bankruptcy against his debtor, should not afterwards himself petition for an adjudication of bankruptcy against the debtor in respect of the same debt.

The 3rd clause of sect. 80 of the B. A. 1869, which gives power to the London Court of Bankruptcy, where proceedings against the debtor are instituted in more courts than one, upon the application of any creditor to direct the transfer of such proceedings to the London Court of Bankruptcy, or to any local bankruptcy court, applies to a case where proceedings have been commenced before the Act came into operation.

Mr. John Frederick Wieland, a bankrupt, appealed from two orders made by the Chief Judge in bankruptcy. The first order appealed from was made on the 22nd Feb. 1870, and confirmed an adjudication of bankruptcy against Wieland which had been made on the petition of the official liquidator of the National Savings' Bank Association (Limited). This adjudication was objected to on the ground that Wieland had been on the 24th Dec. 1869, adjudicated bankrupt in the County Court at Lewes, on his own petition, and that the liquidator had proved his debt under that adjudication. The second order appealed from was made on the application of the liquidator on the 1st March 1870, and it directed that the bankruptcy in the County Court, and all the proceedings thereunder, should be transferred to the London Court of Bankruptcy.

On the 18th March 1869, the liquidator had commenced an action at law against Wieland, to recover an alleged debt due from him. This action was afterwards referred to arbitration, and the arbitrator, on the 1st Nov. 1869, made his award, and thereby found that 7730*l.* was due to the plaintiff from Wieland, and also the sum of 117*l.* for costs. On the 11th Dec. 1869 another action was commenced against Wieland by a Mr. Scott, who had been formerly his family solicitor, to recover 95*l.* due for costs. On the 18th Dec. 1869, Wieland executed a bill of sale assigning to his brother all his furniture to secure an antecedent debt of 150*l.*

This bill of sale was registered on the 22nd Dec. 1869. On the next day Wieland, who had formerly resided in London, but who had then for some little time been living at Brighton, was on his way from there to Lewes; and at Bramber he was arrested at the instance of Scott, who, in default of appearance by Wieland in Scott's action, had, on the 22nd Dec., signed judgment against him for the 95*l.* and costs, and had issued a writ of *ca. sa.* Wieland was lodged under this writ in the Lewes gaol, and on the next day, the 24th Dec., he presented a petition *in formâ pauperis* in the Lewes County Court, for an adjudication of bankruptcy against himself, and he was the same day adjudged

ROLLS.]

GUEST v. SMYTHE.

[ROLLS.]

a bankrupt; and he was on that day also released from custody, Scott having signed a written waiver of his right to notice of Wieland's intention to apply for his release. Under this adjudication the liquidator proved his debt, and was appointed creditors' assignee. On the 27th Jan. 1870 he presented a petition in the London Court of Bankruptcy for an adjudication of bankruptcy against Wieland, founding his petition upon the same debt, and under this petition the orders already mentioned were made by the Chief Judge.

Robertson Griffiths, for the appellant, contended that as the liquidator had proved his debt under the first adjudication, he had elected in favour of that proceeding, and his debt could not afterwards support another adjudication. He also urged that the Chief Judge had no jurisdiction to make the order transferring the proceedings, inasmuch as sect. 80, clause 3, of Bankruptcy Act 1869, applied only to proceedings commenced after the Act came into operation. He cited

Ex parte Chambers, 2 Mont. & Ayr. 440.

Ex parte Diack, Ib. 675.

Ex parte Flower, 1 De G. 503.

De Gex, Q. C. and *Ernest Reed*, for the liquidator, with regard to the first point, contended that proof was merely an election to proceed in bankruptcy, but not in favour of a particular adjudication. Proceedings under one adjudication had often been stayed for the purpose of enabling a creditor to present a petition, so as to set aside some transactions of the bankrupt which could not be reached under an adjudication obtained on his own petition. On the second point they urged that sect. 80, clause 3, of the Bankruptcy Act 1869 gave the Chief Judge jurisdiction to make the order transferring the proceedings to the London court. They cited

Ex parte Taylor, 6 De G. M. & G. 737;

Ex parte Roberts, 3 De G. F. & J. 747;

Spencer v. Demett, L. Rep. 1 Ex. 123; 13 L. T. Rep. N. S. 677.

Robertson Griffiths in reply.

Lord Justice GIFFARD said that there was no ground whatever for the appeal. The fact that the liquidator had proved his debt under the first adjudication could not prevent him from afterwards himself presenting a petition for adjudication founded on the same debt. *Ex parte Taylor* was a clear authority in favour of what had been done by the Chief Judge in the present case. With regard to the order transferring the proceedings, his Lordship was of opinion that sect. 80, clause 3, of the Bankruptcy Act 1869 applied to proceedings commenced before the Act came into operation as well as those commenced after it came into operation. The appeal must be dismissed with costs.

Solicitor for the appellant, *S. W. Barrow*.

Solicitors for the respondent, *Lewis, Munns, Nunn, and Longden*.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

March 12 and 17.

GUEST v. SMYTHE.

Sale by court—Confirmation—Purchase by solicitor of party interested in the sale—Setting aside sale after confirmation.

In a foreclosure suit an order was made for the sale of the property. The property was purchased by a solicitor, whose name appeared at the foot of the particulars of sale as one of the persons from whom copies of the particulars and other information might

be obtained, and who had acted as solicitor for one of the persons interested in the sale.

The sale was confirmed by the chief clerk:

Held, that, notwithstanding the confirmation, the property must be resold, being put up at the price at which the solicitor purchased, who, if there should be no advance, must be held to his purchase.

Lister v. Lister, 6 Ves. 631, followed.

Adjourned summons.

This was an application by persons claiming under a mortgagor to set aside a sale by the court on the ground that the purchaser had acted as solicitor for one of the parties interested in the sale.

The suit was instituted by Guest, the sub-mortgagee of certain real estate, against the representatives of one Smythe, the mortgagee who had sub-mortgaged the property to Guest, and the representatives of one Piddocke, the original mortgagor of the property. The bill prayed for foreclosure or sale, and by the decree it was ordered that the property should be sold. Before the suit came to a hearing the plaintiff died, and the suit was revived by his representatives. Certain suits were instituted by various creditors for the administration of the estate of Guest, the original plaintiff in the present suit, and in one of those suits a Mr. Wright had acted as solicitor for the plaintiff.

The property was, in pursuance of the decree, put up for sale in July 1869. The name of Mr. Wright appeared at the foot of the particulars of sale as one of the solicitors from whom copies and other information might be obtained. There was a reserved bidding of 5600*l.* put on the property, and it was bought by Mr. Wright for the sum of 6100*l.*

On the 4th Aug. 1869, the sale was confirmed before Mr. Hawkins, the chief clerk.

The present application to set aside the sale was made by the representatives of the original mortgagor, who stated that certain circumstances rendered the property, which was reversionary, more valuable than appeared from the particulars of sale.

Southgate, Q. C., *Speed*, and *Simmons*, for the applicants, submitted that Mr. Wright's position as solicitor for parties interested in the sale incapacitated him from becoming a purchaser without the leave of the court, and that, therefore, the sale ought to be set aside.

Jessel, Q. C. and *Bugshawe*, for Mr. Wright, contended that the sale, having been confirmed, could not be set aside unless it was proved to have been fraudulent. This was proved by the authorities as the confirmation of the master's report under the old practice corresponded to confirmation of the sale under the new system. They cited

Morice v. The Bishop of Durham, 11 Ves. 57;

White v. Wilson, 14 Ves. 151;

Re Crew's Estate, 32 L. T. Rep. O. S. 154; 26 Beav. 187;

Fergus v. Gore, 1 Sch. & Lef. 350.

Swanston, Q. C. and *W. J. Bovill*, for the plaintiff, contended that the sale, having produced sufficient for the payment of the mortgage debt, ought to be upheld. They cited

Ex parte Lacey, 6 Ves. 625;

Austin v. Chambers, 6 Cl. & Fin. 1.

Lord ROMILLY: Mr. Southgate, I should like to consider this a little before I dispose of the case finally, but I will state now what I consider to be the principles affecting cases of this description. I should like however, to speak to Mr. Hawkins before I finally dispose of it. I do not think the form of your summons is right, and I am not at all clear whether the form of the summons ought not

ROLLS.]

GUEST v. SMYTHE.

[ROLLS.]

merely to have been to direct a new sale and nothing more, leaving the court to determine what should be done afterwards with the case. But I do not consider that the confirmation of the sale affects the question, unless there has been a great lapse of time and acquiescence. I consider the principle which governs the question to be that which was laid down by Sir John Leach in the case of *Grover v. Hugell* 3 Russ. 428: The question is this, was it the duty of the solicitor to give his aid to the procuring of the best possible price? That is the question, for if it was his duty to do so, then he could not buy. There are various authorities; there is another case of *Re Bloye's Trust*, 1 Mac. & G. 488, in which it is expressly laid down that the solicitor who conducts the sale cannot become the purchaser without giving full explanation to the vendor and informing him that he (the solicitor) is to become the purchaser on his own account; and in the course of that case Lord Cottenham refers to what Lord Eldon says: "How can a man, who cannot buy himself, give another person authority to buy?" Therefore, I think that the question which I have to consider is, first, what was the position of Mr. Wright? I should be glad to be set right if I mistake his position, but, as I understand, he was the solicitor of certain creditors of the mortgagee and in that character was employed to take steps for the purpose of intervening in the suit and having some management in the suit, for which purpose he obtained an order though not until the day after the sale, or a day or two after the sale. That, however, was his character; he therefore was representing the creditors in the cause. It was clearly a sale on behalf of mortgagees, and on behalf of the persons interested in the mortgage. It was for the purpose of all the creditors, therefore, and they were as much interested in it being a good sale in order that it might be sufficient to pay them as any other person, and Mr. Wright was their solicitor, and only their solicitor. Now they could not have appointed a person to purchase the property—without the leave of the court of course I mean; they could not in their character of creditors have appointed a person to buy. I understand that Mr. Wright obtained leave to intervene on behalf of the creditors. From that time I should consider that the creditors were parties to the suit, and that when Mr. Wright's name was added as one of the solicitors for the vendor, he was to act on their behalf, and to make the sale as effective as it could be for them. Well, that being his character, I do not think he was in a situation in which he was entitled to buy. The case of *Grover v. Hugell* (*sup.*) was a very peculiar case. A person entered into an agreement for the purchase of land, formerly part of the glebe of a rectory, and which had been sold for the redemption of the land tax. He was not bound to complete the purchase, because it appeared that the rector himself had been the actual purchaser in the name of the curate. I do not think that the fact of it being in the name of the curate was anything. What Sir John Leach says is this: "The general rule in equity is, that a man cannot place himself in a situation in which his interest conflicts with his duty. The duty of the rector was to obtain the best possible price for the land sold, and his interest as purchaser was to pay the least possible price for it. It is no answer to say that the superintendence of the commissioners would secure a full price. The sale is to be by public auction and before two of the commissioners or some person appointed by them, and their approbation of the sale is required by the Act. But still the duty of the rector was to give his aid to the procuring of the best possible price." I consider that every one of those observations applies on the present occa-

sion; it was the duty of Mr. Wright to give all his assistance to the obtaining of the best possible price, and his name was put upon the list as one of the solicitors for that purpose. I do not assent to the observation which was made by Mr. Swanston, that where the name of an hotel keeper is inserted in the particulars with reference to the hotel where the sale was to take place, that the mere fact of the name appearing upon the particulars of sale would prevent that person from buying. When it is stated that information is to be obtained from solicitors it is assumed that they are the solicitors for the persons interested in the sale, interested in obtaining the highest possible price that can be obtained for the property; and I am of opinion that Mr. Wright's duty was, on behalf of the creditors, to obtain the highest possible price and to do everything for that purpose, and that in that situation he was not competent to buy. This is my present impression, but I will look further into the matter, and consult Mr. Hawkins, but that is the view I take of the case, and that is the view taken of the principle by Lord Langdale in the case of *Greenlaw v. King*, 3 Beav. 49, in which he points out the principles upon which the question rests. I agree in the observation made by Mr. Jessel that it is a question of great importance; it is a question whether a person whose duty it is to obtain the highest possible price he can for the property sold can become the purchaser of the property, and though there is no evidence upon the subject, observe what might in many cases be the effect of this, that upon seeing the person bid whose name appeared as one of the solicitors for the vendors, people might suppose that the property was bought in, and that it was not an effectual sale. I am, therefore, disposed to think that the proper order will be to direct a new sale of the property, but in that case it is clear that I ought to give leave to amend the summons or to take out another summons for that purpose. I am not at all clear that Mr. Jessel's client will not be entitled to be heard upon that point, but I will consult Mr. Hawkins about it. If the matter is carried further, which is very probable as it is a case of very considerable importance, I will put it in such a form that every facility shall be open for anything which you may wish to do.

March 17.—Lord ROMILLY.—I have spoken to Mr. Hawkins about this case, and I am confirmed in the decision which I gave the other day. Mr. Hawkins tells me that when he was asked to confirm the sale his attention was not pointedly called to the fact that Mr. Wright was in fact the solicitor of the mortgagee's creditors, who were interested in the matter, and that his name was upon the particulars of sale; and Mr. Hawkins tells me that if he had known such to be the case he should not have confirmed the sale.

As to the form of the order, *Southgate*, Q. C., referred to *Lister v. Lister*, 6 Ves. 631, a suit to set aside a sale, in which Sir William Grant says: "The rule is a rule of general policy, to prevent the possibility of fraud and abuse; for it may not always be possible to know whether the property was undersold. I was not aware that the Lord Chancellor had laid down a general rule as to the terms; that the property should be set up again at the risk of the trustee. It is a very important consideration whether that is to be taken as a general rule. If it is, I must adhere to it; but if it turns upon special circumstances, I see no special circumstances in this case. These lots must be resold, at all events. The only question is, whether they shall be put up at the price at which the trustees purchased." On a subsequent day Sir

V.C. S.]

RICHARDS v. FRENCH.

[V.C. S.]

William Grant said that he had mentioned the matter to the Lord Chancellor (Lord Eldon), who stated that he meant to lay down a general rule, and that he understood that it had been so established in Lord Thurlow's time.

Lord ROMILLY.—I shall follow that rule exactly. The property must be put up at the price at which Mr. Wright purchased, and if there is no advance in the price he will be held to his purchase. I give Mr. Wright liberty to bid only in the event of his *bonâ fide* ceasing to be solicitor for the creditors or any party interested in the sale.

[This decision has been reversed on appeal to Giffard, L.J., a report of whose judgment we shall give shortly.]

Solicitors for the applicants, *Field, Roscoe, Field, and Francis*.

Solicitors for other parties, *Palmer, Eland, and Nettleship; Combe and Weinwright*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

March 15 and 16.

RICHARDS v. FRENCH.

Solicitor and client—Brother-in-law and sister-in-law—Confidential relationship—Assignments in favour of solicitor—Bill to set aside dismissed.

In order to bring a case within the rule that a solicitor can receive no gift or reward from his client, there must be clear and unequivocal evidence of the relationship between the parties, that advantage was taken of that relationship, and that what was given was a reward to the solicitor for his services.

Where, therefore, a bill was filed by the legal personal representative of a lady to set aside certain deeds executed by her in favour of her brother-in-law (a solicitor), and it appeared that he had never done or charged for anything in the course of the transactions as her solicitor; that he had, when necessary, resorted to other professional advice on her behalf, and that he had exercised no undue influence over her:

Held, that the relationship between the parties was not sufficient to invalidate the deeds, and that the bill must be dismissed with costs.

This bill was filed for the purpose of setting aside certain indentures executed by and between a Miss Elizabeth Harrison and the defendant, a solicitor, under these circumstances.

John Harrison, the elder, by his will, dated 30th June 1834, left the whole of his residuary real and personal estate to trustees upon trust to sell and convert the same, and to invest the proceeds thereof, and, after payment thereof of a certain annuity, to divide the residue equally between all of his children who, being sons, should attain the age of twenty-one, or who, being daughters, should attain that age or marry under it; and the testator directed that the share of each daughter should be held by his trustees upon trust for such daughter during her life, for her separate use, without power of anticipation, and after her death for her children, as therein mentioned, and in default of children, then as she should by will appoint, and, until sale, the rents and profits were to go in the same manner as was directed with regard to the proceeds of sale and conversion.

John Harrison the elder died in Dec. 1857, leaving four children, viz., John Harrison the younger, who acted as executor under the will, William Harrison, Mary Harrison, and Elizabeth Harrison, all of whom attained the age of twenty-one.

After the death of the testator his family lived

together until 1854, when John Harrison the younger left them and married. In April, 1854 the defendant married Mary Harrison. At the time of the marriage the defendant was practising as a solicitor at Stamford, but as his wife did not wish to be entirely separated from her family it was arranged that she and her husband should spend half the year at her brother's and sister's house in London and that they in return should spend the other half at the defendant's house at Stamford. This arrangement was continued until Aug. 1859, when William Harrison dying the house in London was given up, and Elizabeth Harrison went to reside altogether at the defendant's house at Stamford, paying her share towards the household expenses.

In 1861 John Harrison, the younger, died. It appeared that although he had acted as trustee of his father's will up to the time of his death, he had never sold the residuary real estate, or rendered any accounts to his sisters of their share of the property, but had merely paid to them from time to time money on account. He had, however, settled all accounts in respect of his sister Mary Harrison's share, up to the time of her marriage; but subsequently his payments fell considerably into arrear; those which were made were (subject to a few trifling deductions) always handed over to the defendant by his wife. At the time of his death the arrears of the income accruing on his sisters' shares of the property, amounted, as to the defendant's wife's share, to 205*l.* 17*s.* 6*d.*, and as to Miss Harrison's share, to 247*l.* 2*s.* 8*d.*

The defendant's wife died in April 1862. By her will, dated in Sept. 1861, she gave all the property under her marriage settlement and father's will, which she was entitled to dispose of to trustees (whom she also appointed her executors) upon trust, after payment of three legacies of 500*l.*, for Miss Harrison absolutely. The above-mentioned arrears of income not having been paid to the testatrix during her lifetime, passed by her will to her sister, Miss Harrison, but it appeared that it was the wish of the testatrix that the amount of such arrears should be paid to the defendant, and that Miss Harrison was aware of this wish, and was desirous of giving effect to it. One of the executors of the testatrix's will having died, and the other having refused to act, Miss Harrison determined to take out letters of administration to the estate; and for that purpose was, at her own request, introduced by the defendant to a proctor, who had been employed by the defendant on previous occasions, and who undertook the business of obtaining the grant of administration.

The personal estate was sworn under 12,000*l.*, and it became necessary to procure two sureties to an administration bond of 24,000*l.* At this time an agreement was made between the defendant and Miss Harrison, whereby the defendant undertook the risk of being one of the sureties of this bond, and also to find a co-surety; Miss Harrison, on her part, agreeing to carry out the wishes of her sister (the defendant's wife) with reference to the sum of 205*l.* 17*s.* 6*d.* This agreement, which was reduced into writing by the defendant, and signed by him and also by Miss Harrison, was dated the 12th June 1862, and Miss Harrison thereby agreed to invest three several sums of 500*l.* Consols each, to provide for the contingent legacies given by will of defendant's wife, and also that the defendant "should be entitled to receive and should receive accordingly, the debt composing the balance of the dividends and proceeds due from John Harrison the younger, and arising from the estate of John Harrison the elder, from 25th April 1854 to 1st April 1862, to the defendant's wife, agreeably to her intention and wish. . . . And in consideration thereof the defendant agreed to join in the bond for

V.C. S.]

RICHARDS v. FRENCH.

[V.C. S.]

24,000*l.* to be given by Miss Harrison on her taking out letters of administration to the effects of the defendant's wife with her will annexed, and the defendant further agreed to procure a second surety to join in the said bond, to the satisfaction of the Court of Probate." Before signing this agreement Miss Harrison had no independent advice, but (as alleged by the defendant) she thoroughly understood what she was doing. Eleanor Harrison, as the personal representative of her husband (the trustee), not wishing to pay over the said sums of 205*l.* 17*s.* 6*d.* and 2473*l.* 2*s.* 8*d.* (4525*l.* 0*s.* 2*d.*) to Miss Harrison, in cash, an agreement was made between these parties, dated 14th May 1863, whereby a share (one third) of certain leaseholds to which Eleanor Harrison as such personal representative, was entitled, should be sold to Miss Harrison for 4190*l.*, which sum was to be set-off *pro tanto* against the 4525*l.* 0*s.* 2*d.* This was carried out, and the balance (335*l.* 0*s.* 2*d.*) was paid the same day to Miss Harrison.

Contemporaneously with this agreement, and as part of one and the same arrangement, by an agreement bearing even date, and made between Miss Harrison of the one part and the defendant of the other part, after reciting (among other things) the above-mentioned agreements, and the amounts due from the estate of John Harrison the younger, in respect of the said arrears of income, Miss Harrison agreed to assign half of the one-third, so that the same one-third might be held by Miss Harrison and the defendant, as tenants in common, in the proportions therein mentioned, and the defendant also thereby agreed to allow Miss Harrison, to retain out of the 205*l.* 17*s.* 6*d.*, one-half part of the amount paid or allowed to Eleanor Harrison as the price of the said one-third, but that Miss Harrison should not require, the defendant to contribute any sum to the purchase aforesaid, beyond the sum of 205*l.* 17*s.* 6*d.* This transaction was completed by two indentures of assignment, dated the 2nd July, 1863, and made between Miss Harrison of the one part and the defendant of the other part, each of them being expressed to be made in consideration of the defendant having, at the request of Miss Harrison, joined in a bond for 24,000*l.*, given by her on her taking out letters of administration to the effects of the defendant's wife, and having procured another surety to join in the said bond.

These deeds were prepared by the defendant's conveyancing counsel on verbal instructions given by the defendant (but as he alleged with the full consent of Miss Harrison), and were explained to her before execution by a Mr. Fraser, a solicitor, who it appeared had acted as the defendant's London agent on some occasions when he practised in the country; but the defendant stated that though this was the case, yet it was at Miss Harrison's special request that Mr. Fraser acted for her in this, as he had done in the year 1860, and that Mr. Fraser was considered by her to be, and in fact was, her solicitor both on this and on a subsequent occasion.

In Feb. 1863, the defendant and Miss Harrison entered into an agreement for the purchase of the lease of a house at Tulse-hill. It was arranged that the purchase-money (2500*l.*) should be paid in equal shares, and the property be so conveyed as to go to the use of the defendant and Miss Harrison during their joint lives, and after the death of either of them to the survivor during his or her life, and subsequent thereto to the defendant and Miss Harrison absolutely in equal shares as tenants in common.

At the time of the purchase, Miss Harrison was forty-five, and the defendant sixty-two, and it appeared that the counsel who prepared the draft conveyance introduced a clause into it to the effect that the property was to vest solely in the defendant in the event of Miss Harrison's marrying. The

defendant and Miss Harrison, however, being desirous (as was alleged) that there should be an entire equality as regarded both of them in the provisions, signed a memorandum to the effect that they desired that the clause should attach equally to the event of the defendant's marrying again, and the draft was altered accordingly.

It was alleged by the plaintiff that Miss Harrison was in a very weak state of health, and that her life in fact was uninsurable at the time of this transaction. This, however was denied by the defendant.

Miss Harrison died in April 1865.

The plaintiff, who was her legal personal representative, filed this bill in pursuance of an order of the Lords Justices to that effect, praying that it might be declared that the agreements of the 12th June 1862, and 14th May 1863, and the two indentures of the 2nd July 1863 were fraudulent and void as against Miss Harrison, and that the same might be delivered up to be cancelled, and that it might be declared that the assignment of the house at Tulse-hill was procured to be made by the fraud and undue influence of the defendant, and that he might be declared a trustee of a moiety thereof, with consequential relief.

The grounds on which the deeds were sought to be set aside were, that the defendant had acted as Miss Harrison's solicitor in the transactions in question; that he had taken an improper advantage of the relationship towards her, and had otherwise exercised over her an undue influence.

The evidence on both sides was very voluminous and conflicting. That on the part of the defendant was to the effect that he had not acted in the transactions as Miss Harrison's solicitor, but simply in his capacity of brother-in-law. That he had never made out any bills of costs, or charged for his services, and that on all occasions when it had been necessary other professional advice and assistance had been called in. That Miss Harrison, up to the time of her death, had always treated the transactions as binding on her in every way, and that on nearly every quarter-day a settlement of account was come to between her and the defendant.

Greene, Q. C., Hardy, Q. C., and Hemming, for the plaintiff, contended that the relationship of solicitor and client subsisted between the defendant and Miss Harrison at the time of the transactions in question. The defendant had taken advantage of his position to induce her to execute the deeds, and that being so no subsequent acquiescence on her part could avail anything: (*Wood v. Downes*, 18 Ves. 120.) At all events, the *onus* of proving, by independent testimony, that she was fully aware of the nature of the transactions, and that no advantage was taken, devolved upon the defendant:

Rhodes v. Bate, L. Rep. 1 Ch. App. 252; 13 L. T. Rep. N. S. 778;

O'Brien v. Lewis, 4 Giff. 221;

Gibson v. Jeyes, 6 Vos. 266;

Walker v. Smith, 29 Beav. 394.

She was under no special obligation to the defendant, and there was nothing to prove that she was conscious of any such feeling. In fact, the deeds themselves went to show that the transaction was strictly regarded as one of bargain and sale, and it was not open to the defendant to contend for a different consideration than the one expressed:

Tomson v. Judge, 3 Drew. 306;

Gibson v. Russell, 2 Y. & C. C. C. 104.

It could not be said that the defendant incurred any substantial risk by becoming surety on the administration bond; the utmost he could be called upon to pay was 15,000*l.*, and on a mere pretence that he was liable for that sum, he got the benefit of more than 2000*l.* The relationship between the parties was in itself sufficient to invalidate the transac-

V.C. S.]

RICHARDS v. FRENCH.

[V.C. S.]

tions: (*Dent v. Bennett*, 4 My. & Cr. 269); but it was an additional element in the plaintiff's case that Miss Harrison was in a weak state of health, and that the management of her affairs was left almost entirely to the defendant. As to the fact of the defendant's calling in other professional advice on different occasions, it amounted to nothing, for the gentleman so employed was his own friend, and, of course, might reasonably be expected to arrange matters with a regard to his interest. Upon the whole case, taking into consideration the relationship of the parties, the inference that improper advantage had been taken, and undue influence exercised by the defendant, and the absence of any evidence on his part to rebut that inference, the plaintiff was fully entitled to a decree in the terms of the prayer of his bill.

Dickinson, Q. C. and *B. B. Rogers*, for the defendant, were not called upon.

The VICE-CHANCELLOR.—The object of this suit is to set aside two transactions by which the defendant has obtained a benefit to himself, purporting to be conferred on him by Miss Elizabeth Harrison, his sister-in-law. The relief is sought on the ground that the defendant is a solicitor; that he acted as such, and lived on terms of great intimacy with Miss Harrison during the transaction in question; and that the relationship which subsisted between the parties, if it did not amount to incapacitating him from taking the gift or bounty, at any rate cast upon him the duty of showing that there was no pressure or undue advantage exercised by him upon his sister-in-law. In *Montesquieu v. Sandys*, 18 Ves. 312, Lord Eldon, in stating the law on the subject, says, "The courts have wisely established the principle that an attorney shall not take from his client a gift or reward while standing in that relation, the connection between them subsisting with the influence attending it, though the transaction may be as right as was ever carried on." Lord Eldon clearly thought that the righteousness of the transaction did not remove the infirmity inherent in the relation of the parties to each other, and he goes on to show that the same rule applies to cases of guardian and ward, medical man and patient, and others which he mentioned. But in order to bring the case within this principle, there must be clear and unequivocal evidence of the facts of the relationship, of circumstances showing that an advantage was taken of that position, and that what was given to the solicitor was given as a reward for his services. Lord Eldon, in pointing out how necessary it is to look at all the surrounding circumstances, says, at page 308 of the report I have just referred to, "Cases of this description, more than any other, impose upon the court the direct duty of giving the most accurate attention to the real circumstances, the relief being required sometimes upon misconduct and fraud, bearing particularly hard upon moral character; in other circumstances not upon such grounds, but on that degree of negligence in the performance of duty which is sufficient to defeat transactions arising out of that negligence." The facts of the present case are very peculiar. The defendant by an agreement entered into between him and Miss Harrison, in June 1862, and which agreement was afterwards embodied in several deeds, acquired a right to certain property which, but for an accident would have sooner passed into his own possession. As to the question whether it was a bounty or reward for his services, it was not a bounty except so far as this, that Miss Harrison was not bound to give the property up to him. The relationship between Miss Harrison and him was no

doubt a delicate one. They both lived in the same house, and had done so during the life of the defendant's wife. But it is impossible, on the evidence in the case to say that the defendant acted as Miss Harrison's professional adviser. He gave his advice more in the character of her brother-in-law. He never did anything, and never charged for anything as her attorney, or solicitor, though he was an attorney, and when it was necessary to resort to professional advice for her, he called in the intervention of another professional man, a Mr. Fraser. As to that it has been contended that Miss Harrison only knew that gentleman through the defendant, that he was the defendant's friend, and was introduced by the defendant for his own purposes. The evidence, however, and the comments of the plaintiff's counsel upon it, have entirely failed to support any such contention, or to prove that in these transactions any improper or undue influence was exercised by the defendant on Miss Harrison, or that anything was done by him to interfere with the unfettered action of Mr. Fraser as her professional adviser. Another peculiarity is with respect to the deeds themselves. They state nothing of any bounty, or any moral obligation on the part of Miss Harrison, or of the motive for her execution of them; they show that the defendant had executed an administration bond for 24,000*l.*, as surety for Miss Harrison, who was her sister's legal personal representative; and that in consideration of the liability so incurred by him she consented to give up to him the property in question. But that property represented considerable arrears of his late wife's income due to her in respect of funds settled to her separate use. Those arrears would have been long before in the defendant's hands, had not the conduct of Miss Harrison's brother prevented their being paid to her in her lifetime. That property, however, the defendant's wife had told him he should have after her death, and it was perfectly natural on the part of her sister to say that the property should go as it would have done but for their brother's misconduct. The evidence shows that it was a natural and spontaneous act on the part of Miss Harrison; but, even if it were done partly in consideration of the defendant's liability as her surety, the double motive is not inconsistent with probability and reason. Then, again, it is of great importance to observe that the defendant did nothing secretly—indeed, from the very nature of the case, and the character of the property, there could be no concealment in the transactions. The case, therefore, of *Dent v. Bennett* (*sup.*), which has been referred to in the argument, has no application to the present, for there Lord Cottenham set aside a gift by a patient to his medical man, not only on account of the relation between the parties, but on the grounds of improper concealment of the circumstances under which the gift had been made. As to the transaction relating to the house in Tulse-hill, I see no reason why the defendant and Miss Harrison should not have entered into a joint purchase. It was arranged between them that the survivor should enjoy the use of the house for his or her life, and it has been contended that as Miss Harrison was, at the time, in an infirm state of health, an improper advantage was taken by this mode of conveyance. Miss Harrison, however, appears to have been very well able to take care of her own interests, for, during the preparation of the conveyance, when it was suggested that a clause should be introduced to the effect that if she married she should cease to have the right of using this house, a memorandum was signed at her request by the defendant and herself, stating that they wished the clause equally to apply to the event of the defendant's marrying again. The draft conveyance was altered accordingly. This, coupled with the

V.C. J.] ATTORNEY-GENERAL v. THE MAYOR, ALDERMEN, AND BURGESSES OF LEEDS. [V.C. J.]

fact that Miss Harrison was in the habit of examining her accounts and settling her affairs regularly every three months, conveys the impression that this lady was a person of acute and business-like habits, and renders it highly improbable that any advantage could have been taken of her. The evidence certainly goes to prove that she was in a weak state of health at the time of the transaction, but opposed to this is the fact that the defendant was seventeen years her senior. Upon the whole case, therefore, looking at the subject-matter of the transactions, the relation between the parties, and all other circumstances, I am of opinion that no undue influence has been exercised by the defendant upon his sister-in-law; and that the relationship which subsisted between them was in no wise such as to invalidate the transaction in question. The plaintiff, as the legal personal representative of Miss Harrison, has only done his duty in filing the bill in this suit; but it must, nevertheless, be dismissed, with costs.

Solicitors for the plaintiff, *Terrel and Chamberlain*.
Solicitors for the defendant, *Cree and Last*.

V. C. JAMES'S COURT.

Reported by the Hon. ROBERT BUTLER, Barrister-at-Law.

Wednesday, March 2.

ATTORNEY-GENERAL v. THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF LEEDS.

Nuisance—Local Act—Power under, limited by public Act—Convenience of majority—Injunction.

A corporation, under the powers conferred upon them by a local Act, constructed sewers having their outfall into a river, whereby a nuisance was created, and the persons living in the neighbourhood of the river below the town thereby injured:

Held, that the general sections of the Towns Improvement Act relating to nuisances must be considered as incorporated with the local Act, and that therefore an injunction must be granted to restrain the corporation from exercising their powers in such a manner as to create a nuisance.

Where it is shown that the granting of an injunction would be injurious to a greater number of persons than the refusing it:

Held, that the court will not interfere with the discretion of the Attorney-General as to the convenience or inconvenience of the parties.

This was an information filed at the relation of persons residing by the banks of the river Aire, below Leeds, against the mayor, aldermen, and burgesses of Leeds, for the purpose of restraining the defendants from polluting the river Aire by causing the sewage of the town to be discharged into that river before it had been sufficiently purified.

In 1848 an Act of Parliament was obtained by the corporation, called the Leeds Improvement Amendment Act (11 & 12 Vict. c. 11), by the 3rd section of which Act it was provided that such of the clauses of the Towns Improvement Clauses Act 1847, as related to the making and maintaining the public sewers, and to the drainage of houses, "shall be incorporated with this Act, and such clauses, except so far as they, or any of them, are inconsistent with the provisions of this Act, or are expressly varied or excepted by this Act shall form part thereof."

The 6th and 7th sections were as follow:

6. And be it enacted that the several townships of Leeds, Hunslet, and Holbeck, in the borough of Leeds, shall be one drainage district, and it shall be lawful for the council to construct one main trunk and other sewer or sewers,

sufficiently capacious to receive the foul and drainage water and filth of all the said three townships, and to convey the same into the river Aire.

7. And be it enacted that it shall be lawful for the council to unite the several other townships within the borough, or so much and such parts thereof respectively, as the council shall think fit, into one or more drainage district or districts, and to construct one or more main trunk or other sewer or sewers, for the purpose of receiving the foul and drainage water and filth of each such district.

Under the powers conferred by this Act, the corporation constructed sewers having their outfall into the river Aire, and they were still constructing more sewers having their outfall into the same river, the effect of which was to make the river no better than an open sewer.

The defendants did not deny that there was a nuisance, but contended that they were acting within the powers conferred on them by the 6th and 7th sections of the Leeds Improvement Amendment Act.

Sir Roundell Palmer, Q. C., E. E. Kay, Q. C., and C. Hall appeared for the information.

G. Jessell, Q. C., E. Fry, Q. C., Graham Hastings, and S. Tennant were for the defendants.

On behalf of the information it was contended that these sections must be read in connection with the Towns Improvement Clauses Act 1847, the 24th section of which provides that sewers shall be made, "but so that the same shall in no case become a nuisance." And the 107th section provides as follows:

Nothing in this Act contained shall be construed to render lawful any act or omission on the part of any person which is, or but for this Act would be deemed to be, a nuisance at common law, nor to exempt any person guilty of nuisance at common law, from prosecution or action in respect thereof according to the forms of proceeding at common law, nor from the consequences of being convicted thereof.

For the defendants it was contended that the express powers given by the 6th section of the Leeds Improvement Amendment Act was not limited by the general provisions of the Towns Improvement Act. The 107th section of which latter Act not being one included under the sub-heading, "With respect to the making of sewers," was not incorporated in the private Act by the 3rd section of which it is enacted that "such of the clauses in the Towns Improvement Clauses Act 1847 as relate to the making and maintaining the public sewers, and to the drainage of houses shall be incorporated with this Act, and such clauses, except so far as they or any of them are inconsistent with the provision of this Act, or are expressly varied or excepted by this Act, shall form part thereof."

It was further contended that the provisions contained in the 24th section of the Act of 1847, that sewers were in no case to become a nuisance were inconsistent with the powers conferred by the 6th section of the Act of 1848, and were, therefore, not incorporated in it. And when a public body was empowered by Parliament to carry out certain works, everything incident to those works, even to the extent of creating a nuisance, was authorised unless there are special words to restrain them; and that there would be greater injury caused to the public health if the injunction was granted than if it was refused; if it was granted, the present sewer arrangements in the town would have to be stopped, which would be most injurious to the health of the inhabitants of the borough, the population of which was about 250,000, whereas the only persons injured by the present arrangements were a few persons who lived on the banks of the river. The court ought, therefore, to have regard to the balance of convenience or inconvenience, and not to endanger the health of so large a population as that of

V.C. J.]

BERRY (app.) v. HENDERSON (resp.)

[Q. B.]

the town of Leeds for the sake of affording relief to the few persons who at present may suffer inconvenience from the alleged nuisance.

On behalf of the information, evidence was given of certain resolutions passed at a public meeting held in Leeds on the 27th Aug. 1869, at which the principal residents and proprietors of lands in the district through which the river Aire flowed were present, and at which meeting it was resolved, "That the pollution of the river Aire below Leeds, occasioned by the discharge of offensive matter from the sewage works of the Leeds corporation, has recently increased so rapidly, and has now become so serious, that the health of the inhabitants throughout the valley is seriously affected, and during the summer months it is unsafe to reside on its banks; and that the water itself has become so impure as to be totally unfit for cattle and destructive to fish."

The following cases were cited in the course of argument by counsel.

Cator v. Lewisham Board of Works, 5 B. & S. 115; 20 L. T. Rep. N. S. 235;

The Attorney-General v. The Corporation of Halifax, 21 L. T. Rep. N. S. 52; L. Rep. 5 Ch. 115;

Hammersmith Railway v. Brand, L. Rep. 4 H. L. 171; 21 L. T. Rep. N. S. 238;

Bolton v. Crowther, 2 B. & C. 703;

Attorney-General v. Metropolitan Board of Works, 1 H. & M. 298;

Reg. v. Pease, 4 B. & Ad. 30;

Attorney-General v. Council of Borough of Birmingham, 4 K. & J. 528.

The VICE-CHANCELLOR, without hearing a reply, said:—I am of opinion that the case raised by the information is fully made out. It was scarcely denied by the defendants that a nuisance of a most offensive description, and one dangerous to health had been produced by the drainage operations of the defendants, who seem to have been under the same delusion as the corporations of several other large towns in England in supposing that the sewage of a large town could be turned into a river without thereby producing a nuisance. The resolution passed at the meeting held on the 27th Aug. 1869, at which the residents and proprietors of land in the neighbourhood of the river were present, was supported by the direct testimony of persons whose health had suffered in consequence of the unwholesome state of the river. The existence of this nuisance having been fully proved, the question then arises as to whether the corporation of Leeds had obtained by their Act of 1848 the privilege of draining into the river Aire, without regard to any nuisance which might be produced thereby, a privilege which, as far as I am aware, has not been granted to any town in England. It has been contended that the provisions of an Act of Parliament must be strictly interpreted, and that being so interpreted, the Special Act of 1848 enabled the corporation to drain all the sewage of the borough into the river, and that the sections in the Towns Improvement Act, which provide against the creation of a common law nuisance, were not incorporated in the private Act of 1848, else it would render the 6th section of that Act nugatory. The Act of 1848 must, however, be considered as emanating from the corporation of Leeds, and one which they had persuaded Parliament to sanction, its provisions must therefore to some extent be construed strictly against them. I am, therefore, of opinion that the powers given by the special Act were given subject to the general provisions contained in the 24th and 107th sections of the general Act; nor by adopting this construction do I render nugatory and inoperative the permission given to the corporation to

drain into the river Aire. The probability is that by that clause the Legislature merely intended to adopt the plans of the board for drainage, and to dispense with the provisions of the public Act, so far as they related to the submitting of their plans to the inspector and finally obtaining his sanction. The plan of emptying the sewage of the town into the river Aire, suggested by the corporation, was sanctioned by the Legislature; but it is too much to say that, because this sanction has been obtained, the sewage is therefore to be allowed to be poured into the river wholly irrespective of, and uncontrolled by, any considerations of nuisance to the inhabitants. If the Legislature had intended anything so monstrous, they should have expressed it distinctly. It has also been urged upon me that the Attorney-General is bound to consider the health of a populous town before that of a few persons residing on the banks of the river; that, although in the case of a private right which an individual seeks to have protected against an infraction of the law, the question would merely be, had he those rights? yet, when the question was one which arose between two portions of the community the convenience of the one may be set-off against the inconvenience suffered by the other, especially when the former are a much more numerous body than the latter. I do not think that I can interfere with the discretion of the Attorney-General when he sanctions an information to restrain a clear wrong. I do not think much weight can be attached to the argument as to the danger which may arise from the restraining of this nuisance. Means will be found of dealing with this sewage in a way which will not be prejudicial to the health of the inhabitants; but at the same time I will give them a reasonable time, as has been done in other cases, to make the necessary arrangements, and, if the corporation are making *bonâ fide* efforts to abate the nuisance, this time may be hereafter extended. The injunction will be in the same terms as that granted in July last against the corporation of Halifax—viz., an immediate injunction against opening any further communications with the existing outfall, and an injunction from and after the last day of the session 1871 (so as to give the defendants time to apply to Parliament for the necessary powers to enable them to purify and deodorise the sewage) against pouring out sewage by the present outfalls in an unpurified state.

Solicitors for the information, *Patterson, Snow, and Burney*, agents for *Dibb and Co.*, Leeds.

Solicitors for defendants, *Wright and Venn*, agents for *C. A. Curwood*, Leeds.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Monday, Feb. 14.

BERRY (app.) v. HENDERSON (resp.).

Sale of poisons—"Medicine"—Person to whom sold or delivered—Pharmacy Act 1868 (31 & 32 Vict. c. 121, s. 17).

Sect. 17 of the Pharmacy Act 1868 (31 & 32 Vict. c. 121) enacts that "it shall be unlawful to sell any poison unless the box, vessel, &c., in which it is contained be distinctly labelled with the name of the article and the word 'poison,' and with the name and address of the seller of the poison; and it shall be unlawful to sell any poison mentioned in the first part of schedule A. to the Act . . . to any person unknown to the."

Q. B.]

BERRY (app.) v. HENDERSON (resp.)

[Q. B.]

seller, unless introduced by some person known to the seller;" but none of the provisions of the section are to apply to "any medicine supplied by a legally qualified apothecary to his patient, nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act; provided such medicine be labelled in manner aforesaid, with the name and address of the seller, and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose;" and the section imposes a penalty on offenders against its provisions.

A duly registered chemist having made up from a prescription signed with the initials of a legally qualified medical practitioner, and purporting to be for "Mrs. Newton," produced by a person unknown to him, and not introduced by anyone known to him, a mixture of rose water and hydrocyanic acid, which is prussic acid, one of the poisons mentioned in the first part of schedule A., gave the mixture to the person producing the prescription without labelling it with the name of the article and the word 'poison,' and entered in his prescription book the name "Mrs. Newton," believing that the prescription had been given to Mrs. Newton for a lotion by a duly qualified medical man:

Held, on appeal from a conviction of the chemist by magistrates for infringing the provisions of the above section, that the mixture of rosewater and hydrocyanic acid was a "medicine" within the meaning of the latter part of the section; that the entry of the name of Mrs. Newton was an entry of the name of the person to whom the mixture was "sold or delivered;" and that the prescription book in which the entry was made sufficiently satisfied the provision of the section as to the "book to be kept by the seller for the purpose."

Cases stated by justices under 20 & 21 Vict. c. 43.

FIRST CASE.

At a petty sessions holden at the Town Hall, Worthing, in and for the Worthing division of Bramber Rape, in the county of Sussex, on the 18th Aug. 1869, an information was preferred under sect. 17 of the Pharmacy Act 1868, by Leonard Baldwin Henderson, the respondent, an inspector of police, against Henry Berry, the appellant, pharmaceutical chemist, duly registered under the Pharmacy Act 1868, charging that the said Henry Berry, on the 11th Aug. 1869, at Worthing, in the parish of Broad Water, in the said county, did unlawfully sell a certain poison of those which are in the first part of the schedule A. to the Pharmacy Act 1868, to wit, prussic acid, to a certain person unknown to the seller, and not introduced by some person known to the seller, to wit, to one Ansell Johnson.

2. The following facts were proved or admitted:

3. On the 11th Aug. 1869 one Ansell Johnson being a person unknown to the appellant, and not introduced to the appellant by any person known to him, came into the shop of the appellant, the appellant and his assistant being there, and asked to have made up a prescription which was written in pencil, and was as follows:

Py. Acid, Hydrocyan. Scheel's, $\frac{1}{2}$ drachm.
Aq. Rosa, $\frac{1}{2}$ oz.
M. ft. Lotio.
Ter die applico.

R. M. L.

Mrs. Newton,

August 11, 1869.

The original of this prescription is to be taken to form part of this case.

4. The meaning of the name Mrs. Newton in the prescription, was that the prescription was for the use of Mrs. Newton. There is a legal qualified medical practitioner having the initials R. M. L.

5. The appellant's assistant dispensed the pre-

scription by putting 2 drachms of hydrocyanic acid into a 2oz. bottle, and filling up the bottle with rose water according to the meaning of the prescription.

6. The appellant made the following entry in his prescription book:

Newton, Mrs.—P. Acid.
Hydrocyan. Schls. $\frac{1}{2}$ drachms.
Aq. Rosa ad. $\frac{1}{2}$ oz.
M. ft. Lotio.
Ter die applicand,

August 11.

R. M. L.

He also indorsed the entry by inserting the name "Newton," and the page in the index contained in the book.

7. The prescription book is a book in which the appellant enters all prescriptions he makes up. This book is to be taken to form part of this case.

8. Ansell Johnson paid the appellant's claim and took the bottle and its contents away.

9. The bottle was labelled as follows: "Caution. For external use. The lotion to be used three times a day. Mrs. Newton. H. Berry, Dispensing Chemist, Member of the Pharmaceutical Society, 58, Montague-street, Worthing." The bottle and the label thereon are to be taken to form part of this case.

10. Hydrocyanic acid (Scheel's) is prussic acid. The prescription is one that might be ordered for lotion. Rosewater by itself is not a medicine.

11. No evidence was given that there was or was not any such person as Mrs. Newton. Ansell Johnson, a witness for the prosecution, refused to answer the two questions. Did he buy it for Mrs. Newton? Did he buy it for himself? on the ground that by answering he might tend to criminate himself on a charge of attempting to commit suicide, on which he at the time stood remanded.

12. The Pharmacy Act, 1869, received the Royal assent on the day of the alleged offence.

13. The following points were raised on behalf of the appellant.

14. That the appellant had not sold prussic acid pure and simple, but a mixture or compound of prussic acid and rosewater. That that mixture was a medicine and the prussic acid sold formed an ingredient of that medicine, and was therefore within the exception contained in the 17th section of the Pharmacy Act, 1868.

15. That the name Mrs. Newton indicated the name of the person to whom the medicine was sold or delivered.

16. The following points were raised on behalf of the respondent.

17. That the thing sold was not a medicine but a poison partially diluted.

18. That the name Mrs. Newton entered by the appellant was not the name of the person to whom the article was sold and delivered, but only the name of a person for whose use it was alleged to be required.

19. That the book on which the entry was made was not a book kept for that purpose, inasmuch as it was kept for the purpose of keeping therein prescriptions of all sorts.

20. We adjourned the further consideration of the matter until the 26th Aug. 1869.

21. On the last mentioned day we convicted the appellant of the said offence, and adjudged him to forfeit and pay the sum of 10s., to be paid and applied according to law, and also to pay to the respondent the sum of 1l. 1s. for his cost in this behalf.

22. The appellant being dissatisfied with our decision, duly applied to us to state this case, and entered into a recognisance, as required by the first-mentioned Act.

23. The questions of law are:—

24. Whether a mixture of prussic acid and rosewater is a poison within the meaning of sect. 17 of

Q. B.]

BERRY (app.) v. HENDERSON (resp.)

[Q. B.]

the Pharmacy Act 1868, and of schedule A., part thereto.

25. Whether a mixture of prussic acid and rose-water is a medicine within the meaning of the said sect. 17.

26. Whether, according to the facts before stated, the appellant complied with the requirement of the proviso at the end of the 17th sect. of the Pharmacy Act 1868.

27. Whether, according to the facts herein stated, the defendant had committed the offence with which he was charged.

SECOND CASE.

At a petty sessions holden at the Town Hall, Worthing, in and for the Worthing division of Bramber Rape, in the county of Sussex, on the 18th Aug. 1869, an information was preferred under sect. 17 of the Pharmacy Act 1868, by Leonard Baldwin Henderson, the respondent and inspector of police, against Henry Berry, the appellant, a pharmaceutical chemist duly registered under the Pharmacy Act 1868, charging that the said Henry Berry, on the 11th Aug. 1869, at Worthing, in the parish of Broadwater, in the said county, did unlawfully sell a certain poison, to wit prussic acid, by retail, the bottle in which such poison was contained not being labelled with the word "poison."

The following facts were proved or admitted. [The case then set out all the facts stated in the first case.]

The appellant had been convicted in respect of the same sale of selling poison to a person unknown to him.

The following points were raised on behalf of the appellant:—

That the appellant had not sold a poison within the meaning of the Pharmaceutical Act 1868, but that the appellant being a person registered under that Act had dispensed a medicine, and that the appellant had complied with the provisions of the Pharmacy Act 1868:

That if the appellant had sold a poison it was an article forming part of the ingredients of a medicine, and that the proviso forming the end of the said section had been complied with:

That the appellant could not have committed two offences by one Act, and that he could not therefore be convicted for this offence.

The following points were raised on behalf of the respondent:—

That the thing sold was not a medicine, but a poison partially diluted:

That the name "Mrs. Newton," entered by the appellant, was not the name of the person to whom the article was sold or delivered, but only the name of a person for whose use it was alleged to be required.

That the book in which the entry was made was not a book kept for the purpose, inasmuch as it was kept for the purpose of copying therein prescriptions of all sorts.

That if by one act two laws were broken, two punishments might follow.

We adjourned the further consideration of the matter until the 25th Aug. 1869.

On the last-mentioned day we convicted the appellant of the said offence, and adjudged him to forfeit and pay the sum of 10s., to be paid and applied according to law, and also to pay to the respondent the sum of 1l. 1s. for his costs in this behalf.

The appellant, being dissatisfied with our decision, duly applied to us to state this case, and entered into a recognisance as required by the first-mentioned Act.

The questions of law are:—

Whether a mixture of prussic acid and rose-

water is a poison within the meaning of sect. 17 of the Pharmacy Act 1868?

Whether a mixture of prussic acid and rose-water, when dispensed by a person registered under the Pharmacy Act 1868 is a medicine within the meaning of sect. 17 of that Act?

Whether, according to the facts before stated, the appellant complied with the requirements of the proviso at the end of the 17th section of the Pharmacy Act 1868?

Whether a man can be twice convicted for one act?

Whether, upon the facts herein stated, and the law applicable thereto, the appellant was properly convicted?

Given under our hands this 16th Nov. 1869, at Worthing, in the county aforesaid.

EDWIN HENTY.
W. HARGOOD.
J. S. WARREN.

Sect. 17 of 31 & 32 Vict. c. 121, enacts that:—

It shall be unlawful to sell any poison, either by wholesale or by retail, unless the box, bottle, vessel, wrapper, or cover in which such poison is contained, be distinctly labelled with the name of the article and the word poison, and with the name and address of the seller of the poison; and it shall be unlawful to sell any poison of those which are in the first part of schedule (A) to this Act, or may hereafter be added thereto under sect. 2 of this Act, to any person unknown to the seller, unless introduced by some person known to the seller; and on every sale of any such article, the seller shall, before delivery, make or cause to be made an entry in a book to be kept for that purpose, stating, in the form set forth in the schedule (F) to this Act, the date of the sale, the name and address of the purchaser, the name and quantity of the article sold, and the purpose for which it is stated by the purchaser to be required, to which entry the signature of the purchaser and of the person, if any, who introduced him, shall be affixed; and any person selling poison otherwise than is herein provided shall, upon a summary conviction before two justices of the peace in England or the sheriff in Scotland, be liable to a penalty not exceeding five pounds for the first offence, and to a penalty not exceeding ten pounds for the second or any subsequent offence, and for the purposes of this section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller; but the provisions of this section, which are solely applicable to poison in the first part of the schedule (A) to this Act, or which require that the label shall contain the name and address of the seller, shall not apply to articles to be exported from Great Britain by wholesale dealers, nor to sales by wholesale to retail dealers in the ordinary course of wholesale dealing, nor shall any of the provisions of this section apply to any medicine supplied by a legally qualified apothecary to his patient, nor apply to any articles when forming part of the ingredients of any medicine dispensed by a person registered under this Act; provided such medicine be retailed in the manner aforesaid, with the name and address of the seller, and the ingredients thereof be entered with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose; and nothing in this Act contained shall repeal or affect any of the provisions of an Act of the Session holden in the 14th and 15th years of the reign of Her present Majesty, intituled "An Act to regulate the Sale of Arsenic."

Quain, Q.C. (with him Bullock) for the appellant. The mixture given by the appellant was not a poison within the meaning of the first part of sect. 17 of 31 & 32 Vict. c. 121, but was a medicine within the meaning of the latter part of the section. It was made up from a prescription bearing the initials of a medical practitioner; and it is proved as a fact that such a mixture would be proper for a lotion; and a thing is as much a medicine which is to be applied externally, as if it were to be applied internally. [HANNEN, J.—Prussic acid is one of the poisons enumerated in the schedule (A) to the Act.] But if it is diluted with rosewater, as in the present case, it is no longer prussic acid. The intention of the statute was, that where poison was sold as poison, it should be so labelled; not that wherever any quantity, however small, of a poisonous ingredient was contained in a medicine, the medicine itself should be labelled as poisonous. If this mixture is a medicine within the meaning of the latter part of the section,

Q. B.]

BERRY (app.) v. HENDERSON (resp.)

[Q. B.]

the only other question is whether the appellant complied with the requisites of the section, which are that the medicine "be labelled in manner aforesaid, with the name and address of the seller, and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose." The name of Mrs. Newton was given as that of the person to whom the mixture was "sold," and that name was entered in a book kept for the entry of such prescriptions. As to the infliction of a second penalty for the same act, it is submitted that this was clearly wrong.

Lumley Smith for the respondent.—The present is one of those cases which the Act of Parliament was designed to meet, by preventing poisons being sold to improper persons, and by providing evidence of the persons to whom poisons have been supplied. It is submitted in the first place that the mixture sold by the appellant was a poison within the meaning of the first part of the section. Prussic acid is one of the poisons enumerated in the schedule, and rose water having no medicinal effect, the mixture of the two was merely a diluted poison, and therefore within the application of the section. Is it, then, a medicine? It is submitted that the proviso was intended to apply to medicines for internal use only, and not to lotions like that supplied by the appellant. [LUSH, J.—Suppose this lotion had been given by a legally qualified practitioner to a patient, would it be within the exemption?] It probably would. [LUSH, J.—Then may it not be argued that it is equally protected if "dispensed" by a person registered under the Act? In order to establish your contention must you not show that it would have been necessary to label it as poison if given by a legally qualified practitioner to his patient?] Where the poisonous mixture is to be applied externally as a lotion, it is submitted that it must in both cases be labelled as poisonous. The appellant was bound to prove that the lotion was a medicine; it is enough for the respondent to show the sale of the poisonous compound. The appellant, moreover, should have shown that the prescription was a real one, and that there was a really existing Mrs. Newton; if otherwise, any person who wishes to commit suicide by taking poison can accomplish his purpose by bringing a false prescription to the dispensing chemist. Again, it is submitted that the name of Mrs. Newton, which was entered in the appellant's book, was not the name of the person to whom the mixture was "sold or delivered." [HAN-
NEN, J.—It was delivered to Johnson, but was it not "sold" to Mrs. Newton? What effect do you give to the word "sold" as distinguished from "delivered?"] "Delivered" applies to cases where medicines, as often happens, are given without being sold. Finally, the entry should have been in a book kept for the particular purpose, *i. e.*, for prescriptions for poisonous medicines, which the book in which the entry was made by the appellant was not; and the magistrates were justified in inflicting a separate penalty for each kind of offence, though springing out of the same act.

Quain, Q. C., in reply.—It is for those who seek to inflict a penalty to make out their case strictly, especially where the appellant appears to have acted quite *bona fide*. [LUSH, J.—We find a difficulty in this, that there is no finding that the appellant reasonably believed that the prescription brought to him was given to Mrs. Newton by the practitioner whose initials it bore, the prescription being one for very poisonous materials, and written in pencil. On the other hand, I can hardly think that the proviso was intended to cast on the chemist the duty of finding out at the time the prescrip-

tion is brought whether there is actually existing a medical practitioner bearing the initials on the prescription. As the case at present stands, I don't think we can satisfactorily answer the question of law put to us. No doubt if a prescription came to the shop of a dispensing chemist in such a shape that no reasonable man would act on it, such a case would come within the Act; but on that subject we are left in doubt as to the matter of fact.]

Lumley Smith said that the object of pressing the prosecution was to get a decision of the law relating to the subject. [LUSH, J.—Then I think we need not further trouble Mr. Quain.]

LUSH, J.—Assuming that we are to draw inferences, and taking the case as if it stood as the finding of the magistrates, in point of fact, that this gentleman did really believe that when he was dispensing this prescription he was making up a prescription which had been actually given by a medical man to Mrs. Newton for a lotion, as it purported to be, I am of opinion that he has brought himself within the proviso. The first part (31 & 32 Vict. c. 121, s. 17), the enacting part, applies to the sale of poisons, and amongst the enumerated poisons is prussic acid. I observe that the Act seems to allude to poisons as being sold in their simple state, or in one form of preparation. It does not appear to contemplate their being mixed up with any other ingredients; they must be pure and simple. Then comes the proviso. Taking the general sweeping words of the enactment, they would, perhaps, have prohibited any medical man dispensing a prescription that contained a poison. It was supposed this might be so, in all probability; and then comes the proviso, which says that nothing in the Act contained shall "apply to any medicine supplied by a legally qualified apothecary to his patient, nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act." Is this a medicine? That is not disputed. The word "medicine" is comprehensive enough to embrace everything which is to be applied medicinally, whether externally or internally. According to the prescription, this was intended to be used as a lotion, and the case states as a fact, that the prescription was one which might be proper for a lotion. The proviso seems to put upon the same footing, in this respect, a duly qualified medical man, supplying this thing to his patient, and a registered chemist and druggist dispensing such a thing. If a duly qualified medical man had actually supplied, delivered himself, to his patient this compound of prussic acid and rosewater as a lotion, then he would be protected under the first part of the proviso. That being so, I think the same rules apply to a registered chemist and druggist making up that compound from a prescription, which, as I understand, is the making up something that is prescribed, and making it with directions how it is to be used. Then, did this prussic acid form part of the ingredients of a *medicine* dispensed by a duly registered person? It struck me on first reading the section that the word applied only to cases where the poisonous article is one of several ingredients, where perhaps its poisonous qualities are qualified in a more or less degree by the other ingredients; but then, I think, it would be very difficult to apply the Act with that interpretation of it. We cannot enter into the consideration whether the other ingredients are fewer or greater in number, or in what proportion they may be. This is of itself a compound, and is a medicine which might have been ordered by a medical man to be used as a lotion. Then, has he complied with the remaining part of the section, which requires that the medicine "should be labelled in the manner aforesaid," by which I understand,

Q. B.] REG. (on the prosecution of the Attorney-General) v. HAMILTON KINGLAKE. [Q. B.]

distinctly and legibly with the name and address of the seller, as stated in the section; and that the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose? It is found that the ingredients were entered in what he called his prescription book, which, I think, satisfies the requirements of the Act, as a book kept for that purpose, a book kept for entering such medicines or prescriptions. Then he has entered, as the person to whom it was sold, Mrs. Newton. The statute, by saying the name of the person to whom it was sold, or for whom it was delivered, has, I think, meant to give him the option of putting down the name of the person to whom he actually gave it over the counter, or the name of the person whose agent that person was for whose use it was intended. Taking the fact to be found that he reasonably believed that this was duly prescribed for Mrs. Newton, Mrs. Newton must be taken to be the person to whom he sold it, and, therefore, he complied with the provisions of the Act. For these reasons I think the conviction is wrong.

HANNEN, J.—I am of the same opinion. I think we are able to pronounce our judgment upon the assumption which has been made, that it is to be taken that the magistrates would have found that the chemist in this case acted *bona fide*, believing that Mrs. Newton was the person to whom the medicine was sold. Without that, I should have thought it necessary that there should be a further inquiry, but upon that assumption I think we shall be putting a construction upon the Act which will not lead to the dangerous consequences which have been suggested, because it will only be where a chemist establishes that he has entered the name of the person to whom he delivers the medicine, or the person to whom it shall be found he has reasonably believed he had sold it, that he brings himself within the terms of this proviso.

Conviction quashed.

Attorneys for appellant, *Flux, Argles, and Rawlins.*
Attorney for respondent, *Willet.*

Saturday, April 23.

REG. (on the prosecution of the Attorney-General)
v. HAMILTON KINGLAKE.

Witness—Evidence—Refusal of witness to give evidence on account of its criminating him—Objection overruled, and evidence given—Objection afterwards by defendant that the evidence was improperly received.

The privilege of refusing to answer questions on the ground that they tend to criminate, is, that of the witness alone, and neither party to the suit can take any advantage therefrom.

Where, therefore, a witness was called on the part of the Crown to prove bribery against the defendant, and he refused to give evidence on the ground that his evidence would tend to criminate himself, which objection was overruled by the judge, whereupon he gave his evidence:

Held, that the defendant could not afterwards object that such evidence was improperly received.

This was an application for a rule at the instance of the defendant, calling upon the Attorney-General to show cause why a new trial should not be had herein, and why a verdict should not be entered for the defendant upon the 2nd and 3rd counts of the information.

The facts were as follows:—The Attorney-General had filed an information against Dr.

Hamilton Kinglake and Mr. Henry Lovibond for certain misdemeanors connected with the last Parliamentary election for the borough of Bridgewater. The information contained four counts—1st, for bribery; 2nd, for a conspiracy to bribe; 3rd, for a conspiracy corruptly to expend 500*l.* in bribery; 4th, for a conspiracy to advance 500*l.* for the purposes of corruption.

As far as regarded Mr. Lovibond, the Attorney-General had, in consequence of the expression of the opinion of the Court of Queen's Bench in *Reg. v. Price and others, Ex parte Lovibond*, 22 L. T. Rep. N. S. 12, abstained from further proceeding against him, and the information stood for trial against Dr. Kinglake alone.

At the trial at the last assizes at Taunton, before Hannen, J., the Crown called Mr. Lovibond as a witness; but upon being sworn he declined to give evidence, on the ground that his name was still included in the information; and that two actions were pending against him for penalties for bribery at the said election. Upon this it was announced by the Solicitor-General that a *nolle prosequi* had been entered as to Mr. Lovibond, and a free pardon was at the same time handed to him. He still declined to give evidence, alleging that a pardon would be no protection to him against the actions. The question having been argued, and the 14 & 15 Vict. c. 99, s. 3, 17 & 18 Vict. c. 102, ss. 3, 14, 35, and the 26 & 27 Vict. c. 29, ss. 5 and 7, being referred to, the learned judge held that Mr. Lovibond was compellable to give evidence, and he gave his evidence accordingly, without which, as was admitted, no case could have been made out against Dr. Kinglake. The jury returned a general verdict of "guilty."

Sir J. Karlake, Q.C. (*Charles and H. Kinglake* with him) now moved accordingly, and argued that the objection of Mr. Lovibond to give evidence was well founded. (It is unnecessary to give the argument upon this point as the judgment did not turn upon it.) He contended also that as the evidence of Mr. Lovibond after his objection to give it was wrongly received Dr. Kinglake had a right to avail himself of the objection upon this point. The following cases were cited by counsel, or referred to by the court:

Dandridge v. Corden, 3 Car. & Pay. 11;
Roberts v. Allatt, 1 Mos. & Mal. 192;
Doe d. Earl of Egremont v. Date, 3 Q. B. 609;
Reg. v. Boys, 1 Best & S. 311.

COCKBURN, C.J.—I am of opinion that there should be no rule in this case. An objection is taken by Sir John Karlake that Mr. Lovibond whose evidence was essential for a conviction was under the circumstances not bound to give evidence, but that having been compelled to do so his evidence was improperly received. Now in the first place I am not satisfied that he had any such privilege as he claimed, my strong opinion being that none such existed, and that he was compellable to give the evidence required of him. It is admitted that the pardon protected him against any criminal proceeding; but it is said that it affords him no protection against actions for penalties, and that there are actions now pending against him. I entertain very great doubt whether the privilege of a witness extends to not answering questions which may be used against him, not in a criminal proceeding but in an action for penalties. But it is not necessary for me to rest my judgment upon that ground, for I desire to place it upon a wider basis. I am of opinion that Mr. Lovibond was the only party who could take any exception to his answering; and that the privilege of refusing to be examined cannot be taken advantage of by

Q. B.]

REG. v. THE GUARDIANS OF THE WHITBY UNION.

[Q. B.]

any other party. By refusing to be examined the witness may have exposed himself to imprisonment for contempt, or to a fine. But that merely concerns the witness himself. If he chooses to give his evidence voluntarily it would be perfectly good evidence, and it would not be illegal evidence in any sense whatever, and there could be no cause of complaint. If so, what difference does it make that he has given his evidence in consequence of some coercion which has been put upon him? I can see no reason for saying that when the witness is compelled to answer, although he may have objected, that that is a ground of objection on the part of either of the litigants. .

BLACKBURN, J., after referring to the section of the statute and expressing an opinion that the witness was bound to give evidence, said: But assuming that my brother Hannen was wrong and that some injustice was done to Mr. Lovibond, there was no injustice done to the defendant. The privilege is that of the witness, and if he waives it it is his own affair. But if instead of giving his evidence voluntarily he gives it under compulsion, what is the difference? The party in the suit is not injured. The only case cited upon this point is *Doe d. Earl of Egremont v. Date*, 3 Q. B. 609. But granting that a wrong was done to the witness, it is a ground of complaint for him and no one else.

MELLOR, J.—I am entirely of the same opinion upon the last ground. It is clear that if Mr. Lovibond had made no objection his evidence would have been receivable, and it really can make no difference that he objected and was compelled to give his evidence.

HANNEN, J. concurred.

Rule refused (a).

Wednesday, April 27.

REG. (on the prosecution of the Guardians of the Stepney Union) v. THE GUARDIANS OF THE POOR OF THE WHITBY UNION, YORKSHIRE.

Re ESTHER MARSHALL (a pauper lunatic).

Poor law—Status of irremovability—Lunatic pauper—Removal of, without her assent to another union—Order of maintenance.

Where the status of irremovability by virtue of a year's residence is shown to have existed, it is for the party alleging that it has ceased to exist to prove that to be the case.

The leaving of a residence which has conferred the status of irremovability must be the voluntary act of the party.

Where, therefore, a pauper lunatic who had acquired the status of irremovability by residence in the union of R. as a domestic servant, whilst continuing in that same union became insane, whereupon her mother took her away into the union S., where an order was made for her maintenance upon her union of settlement at

Held, that the order was bad, for that she had not lost her status of irremovability in the union of R.

This was a case stated by the Quarter Sessions for the North Riding of Yorkshire as follows:—

At a general quarter session of the peace holden in and for the county of Middlesex, upon an appeal wherein the guardians of the poor of the Whitby

union in the North Riding of the county of York were appellants, and the guardians of the poor of the Stepney union, in the county of Middlesex, were respondents, against an order dated 23rd Oct. 1868, made by two of Her Majesty's justices of the peace for the said county of Middlesex, whereby the settlement of Esther Marshall, a pauper lunatic, was adjudged to be in the township of Whitby, in the said Whitby union, and the guardians of the said Whitby union were ordered to pay a certain sum of money therein mentioned, for the expenses incurred in and about the examination of the said lunatic and her removal to a lunatic asylum; also a certain sum for her maintenance, &c., therein, up to the date of the said order, and also a certain weekly sum therein also mentioned, for her future maintenance, &c., in the said asylum. It was ordered that the said order be confirmed, subject to the opinion of the Court of Queen's Bench on the following

CASE.

The said Esther Marshall is a single woman, aged twenty-eight years, legally settled in the township of Whitby, in the Whitby Union. For one year and three months immediately preceding the 17th Sept. 1868 she had been a domestic servant in the service of Mr. Dunn, of Richmond, in the Richmond Poor-law Union, in the county of Surrey, as a yearly servant, and had, during such period resided and slept at the house of her said master in Richmond aforesaid. On the night of Wednesday, the 16th Sept. 1868, the said Esther Marshall was seized with a severe attack of mania, and her master thereupon went to the workhouse of the said Richmond Union, and there informed the master of the said workhouse and the gate porter that the said Esther Marshall was insane, and that he was unable to keep her in his house, and he requested them to remove her to the said workhouse to be taken care of.

The master of the workhouse stated in reply that he could not interfere in any way, as the said Esther Marshall was still residing in her master's house, but he lent her master a strait waistcoat in case it should become necessary to restrain her. The next morning (the 17th Sept.) the master of the said Esther Marshall had an interview with the clerk to the guardians of the poor of the Richmond Union, and afterwards on the same day attended with his doctor before the board of guardians of the said union, who happened to be then sitting at the said workhouse, and informed them of the facts before mentioned relating to the said Esther Marshall, and requesting them to remove her to the workhouse in order that she might be properly taken care of. The board, however, stated in reply, that they had no power to interfere in any way, and the master then telegraphed to the parents of the lunatic, who were residing at Ratcliffe, in the Stepney Union (a distance of about fourteen miles), to come to Richmond to remove her. In the afternoon of this day (17th Sept. 1868) the said Esther Marshall's mother and her brother arrived at Richmond. The master thereupon paid the mother her daughter's wages up to that day, and having hired a fly at his own expense, the said Esther Marshall was removed in it by her said relations from the residence of her master at Richmond to the residence of her parents at Ratcliffe, in the Stepney Union. The master had not the slightest intention or expectation of receiving the said Esther Marshall back again into his house. The said Esther Marshall remained at the house of her parents, who were poor persons, and in receipt of out-door parochial relief from the township of Whitby, one night only, during which time she attempted to throw herself out of the window. The next morning (18th Sept.) the parents of the said Esther Marshall applied to the

(a) With reference to that part of the rule having reference to the third and fourth counts, it was arranged that the question should be referred to Hannen, J. at chambers, it being thought probable that the Attorney-General would consent to the verdict being confined to the first and second counts only.

Q. B.]

REG. v. THE GUARDIANS OF THE WHITBY UNION.

[Q. B.]

relieving officer of the Ratcliff district of the Stepney Union, who visited the lunatic, and had her removed in due course on the same day to the workhouse of that union. She remained in the Stepney Union Workhouse for seven days, and was then sent to the lunatic asylum for the county of Middlesex on the 26th Sept., where she has since remained confined as a pauper lunatic. On the 26th Oct. 1868, the order appealed against was made. The said Esther Marshall had, on the 16th Sept. 1868, acquired the status of irremovability from the Richmond Union, under 9 & 10 Vict. c. 66, s. 1; 24 & 25 Vict. c. 55, s. 1; and 28 & 29 Vict. c. 79, s. 8, by virtue of residence therein for more than a year. She has remained insane from the night of the 16th Sept. It was contended, on behalf of the appellants, that, as the said Esther Marshall had, on the said 16th Sept. 1868, acquired a status of irremovability by residence in the Richmond Union, the order for her past and future maintenance ought not to have been made upon the guardians of the place of her settlement, but ought to have been made upon the guardians of the Richmond Union, under 16 & 17 Vict. c. 97, s. 102; and it was further contended that her removal under the circumstances mentioned did not constitute a breach of her residence in Richmond so as to destroy the status of irremovability.

It was contended, on behalf of the respondents, that the order was rightly made on the guardians of the place of settlement, and, further, that the removal of the said Esther Marshall under the circumstances mentioned did constitute a breach of residence so as to destroy her status of irremovability.

The Court of Quarter Sessions directed in favour of the respondents, and confirmed the said order appealed against.

The question for the opinion of this court is whether, under the circumstances above stated, the guardians of the Stepney Union were prevented from obtaining an order on the guardians of the Whitby Union for the maintenance of the said Esther Marshall, under 16 & 17 Vict. c. 97, s. 97. If the court shall answer this question in the affirmative, then the order of sessions is to be quashed, but if in the negative, then the order of sessions is to be confirmed.

By the 9 & 10 Vict. c. 66, s. 1, it is enacted:

That from and after the passing of this Act no person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant.

The period of five years was, by the 28 & 29 Vict. c. 79, s. 8, reduced to one year.

By the 16 & 17 Vict. c. 97, s. 97, it is enacted:

It shall be lawful for any two justices for the county or borough in which any asylum, registered hospital, or licensed house in which any pauper lunatic is or has been confined is situate, or to which such asylum wholly or in part belongs, or from any part of which any pauper lunatic is or has been sent for confinement at any time, to inquire into the last legal settlement of such pauper lunatic, and if satisfactory evidence can be obtained as to such settlement in any parish, such justices shall, by order under their hands and seals, adjudge such settlement accordingly, and order the guardians of the union to which the parish in which such lunatic is adjudged to be settled belongs, or of such parish in case such parish be in a union or be under a board of guardians, and if not, then the overseers of such parish to pay to the guardians of any union or parish, or the overseers of any parish, all expenses incurred in or on behalf of such union or parish in or about the examination of such lunatic, and the bringing him before a justice or justices, and his conveyance to the asylum, hospital, or house, and of all moneys paid by such last mentioned guardians or overseers, to the treasurer, officer or proprietor of the asylum, hospital, or house, for the lodging, maintenance, medicine, clothing, and care of such lunatic, and incurred within twelve months previous to the date of such order; and if such lunatic is still in confinement, also to pay to the treasurer, officer, or proprietor of the asylum, hospital, or

house the reasonable charges of the future lodging, maintenance, medicine, clothing, and care of such lunatic, &c.

By sect. 102, it is enacted:

Provided always that all the expenses incurred since the 29th Sept. 1853, or hereafter to be incurred in and about the examination, bringing before a justice or justices, removal, lodging, maintenance, medicine, clothing, and care of a pauper lunatic heretofore or hereafter removed to an asylum, registered hospital, or licensed house under the authority of this or any other Act who would at the time of his being conveyed to such asylum, hospital, or house, have been exempt from removal to the parish of his settlement, or the country of his birth by reason of some provision in the Act of the session holden in the ninth and tenth years of Her Majesty, c. 66, shall be paid by the guardians of the parish wherein such lunatic shall have acquired such exemption if such parish be subject to a separate board of guardians, or by the overseers of such parish where the same is not subject to such separate board, and where such parish shall be comprised in any union, the same shall be paid by the guardians and be charged to the common fund of such union so long as the cost of the relief of paupers rendered irremovable by the last-mentioned Act shall continue to be chargeable upon the common funds of unions, &c.

Taylor appeared for the respondents.—The order was rightly made upon the Stepney Union, for the lunatic had under the circumstances lost her status of irremovability. The pauper at the time of the order, was in the Stepney Union, and as between Stepney and Whitby there was no irremovability the pauper had not acquired the status of irremovability in Stepney, and she had lost it in Richmond. She had left Richmond with no intention of returning. Her parents, who were her natural guardians, took her away to Stepney, and there was no intention, nor any ability or right to return. [BLACKBURN, J.—Has this taking away by her parents any greater effect upon her status than though she had voluntarily gone to them upon a visit?] If she had gone to them voluntarily upon a visit she would have had the intention to return. To prevent a break of residence there must be, first, a temporary absence; secondly, an intention to return; thirdly, a place to return to. In all the cases upon the subject there has been an actual return to the parish, and an order of removal from it. Here there was no return to Richmond, nor any intention to return, nor was the order made as from Richmond. It is sufficient for my purpose if I establish the fact that at the time the order was made the pauper lunatic was not residing in Richmond Union. [BLACKBURN, J.—The great difficulty is that the poor woman could have had no intention the one way or the other.] He cited the following cases:

- R. v. St. Giles*, 3 Ell. & Ell. 224;
- R. v. Whissendine*, 2 Q. B. 450; 11 L. J. 42, M. C.
- R. v. Glossop*, L. Rep. 1 Q. B. 227;
- Leeds v. Wakefield*, 7 Ell. & Bla. 258;
- R. v. Stapleton*, 22 L. J. 102, M. C.;
- R. v. Tacolnstone*, 18 L. J. 44, M. C.;
- R. v. Brighton*, 24 L. J. 41, M. C.

Poland (*Poynter* with him) appeared for the appellants.—The pauper lunatic having acquired the status of irremovability, did not lose it; she could only have lost it, first, by some voluntary act of her own, or, secondly, by the operation of law, as by a lawful removal. She did no act indicating an intention to abandon her residence. The lunatic was a yearly servant; she had served one year, and was serving a portion of another, and she did no act showing an intention to determine her contract. There was no voluntary leaving on her part, and nothing to show that she did not intend to return. Had she recovered in a day or two's time, and gone back to her service, it would have been clear that there would have been no break of residence. She did nothing to terminate her service with her master; all that occurred was that she became in a state of insensibility, whereupon others took her away. Her parents had no legal right to act for her, nor were they under any legal obligation to

Q. B.]

GODWIN v. FRANCIS.

[C. P.]

support her, unless they were capable of so doing, and an order had been made upon them under the 43 Eliz. If she was not capable of exercising a judgment, it cannot be said that she voluntarily put an end to her residence in Richmond union. Her service was not determined; her contract to serve remained good for the residue of the second year, and on her recovery she would have had a right to have gone back. Had she been sent to a lunatic asylum at once, there would have been no difficulty. He cited the following cases:

R. v. Seend, 12 Q. B. 133;
R. v. Halifax, 8 Q. B. 111;
R. v. Hartfield, 21 L. J. 65, M. C.;
R. v. St. Andrews, Holborn, 21 L. J. 69, M. C.;
R. v. East Retford, 32 L. J. 17, M. C.;
R. v. St. Mary, Islington, 3 Best & Sm. 46;
R. v. Sutton, 5 T. R. 657;
R. v. Sudbrook, 4 East. 356;
R. v. Islip, 1 Str. 423.

BLACKBURN, J. (a)—I think that in this case our judgment should be that this order be quashed, inasmuch as it ought not to have been made upon the Stepney Union. The way in which the case arises is this: [His Lordship here stated the facts.] Now the proceedings pointed out by the Legislature are described in the 97th section of the 16 & 17 Vict. c. 97, which throws the burthen of maintenance of a pauper lunatic upon the parish or union of settlement; but then there is the 102nd section, which enacts that the costs of pauper lunatics who are irremovable by virtue of the operation of the 9 & 10 Vict. c. 66, s. 1, are to be borne by the parish or union wherein they were exempt from removal, and not, therefore, on the parish of settlement. Here, then, comes the question whether, at the time the order was made, the lunatic had become irremovable on the ground that she had resided so long in the Richmond Union as to acquire the *status* of irremovability? I am of opinion upon the facts that she had not lost her *status* of irremovability. It must not be forgotten that this provision was enacted for the benefit of the paupers themselves; that they may not be removed from the place where they have been residing, and where they may have formed friendships and connections. Now, when once the *status* is acquired, how can it cease? It ceases when the residence has been broken; and the onus that it has been broken is upon the party who alleges it, which may be done by showing that the pauper has voluntarily left and obtained a residence elsewhere. If, though he may go away, he still retains the intention and ability of returning, it will be no break of his residence. Here, this unfortunate woman had no intention the one way or the other, as she was a lunatic. I think, however, that the *status* of irremovability ought to be considered as continuing until the contrary is shown. The mere fact of the mother of the lunatic taking her away for a single night, cannot be considered as a change of residence. It seems to me that Mr. Poland is right in his argument, and that if this woman had removed and had returned to Richmond, she would have retained her *status* of irremovability. I consider that the residence must be supposed to continue unless it is affirmatively found that she changed it. If the pauper had recovered and returned, there could have been nothing to have deprived her of her *status*.

MELLOR, J.—I am of the same opinion. The object of the Legislature was to prevent the oppression of removing poor people from their old associates, and although as the present pauper is a lunatic, it may matter little to her whether she is removed to a distance or not, yet in the event of

her recovery it may be otherwise. Now in this case the woman was serving a contract, and there is no evidence that she intended to break it by leaving her service. Her master may have discharged her from his house, but that would not have been a termination of her contract, and certainly he could not have turned her out of the parish; and although she was actually removed out of the parish, yet this was the act of her mother for a temporary purpose, and there is nothing in the removal to show a break of residence.

HANNEN, J.—I am also of the same opinion. The *status* of irremovability can only be put an end to by showing that the residence has ceased. When a place of residence is once established it can be abandoned by showing some act evincing an intention to abandon it. Here from her state of mind the woman was incapable of assenting to the abandonment of her residence, and having acquired the *status* of irremovability, I think it was not destroyed by anything which is shown to have taken place.

Order of sessions quashed.

Attorney for the appellants, *Matthew Gray, Whitby.*

Attorney for the respondents, *W. H. Sweepstone.*

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR and H. H. HOCKING, Esqrs.,
 Barristers-at-Law.

Jan. 15 and Feb. 5.

GODWIN v. FRANCIS.

Damages—Breach of contract to sell real estate—Pretended agent—Costs of action against alleged principal.

The defendant, being part owner of an estate, and believing himself to have authority from the other owners to sell it, agreed to sell it for a stipulated price to the plaintiff. The other owners refused to be bound by the contract, and sold the estate, for a higher price than the plaintiff had agreed to give, to another person. On the owners of the estate refusing to convey to the plaintiff, the plaintiff applied to the defendant, who said he was sorry there had been a misunderstanding in the matter; that he thought that, subject to the preparation of a proper contract, he was authorised to sell; but that it then appeared that other parties interested took a different view of the matter. The solicitor to the other owners informed the plaintiff, in explicit terms, that the defendant had no authority to make the contract he had made. Nevertheless, the plaintiff brought an action against the owners of the estate for breach of contract. On his interrogating them, they, one and all, swore that the defendant had had no authority to sell the estate. Nevertheless, the plaintiff proceeded with his action, hoping to prove by other evidence the agency of the defendant. At the trial he was nonsuited, and had to pay costs on both sides:

Held, in an action against the defendant for wrongfully representing himself to have authority to sell the estate, that the plaintiff was entitled to recover first, the expenses of investigating the title to the estate; secondly, the costs of the first action up to the time of his receiving the answers to the interrogatories, with an allowance for reasonable costs incurred in submitting those answers to the consideration of his legal advisers; thirdly, damages for loss of bargain, the difference between the contract price of the estate and the price at which it was subsequently sold being *prima facie* evidence of the extent of the plaintiff's loss.

This case was reported on another point, 21 L. T. Rep. N. S. 361.

(a) Cockburn, C. J. was absent.

C. P.]

GODWIN v. FRANCIS.

[C. P.]

The declaration stated that the defendant, by warranting the plaintiff that he was authorised by certain others, to wit, &c., who were interested, together with him, in a certain estate, known, &c., to sell the same to the plaintiff for a certain sum, to wit, &c., agreed with the plaintiff, as for himself and the said others, and procured the plaintiff to agree, as with himself (the defendant) and the said others, that the defendant and the said others should sell to the plaintiff, and the plaintiff should purchase from the defendant and the said others the said estate for the sum of 10,500*l.*, and the plaintiff did all things necessary, &c. Yet the defendant was not authorised by the said others to sell, &c., whereby, &c.—the plaintiff claiming, by way of special damage, compensation for loss of bargain, compensation for the expense he had been put to in bringing an action against the owners of the estate, compensation for money spent in investigating the title, and compensation for loss on the resale of animals and things bought for the purpose of stocking and cropping the said estate.

The defendant pleaded: 1. A traverse of the warranty. 2. A denial that he agreed, or procured the plaintiff to agree. And, 3. That at the time, &c., he had authority to sell.

At the trial at Salisbury, at the last summer assizes, before Lush, J., it appeared that the plaintiff was, with certain other persons of the name of Brind, owner of an estate called the Liddington estate. The defendant and the other owners issued an advertisement, which stated that the estate was to be sold, and that "to treat and view the property application was to be made" to certain persons, one of whom was the defendant. The plaintiff accordingly applied to the defendant. A correspondence ensued between them relative to the sale of the estate, for which the plaintiff offered the sum of 10,500*l.* On the 18th Oct. 1867, the defendant wrote to the plaintiff saying, that four out of the five owners of the estate agreed to his proposal, and that he should see the fifth the next day and had no doubt that he would accept it too. On the 20th Oct. the plaintiff wrote to the defendant to say that if he was to have the estate for 10,500*l.*, the matter must be settled at once, "as the season is going on for cropping the ground with wheat, and I find the entry very bad, as there are only thirty acres which can be sown this year." On the 22nd Oct. the defendant accepted the plaintiff's offer by telegraph, and on the 23rd plaintiff wrote to defendant acknowledging the receipt of the telegram, and saying that he considered himself the purchaser. The abstract of title was sent about the end of October. On the 8th Nov. the solicitors to the Brind family wrote to the plaintiff to say that one of the owners had not authorised the defendant to sell. On the 18th they wrote again, saying that it was clear that the defendant had no authority to sell the estate. On the 28th Nov. the defendant himself wrote to the plaintiff, saying, "I am sorry there has been any misunderstanding in the matter of the sale of the Liddington estate. I thought that, subject to the preparation of a proper contract, I was authorised to sell, but it now appears that other parties interested take a different view of the matter." The owners refused to complete the sale, and shortly afterwards sold the estate to another person for a larger sum than the plaintiff had agreed to give. The plaintiff then brought an action against them (the present defendant being one of them), and interrogated them as to whether they had not given Francis authority to sell the estate. Francis, in his answer to interrogatories, said that he had been under the impression that his co-owners would concur, if he could get an offer of the 10,500*l.*; but he had since discovered that there had been a misunderstanding on the point. The other owners denied that they had

given any authority to Francis to sell the estate. Nevertheless, the plaintiff continued his action against them, hoping to prove by means of the before-mentioned advertisement that Francis had had the authority he represented. The case came on for trial at the Salisbury summer assizes 1868, before Mellor, J., who non-suited the plaintiff. The plaintiff subsequently moved for a rule to set aside the non-suit, but that was refused, and he had to pay not only his own costs but those of the defendants. He then commenced the present action, when he obtained a verdict for 726*l.* 9*s.* This sum included full compensation for (1) costs incurred in investigating the title, (2) his own costs and the taxed costs of the defendants in the previous action, (3) the difference between the price which he had agreed to give for the estate and the price at which it was subsequently sold, and (4) loss incurred by him in selling stock, horses, &c., which he had bought, after entering into the contract with the defendant, with a view to stocking the farm. Leave was reserved to move for a rule to reduce the damages.

Lopes, Q.C. (on Nov. 4, 1869), moved accordingly, and a rule was granted.

Cole, Q.C., (on Jan. 15 and Feb. 5), showed cause. All the cases show that the plaintiff is entitled to full compensation for the expense he was at in investigating the title. The next question that arises is up to what point the plaintiff ought to recover the costs of the previous action. The defendant's letter of the 28th Nov. 1868 is clearly not a distinct denial of authority. [BOVILL, C.J.—On the contrary, it looks rather as though he still thought he had authority.] Just so. The plaintiff then was at all events justified according to the rule laid down in *Richardson v. Dunn*, 8 C. B., N. S., 655; 30 L. J. 44, C. P.; *Collen v. Wright*, 7 E. & B. 301; 26 L. J. 147, Q. B.; 8 E. & B. 647; 27 L. J. Q. B. 215; and *Spedding v. Nevill*, L. Rep. 4 C. P. 212; 38 L. J. 133, C. P. in commencing his action and in going on with it, at least until he had the answer of the defendant and the others on oath denying the defendant's authority. Until the plaintiff got this answer, he had every reason to believe that the defendant had authority to sell the estate, and, having got a valuable bargain, he was not bound to sit down and take no steps to enforce it. The question is what would a reasonable man have done under the circumstances? It is submitted that the plaintiff did nothing more than a reasonable and prudent man was bound to do. Even after he had the answers of the then defendants denying on oath that they gave the present defendant authority to sell, the defendant was justified in going on with the action. It is true he failed. Still it was a moot point whether the wording of the advertisement was not such as to hold out the present defendant as authorised to sell the estate. The plaintiff, knowing that the estate had been sold at a higher price than he had contracted to give, was justified in looking with suspicion at the answers of the then defendants, and in proceeding with the action. The next question is as to the damages for loss of bargain! *Engel v. Fitch*, 18 L. T. Rep. N. S. 318; 37 L. J. 145, Q. B.; L. Rep. 3 Q. B. 314, is a conclusive authority to show that the defendant having undertaken to sell what he had not secured command of, cannot claim the protection of a rule which has reference solely to the difficulty of making out a title to real property. The fact that the estate subsequently sold for more than 10,500*l.* is *prima facie* evidence that it was worth more than that sum, and, in the absence of any evidence to the contrary, must be taken as conclusive. As to the last question, the parties clearly contemplated that early

C. P.]

GODWIN v. FRANCIS.

[C. P.]

possession would be given, and the plaintiff in one of his letters says, "I must be at great expense in stocking, &c."

Lopes, Q.C., and Bowen, in support of the rule. We do not contest the plaintiff's right to recover the costs of investigating the title. With regard to the next point, the plaintiff is clearly not entitled to the costs of the previous action, after receiving the answers to the interrogatories. Moreover, he was not justified, after the warnings he had received from the vendors' solicitors, in commencing the action. No reasonable man, who thought he would have to bear the costs himself, would have commenced the action without further inquiry. The letters received from the defendant and the vendors' solicitors were, if not conclusive, at any rate such as ought to have made the plaintiff pause and make further inquiries before proceeding. [BOVILL, C.J.—The letter of the defendant is by no means clear. As for the other letters, they came from the Brinds not from the defendant.] How could the plaintiff possibly expect to prove his case, after receiving those letters? [BOVILL, C.J.—He was not then sure that he could not call Francis as a witness.] Would anyone have advised an action under the circumstances? [BOVILL, C.J.—Put it the other way. Would anyone at that stage of the case have advised an action against Francis for making wrongful representations of authority?] In all decided cases there has been a persistence in the wrongful representation, and in *Spedding v. Nevill* (*ubi sup.*) there was a count in fraud and such misconduct on the part of the defendant that fraud might have well been expected. With regard to the next point, this case is distinguishable from *Engel v. Fitch* (*ubi sup.*), as that related to the loss of profit on the re-sale of a lease. The damages are too remote: they are not the natural consequences of the breach of contract and cannot be said to have been in the contemplation of the parties. In *Sikes v. Wild*, 4 B. & S. 421; 32 L. J. 375, Q.B.; 8 L. T. Rep. N. S. 642, the misconduct of the defendant was the ground of the damages. In *Engel v. Fitch* the defendant was guilty of misconduct. [BRETT, J.—Can the motive of the defendant in a breach of contract be important?] That is the principle of the cases. They cited also

Hopkins v. Grazebrook, 6 B. & C. 31;

Hadley v. Baxendale, 9 Ex. 341; 23 L. J. 179, Ex.;

Walker v. Moore, 10 B. & C. 416.

As to the next point the damages are clearly too remote. The plaintiff began buying stock ten days after the contract was made, and before the abstract of title was investigated. The letters do not show that it was in the contemplation of the parties that the plaintiff should be in such a hurry: (*Worthington v. Wallington*, 18 L. J. 350, C. P.; 8 Q. B. 134.)

BOVILL, C.J.—The defendant having admitted that the verdict must stand as to the costs of investigating the title, three questions only are left for our consideration. The first question that arises is whether the plaintiff is entitled to recover from the defendant the costs of the action brought by him against the parties whose agent the defendant held himself out to be. That action failed, on the ground that the defendant had not been authorised by these parties to sell the estate. The plaintiff was nonsuited, and had to pay the costs of both sides. It seems to me that the present defendant, having contracted on behalf of the vendors, led the plaintiff to believe that he had the authority he warranted. The plaintiff, then, was justified as against him in acting on his representations, and in commencing proceedings against the vendors, on their refusing to convey. If he commenced these proceedings properly

and reasonably, and was led to commence them by the act of the defendant, then, as he failed by reason of the defendant having had no authority to sell the estate, the defendant is responsible for all costs reasonably incurred. (The rule in these cases is that where a pretended agent in reality had no such authority as he pretended to have, he must pay all the costs which he, whom he has deceived, acting on his representations and conduct, has reasonably incurred. It is a question for a jury what costs are reasonably incurred. That was the rule laid down in *Hughes v. Græme*, 33 L. J. 335, Q. B.; and I am at a loss to see what other rule could be adopted. We, then, sitting as a jury, and looking at all the circumstances, think that the action was reasonably and properly brought, and that the plaintiff was led to bring the action by the representations of authority made by the defendant. As to any statement made by the defendant before action, I think that the defendant ought to have made a distinct and positive denial of his authority, to disentitle the plaintiff to the costs of commencing proceedings. The only step taken by the defendant was to write the letter of 28th Nov. 1867, in which he said, "It now appears that other parties interested take a different view of the matter." That is by no means a distinct denial of authority; on the contrary, the defendant seems to intimate that he is by no means sure that he had no authority. Other letters passed between the parties, and the plaintiff received one from the solicitor to the Messrs. Brind distinctly denying the authority. That, however, is a denial by the alleged principals and not by the defendant. In all these cases the question arises whether the plaintiff, as a reasonable man, was bound to act on such a representation. All the circumstances must be considered. The parties may have had the deepest interest in trying to repudiate the bargain made on their behalf. In other cases there may be fraud or collusion. I unhesitatingly think that the proceedings were reasonably commenced, the defendant having made no distinct denial of authority. The question then arises, whether and how far they were properly continued. After the then defendants, including the present defendant, had, in their answers to interrogatories, denied the authority on oath, I do not think that the plaintiff ought to have continued the proceedings against them, but to have gone at once against the present defendant. Instead of doing so, he continued the action and endeavoured to make out a case by means of the advertisement. In doing so he was, according to the decision of this court, wrong, as the advertisement gave the defendant no authority to sell on behalf of the vendors. The plaintiff failed then, and not on the ground of the defendant having represented himself as having an authority which he had not. I think that the plaintiff ought not reasonably to have continued the action, after getting the answers to the interrogatories, so that the damages he is entitled to under this head must be no greater than will cover the costs of the first action up to the time of receiving the answers to interrogatories and of submitting them to the consideration of the plaintiff's legal advisers. The next point is as to the damages for loss of bargain; and the plaintiff's claim on this head is not put on the ground that the plaintiff is entitled to recover the difference of price on the re-sale as such, but that that difference must be treated as a measure of the difference between the contract price and the actual value. Could he have recovered these damages from the vendors if they had been bound by the defendants' contract and had refused to convey the estate? If he could, then he can also recover them from the defendant. I assume that the vendors had a good title, and were in a position to convey. Why, then, did the contract go off?

C. P.]

GODWIN v. FRANCIS.

[C. P.]

Not because of any defect in title, but by reason of a refusal to convey. If the defendant had had authority to bind the vendors, they would have had no justification for their refusal. If a purchase of real estate goes off by reason of a defect in the vendor's title, that is an exceptional case; but there is no decision limiting the damages in a case where a party, having a title, refuses to convey. Mr. Bowen has tried to distinguish *Sikes v. Wild*, and *Engel v. Fitch* (*ubi sup.*); yet the principle of these decisions is clear. If a person has a title and refuses to convey, he is entitled to no exceptional favour. In the case of *Engel v. Fitch* the defendant had it in his power to complete the purchase by ejecting the tenant. Let us apply the principle of that case to this. The purchase goes off, not through any defect in the vendors' title, but merely by reason of their refusal to carry out the contract. On this head, I think that the plaintiff is entitled to a verdict for 100*l.*, that being the difference between the contract price and the price at which the estate was subsequently sold. The third point arises as to the loss incurred by the plaintiff in selling stock and farming implements which he had bought in contemplation of taking early possession of this estate. I do not think, however, that these damages can be said to naturally flow from the defendant's breach of contract. A party who makes a contract for the purchase of an estate, must know that considerable time necessarily elapses before the contract can be completed. It is impossible to say that damages like these are not too remote, the stock, &c., having been purchased before possession was given or the conveyance made. If the plaintiff could have shown that the immediate purchase of stock was clearly in the contemplation of the parties, he might have brought the case within the rule laid down in *Hadley v. Baxendale* (*ubi sup.*). It was no doubt in contemplation of the parties that early possession should be given, and the plaintiff no doubt let the defendant know that he intended purchasing stock for the farm. But there was nothing amounting to a clear notice that the plaintiff intended to purchase stock before taking possession, so as to bring the case within the rule laid down in the case mentioned. I think we should be allowing a new head of damages if we allowed the plaintiff to recover on this head. The circumstances do not warrant it, and the damages cannot be considered as naturally flowing from the breach of contract, or to have been in the contemplation of the parties.

M. SMITH, J.—I am of the same opinion. As regards the costs of the previous action, the question arises what was the reasonable course for the plaintiff to have taken. The defendant had represented himself as authorised to sell the estate, and everything happened to lead the plaintiff to suppose that he had the authority which he said he had. The estate was publicly advertised for sale, and after the contract was made the plaintiff had a correspondence with the vendors' solicitors, in which the contract was treated as valid. The plaintiff went to some expense in investigating the title, and had every reason to believe that he had bought the estate. But it afterwards appeared that the defendant had no authority to sell; and he accordingly wrote a letter to the plaintiff throwing doubt upon the subject. It may have been that the defendant intended to say that he had had no authority; but the letter is equivocal. The plaintiff had a valuable bargain, and he was not bound, under the circumstances, to sit down and do nothing to enforce it. He might have proceeded against either the defendant or his principals. The plaintiff was in a position of some difficulty, but I cannot say that he did not do what a prudent man would

have done under the circumstances. He knew of the subsequent sale at an advanced price, and he might have reasonably hoped to succeed against the vendors. Lots of things might have happened to give evidence of authority. It was a natural and prudent course for him to take to proceed against the vendors. But then, having commenced his action against them, he interrogated them as to the authority, which he contended they had given to the present defendant. They all answered that no such authority had been given. After that, there was no reason for him to doubt that such was the case, and the further prosecution of the action was imprudent. On these grounds I think that the plaintiff is entitled to recover the costs of the previous action up to his receiving the answers to the interrogatories and also any fair expenses incurred by him in considering those answers. The next question that arises is whether the plaintiff is entitled to recover damages for the marketable value of the estate beyond the price he had agreed to give. I think that he is clearly entitled to such an amount as will recompense him for the loss of the contract which he had made. If the defendant had been authorised by the vendors to contract, the plaintiff could clearly have recovered these damages from them. If they had, under such circumstances, refused to carry out their contract, the plaintiff would have been entitled to the difference between the contract and the market price. This is clearly laid down in the case of *Engel v. Fitch* (*ubi sup.*), where Kelly, C. B., in giving the judgment of the Exchequer Chamber, said:—"I may add that I think this would be so in all cases of this kind, excepting those within the rule of *Flureau v. Thornhill*, which is confined to the single case of failure of title. We adopt the general rule as enunciated by Parke, B., in *Robinson v. Harman*, that "the rule of the common law is that when a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of *Flureau v. Thornhill* qualified the rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title, so that when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title." The measure taken here is the difference of price on the re-sale. That is *prima facie* evidence of the real value of the estate, and there being no evidence here to the contrary, it is on this head of damages conclusive. With regard to the third point, I do not think the plaintiff ought to succeed. If nothing had passed between the parties with regard to stocking the farm, the damages would be clearly too remote. It could not be in the contemplation of the parties that the plaintiff would lay out money in collateral purchases, which would only be necessary when the estate was in actual possession. If we were to hold otherwise, every man who contracted for the purchase of the lease of a house might, if the purchase went off, claim damages for loss incurred in purchasing furniture. Such damages are not naturally in the contemplation of the parties. But then the correspondence is relied on to show that the plaintiff gave notice to the defendant that he was about to purchase stock, and it is contended that, on this account, this particular matter must be treated as having been in the contemplation of the parties. But I do not think that the letters show that the plaintiff intended to buy stock before taking possession, so that on this head of damage the plaintiff fails.

C. P.]

BOWDEN v. ALLEN.

[C. P.]

BRETT, J.—I think that the plaintiff is entitled to the costs of the previous action up to his receiving the answers to the interrogatories and for a reasonable time afterwards. I think that he was justified at first in thinking that he had a reasonable prospect of success, and that he might well have thought, until he received the answers to the interrogatories, that he might call the defendant as a witness to prove that he actually had had the authority which he had represented himself to have. As to the increased value of the estate, I think that the plaintiff is entitled to recover the difference between the contract price and the price at which the estate was subsequently sold. If the defendant had had the authority which he represented himself to have, the plaintiff would have had an estate of this increased value, and if the principals had then refused to convey it, he might have recovered from them. The case of *Engel v. Fitch* is a good authority to show that he might, and if, under such circumstances, he might have recovered against them, he may now recover the same damages from the defendant. With regard to the third head of damage, I cannot think that the plaintiff is entitled to recover. The contract was for the sale and purchase of land, and horses and so forth were bought by the defendant before possession of the land was given or even the title investigated. The defendant was surely not bound to contemplate that the plaintiff would make such a purchase. But it is said that he had notice of his intention to do so. That depends on the construction we put upon the correspondence. I must say that the plaintiff does not seem to me to give the defendant any warning in his letters that, if the contract were made, he should at once commence buying stock before possession of the estate was given or the title had been investigated.

Rule accordingly.

Attorneys for the plaintiff, *Vennings, Robins, and Co.*

Attorneys for the defendant, *C. T. Foster*, for *R. W. Williams*, Cardiff.

Friday, April 22.

BOWDEN v. ALLEN.

Practice—Interrogatories—Libel—Newspaper.

The 19th section of 6 & 7 Will. 4, c. 76, which was re-enacted by 32 & 33 Vict. c. 24, sched. 2, does not compel an answer to interrogatories which the person interrogated swears would tend to criminate him.

This was an application to reverse an order of Bramwell B. at chambers.

An action was brought by the plaintiff against the defendant for a libel contained in a newspaper, of which the defendant was supposed to be the publisher. The plaintiff obtained an order from Willes, J., in chambers to interrogate the defendant as to whether he was the responsible publisher of the newspaper in question. The defendant, however, refused to answer the interrogatories, on the ground that his answers would tend to criminate him. Application was made to Bramwell, B., at chambers to compel the defendant to answer; the learned judge, however, made no order, and made the plaintiff pay the costs of the application. Against this decision the plaintiff appealed.

Foard for the plaintiff.—The plaintiff has to prove that the defendant published the libel in question. The statute 32 & 33 Vict. c. 24, which did away with the necessity under which publishers of newspapers formerly lay of registering themselves, renders it difficult to prove who is the publisher of a newspaper. The only course for the plaintiff to take under the circumstances is to interrogate. Accordingly the Act (in sched. 2) re-enacts sect. 19 of 6 & 7

Will. 4, c. 76, which provides that "if any person shall file a bill in any court for the discovery of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matter relative to the printing or publishing of any newspaper, in order more effectually to bring or carry on any suit or action for damages alleged to have been sustained by reason of any slanderous or libellous matter contained in any such newspaper respecting such person, it shall not be lawful for the defendant to plead or demur to such bill, but such defendant shall be compellable to make the discovery required; provided always that such discovery shall not be made use of as evidence or otherwise in any proceeding against the defendant, save only in that proceeding for which the discovery is made." [KEATING, J.—This seems to be a re-enactment of part of a statute passed before the Common Law Procedure Act of 1854, without taking any notice of intervening legislation.] As a court of law has now just the same powers as a court of equity, with regard to discovery, the court will not allow a party to refuse to answer interrogatories, seeing that if the same questions were put to him through the medium of a bill of discovery, he would be compelled to answer. The objection, moreover, was taken at the wrong time. He cited:

Thorpe v. Macaulay, 5 Mad. 218.

Boyle v. Wiseman, 10 Ex. 647.

Tapling v. Ward, 6 H. & N. 30; 30 L. J. 222, Ex.

BOVILL, C.J.—It is certainly a great misfortune that parties who seek redress against wrongs done them in the columns of a newspaper should be met with this difficulty—that they cannot find out who is the responsible person against whom they ought to proceed. The difficulty is caused by the repeal of the statute, which required the responsible publisher of every newspaper to be registered. The Act of last year (32 & 33 Vict. c. 24) which effected this change, re-enacted 6 & 7 Will. 4, c. 76, s. 19, with a view to enabling persons aggrieved to discover the responsible parties, but it made no reference to legislation that had taken place since the passing of the latter Act. Under the circumstances, it appears to me that the decision of my brother Bramwell was right. As a rule, a man is not bound to answer a question if his answer would tend to criminate him. In some cases the presiding judge may require to be satisfied of the reasonableness of the objection, but he most frequently accepts the statement of the witness. It would, as a general rule, render the privilege worthless, if the person claiming it were bound to explain in what way his answer would criminate him. In the present case the interrogatories were framed expressly with the view of making the defendant criminate himself, and it is idle to say that, on claiming the privilege he must show how his answers would criminate him. The rule is established on grounds of public policy, and holds good in the courts both of law and equity. Ordinarily, the court will refuse to order a question to be answered, if the witness says his answer will criminate him. In some cases the court allows the question to be put, leaving it to the witness to claim his privilege if he likes; in other cases the court will refuse to allow the question at all. In the present case my brother Willes made an order requiring the defendant to answer; the defendant claimed his privilege and refused to do so. My brother Bramwell was asked to overrule the objection. He refused to do so, and, in so refusing, was, in my opinion, perfectly right. As a general rule a person may refuse to answer interrogatories administered under the Common Law Procedure Act, if his answers would criminate him. Mr. Foard, however, contends that,

C. P.]

MOULE v. GARRETT AND OTHERS.

[Ex.

under sect. 19 of 6 & 7 Will. 4, c. 76, re-enacted by 32 & 33 Vict. c. 24, sched. 2, the court may compel an answer, even although it has that tendency, and that the person interrogated will be protected by that section from having his answer used against him in any other proceeding. That section is, however, limited in its terms. It is confined to the case of a bill of discovery. If we could give to the person interrogated that protection against the consequences of his answers to interrogatories that is provided in the case of a bill of discovery by the section in question, we should be disposed to make the order. But the statute does not enable us to do so. Thus, if we made the order, we might force the defendant to furnish the means of convicting himself of a criminal offence. The 19th sect. would not protect him, if his answers to these interrogatories were made evidence against him in a criminal prosecution. I think, therefore, that the decision of my brother Bramwell was right, and that this application must be refused.

KEATING, J.—I am of the same opinion. It is with great reluctance, however, that I feel myself compelled to refuse this application, as I think there has been an accidental omission in the statute, which takes away the means formerly given of finding out who is responsible for the statements in a newspaper. To supply this need, a section of an old Act is re-enacted, which provides that in an action for libel against the proprietor of a newspaper, if the plaintiff file a bill against the defendant with a view to discovering whether he is the responsible person, the defendant shall have no excuse for refusing to answer and shall answer. The plaintiff has no other means of discovering. It seems as though the Legislature had forgotten the powers of discovery now enjoyed by courts of law. We are now asked to supply the omissions of the Legislature; but we should exceed our powers if we did so. I think my brother Bramwell was right, as an answer to the interrogatories might have been used as evidence against the defendant on an indictment.

M. SMITH, J.—I am of the same opinion. Independently of the 19th section of 6 & 7 Will. 4, c. 76, re-enacted by 32 & 33 Vict. c. 24, sched. 2, the court certainly has no power to compel any further answers to these interrogatories. The interrogatories are framed with a view to getting the defendant to admit that he published a libel, and the defendant refuses to answer them on the ground that, by so doing, he would criminate himself. Under these circumstances, the court has no power to compel him to answer, unless the section that I have quoted is incorporated in the Common Law Procedure Act, 1854. I have endeavoured to see whether, if we compelled an answer, we could introduce the protection given by that section, and I do not think we have any right to compel, unless we are sure we can give the protection. I cannot at all think that we can give the defendant protection against the possible consequences of his answers, and therefore do not think we have any right to compel him to answer. It is not for us to put a forced construction on the Act; we should rather leave it to the Legislature to amend it where it is manifestly deficient.

BRETT, J.—The interrogatories have been administered to the defendant under the 51st section of the Common Law Procedure Act 1854, and the defendant is bound to answer them, unless he can show just cause to the contrary. He does show a just cause if he says that his answers would tend to criminate him. His answers to these interrogatories might be used as evidence against him on an indictment, unless the Legislature has protected

him against such a consequence. It is contended that the 19th section of 6 & 7 Will. 4, c. 76, which was re-enacted last year, gives him such a protection. That section, however, applies to the case of answers to a bill of discovery, not to that of answers to interrogatories. I think, therefore, that the defendant does show just cause, and that he ought not to be compelled to answer. The plaintiff may file a bill of discovery, and the defendant will then be compelled to answer. It is clear, however, that a lamentable mistake has been made by the Legislature, and it would be well if it were rectified.

Application refused.

Attorneys for plaintiff, *Wilkinson and Howlett.*

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Feb. 1 and 23.

MOULE v. GARRETT AND OTHERS.

Lease—Assignment of—Breach of covenant—Liability of remote assignee to lessee.

A lease containing a covenant to repair was assigned by the lessee and assigned over by the assignee. The ultimate assignee committed a breach of the covenant, for which the lessor sued the lessee, and recovered damages. The lessee sued the ultimate assignee for an indemnity:

Held, that he was entitled to recover, on the ground that the relation of surety and principal exists between a lessee and a subsequent assignee of the lease, whether immediate or remote. Per Channell and Pigott, B.B., Cleasby, B. dissenting.

Declaration in substance stated that Godfrey Thurgood, by indenture bearing date 15th June 1845, demised to the plaintiff a certain messuage, &c., for a certain term, at a yearly rent of 69*l.*, by quarterly payments, and that the plaintiff by the said indenture covenanted to pay rent and to repair the demised premises during the term. That after the making of the said indenture, and the entering by the plaintiff into the occupation of the said messuage and premises, it was agreed by and between the plaintiff and the defendants on the 3rd May 1860, as follows, namely, that the plaintiff should sell, and the defendants should purchase, the said lease for the then unexpired term thereof, for the sum of 60*l.*, and that the plaintiff should pay all rent, rates, and taxes, to the 9th May thereafter following, and should on such day give up possession of the said messuage and premises to the defendants, or whom they might appoint; that the plaintiff did give up possession of the said messuage and premises; and that the defendants afterwards entered upon the said messuage and premises, and became and were assignees of the said lease, and subject to the payment of the rent and observance and performance of the covenants and conditions and agreements, by virtue of the said lease to be observed and performed, and were so possessed as such assignees for a long space of time, whereupon it became and was their duty as such assignees to pay the rent and perform the covenants of the said lease for and during the time during which they should so remain possessed as assignees. Yet the defendants did not pay the rent, but permitted two quarters to be in arrear, and did not repair the premises, by reason of which breaches the executors of Thurgood sued and obtained judgment against the plaintiff for the rent and dilapidations, and the plaintiff was compelled to pay the sum of 158*l.* 16*s.* for damages and costs, and also incurred costs in defending himself against such action.

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MOULE v. GARRETT AND OTHERS.

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Second count, for use and occupation, money paid, and on accounts stated.

Pleas: 1. To first count, not guilty. 2. To same, traverse of the alleged demise to the plaintiff and of the plaintiff's covenant. 3. To same, that it was not agreed by and between the plaintiff and the defendants as alleged, nor did the plaintiff give up possession of, nor did the defendants enter upon the said messuages and premises, nor did they become, nor were they, assignees of the said alleged lease, or subject to the payment of the rent, or performance of the covenants, nor were they possessed as such assignees, nor was there such alleged duty of the defendants as such assignees, as in that behalf alleged. 4. To same, that before the alleged breaches of duty, the defendants, by deed, assigned the term to one Thomas Higgins, who then entered into the premises and was possessed thereof for the residue of the term. 5. To the money counts, never indebted.

Issues thereon.

The trial took place before Pigott, B. at the sittings in Middlesex, after Trinity Term, when the facts appeared to be as follows: By lease dated 16th June 1845, Godfrey Thurgood leased to the plaintiff the premises in question, for twenty-four and three-quarter years, less twenty-one days, subject to covenants to repair and leave in repair. On the 8th Jan. 1846, the plaintiff assigned to one E. Bagley. Various mesne assignments took place, and the lease was finally re-assigned to the plaintiff, by one J. Clark, on the 21st Feb. 1859. On the 3rd May 1860, the defendants agreed to purchase the lease of plaintiff for 60%, for one of their customers, and plaintiff undertook to assign to whomsoever they should appoint. The plaintiff agreed to pay rent, rates, and taxes, up to the 9th May, on which day he agreed to give up possession. The defendants named one Bartley, as assignee, and the plaintiff executed an assignment to him on May 7th, subject to the covenants of the original lease, and which contained a covenant by Bartley, to perform such covenants and indemnify the plaintiff. On the 14th July 1860, the defendants took from Bartley a mortgage, by way of underlease, to secure advances made by them to him. On the 23rd Nov. 1860, Bartley assigned the lease, for the residue of the term, to defendants free from his equity of redemption, subject to the payment of rent and performance of the covenants. The assignment contained a covenant by defendants to indemnify Bartley from all actions which should be prosecuted against him, and all costs which he should incur by reason of the non-payment of the rent, and non-performance of the covenants. The defendants took possession of the premises and remained in possession till Jan. 29th 1867, when they assigned the lease to T. Higgins, he covenanting to pay the rent and perform the covenants and indemnify the defendants. On the 4th July 1866, Godfrey Thurgood gave the plaintiff notice to do certain repairs, and in April 1867, his executors sued plaintiff for breach of covenant. The plaintiff gave immediate notice of the action to the defendants, who replied that they had no interest in the lease. In Nov. 1867, the ground landlord recovered possession of the premises, against Higgins, by action of ejectment. The plaintiff let judgment go by default in the action by Thurgood's executors, and paid 158*l.* 1*s.* 1*d.* for damages and costs. It was agreed that the sum of 75*l.* represented the amount of the dilapidations, which occurred during the time when defendants were assignees of the term.

On these facts the judge directed a verdict for the defendants, reserving leave to the plaintiff to move to enter it for himself for 75*l.*

A rule *nisi* was accordingly obtained against it, when

Munisty, Q. C. and *R. D. Bennett* showed cause.—The case of *Burnett v. Lynch*, 5 B. & C. 589, will be relied on in support of the rule, but that was an action between the original lessee and his immediate assignee. Here there is an intermediate assignee, which is an altogether different case, inasmuch as there is no privity of contract between the parties. The observations made by Lord Denman in *Wolveridge v. Steward*, 1 C. & M. 659, tend, no doubt, to support the plaintiff's contention as there it is suggested that the ultimate assignee is in the nature of a principal debtor, and the original lessee in the nature of a surety, and, therefore, the latter, if sued for breaches of contract, can recover over against the assignee. But this was merely *obiter dictum*, and not necessary for the decision of the case; it professes moreover to be founded on *Burnett v. Lynch*, which does not really bear it out. There is an express covenant by Bartley with plaintiff, and by defendants with Bartley to indemnify against breaches of covenant, which excludes any implied covenant. The plaintiff's remedy was against Bartley his own immediate assignee.

H. T. Cole, Q. C. and *Merewether*, supported the rule.—The plaintiff is clearly entitled to recover according to the principle laid down in *Burnett v. Lynch*, and *Wolveridge v. Steward*. The assignee, whether immediate or not, being the person in enjoyment of the property which was the original consideration for the covenant, and having the control of it is bound to perform the covenants during his holding, and is primarily liable to the lessor for non-performance of them. The lessee, therefore, on the general principles of law, if compelled by law to pay damages for which another is primarily liable, is entitled to recover them from that other. He is in the nature of a surety, and the assignee in that of a principal. The existence of an express covenant between Bartley and defendants or between plaintiff and Bartley cannot affect or exclude any contract or duty arising between plaintiff and defendants.

Cur. adv. vult.

Feb. 23.—*CHANNELL*, B.—This case came on for trial before my brother Pigott at the Middlesex sittings after last Trinity Term. There was no dispute as to the facts. A verdict *pro formâ* was directed for the defendants, with leave to the plaintiff to move to enter a verdict for him for the sum of 75*l.* This sum was agreed upon between the parties as the amount of the damage which, if any, the plaintiff was entitled to recover against the defendants, being the damages in respect of breaches of covenant by the defendants whilst they were assignees of the lease as hereinafter mentioned. In Michaelmas Term a rule to show cause was obtained to enter the verdict for the plaintiff. This rule was, in the absence of the Lord Chief Baron, argued before my brothers Pigott, Cleasby and myself; by Mr. Manisty on the part of the defendant, and Mr. H. T. Cole for the plaintiff. We took time to consider. I now proceed to deliver the judgments of my brother Pigott and myself. The facts are shortly these: The plaintiff was the lessee of certain premises under a lease containing covenants by him usual in leases. He assigned to one Bartley, who assigned to defendants. The defendants afterwards assigned over, but they had, during the time they were assignees, committed breaches of the covenants in the original lease. For these breaches of covenant the plaintiff, as lessee, was sued by the lessor, and he paid to him the before-mentioned sum of 76*l.* He now seeks to recover from the defendants the amount so paid by him to the lessor. The assignment to Bartley was made to him as the nominee of the defendants under a contract between the plaintiff and the de-

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MOULE v. GARRETT AND OTHERS.

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fendants; but that does not appear to us to be material. It might be that by that contract the defendants expressly indemnified the plaintiff against all future breaches of covenant; such, however, does not appear from the contract as recited in the declaration. On the other hand, it would rather appear, from the fact that the assignment was not to be made direct to the defendants but to their nominee, that the intention was that the defendants should not be liable at all upon the covenants of the lease. It is therefore by the subsequent assignment by Bartley to the defendants that they become liable if at all. On the part of the plaintiff it was insisted that the case came within the principle of *Burnett v. Lynch*, 5 B. & C. 589. There the plaintiff, the lessee, had assigned directly to the defendants, whereas in the present case there is an intermediate assignee, and the question we have now to decide is whether this makes a material distinction between the cases. In *Burnett v. Lynch*, the liability of the defendant was based upon a duty on his part to perform the covenants upon which it was held the plaintiff could sue. This duty, however, appears to arise out of contract, and it has been held that where this is the case a stranger to the contract cannot sue for the breach of duty any more than he can for a breach of the contract: (*Winterbottom v. Wright*, 10 M. & W. 109.) If, then, there is no contract, either expressed or implied, between the parties, no action can be maintained upon any duty as founded upon any contract by the defendants, either with Bartley or with any person other than the plaintiff. In *Burnett v. Lynch*, the judges appear to have thought there was a contract between the parties, though not a covenant, the assignment there having been by deed poll. The contract, then, must be considered to have arisen from the defendant's acceptance of the estate assigned to him by the deed poll. In subsequent cases, however, the principle upon which *Burnett v. Lynch* was decided has been further explained. In *Humble v. Langston*, 7 M. & W. 530, Baron Parke says, in reference to *Burnett v. Lynch*, "The assignee of a lease becomes liable to the lessor for the performance of all the covenants which run with the land, and the lessee is also liable in the nature of a surety as between himself and the assignee for the performance of the same covenant." In the case of *Wolveridge v. Steward*, 1 C. & M. 644, in the Exchequer Chamber, Lord Denman, in delivering the unanimous judgment of the Court of Exchequer Chamber, after time taken to consider, said, "*Burnett v. Lynch* proceeds on the ground that during the continuance of the interest of the assignee there is a duty on his part to pay the rent and perform the covenants. . . . This duty, we think, would arise from the relation between the parties without any such words as are now under consideration (viz., subject to the performance of the same covenant, &c.), for the effect of the assignment is that the lessee becomes a surety to the lessor for the assignee who, as between himself and the lessor, is the principal bound whilst he is assignee to pay the rent. . . . And the surety, after paying the debt, or discharging the obligation to which he is liable, has his remedy over against the principal." He then goes on to add, "And he, that is the lessee, after discharging the obligation to which he is liable, would also, in all probability, have the same remedy over against each subsequent assignee in respect of breaches committed during the continuance of the interest of each of them, for the lessee is, in effect, a surety for each of them to the lessor. If that view be correct the plaintiff in this case is entitled to succeed. On the whole, we think it is correct. It is true there is no express contract between the parties, but they are each liable to the lessor for the performance of the cove-

nants. They are each directly liable, and the lessor may sue either at his option, but the assignee having at the time the estate which has been the consideration for the covenants, ought as between himself and the lessee to perform them. Then it is only reasonable to hold, as was suggested in the cases quoted, that the liability of the lessee is as a surety for the assignee, and that there is an implied promise on the part of each assignee to indemnify the lessee against liability for breaches of covenant whilst he is assignee. If there is any implied promise on the part of any subsequent assignee after the first to indemnify any one in respect of breaches of covenant whilst he is assignee, it must be a promise to the original lessee, for none else is liable, except for breaches committed whilst he is assignee. It would of course require an express covenant to make an assignee liable for breaches after he had assigned over. In the present case there were such express covenants on the part of Bartley to Moule, and on the part of the defendants to Bartley, by which they both became liable to indemnify their immediate assignees for all breaches during the remainder of the term. These express covenants clearly create a greater liability than under the implied promise which was in *Wolveridge v. Steward* suggested, and which we think exists between assignee and original lessee. It does not seem to us that the fact that there is a liability on the part of the defendants towards their assignees upon an express covenant to indemnify him against all breaches not only in their own time, but subsequently, ought to induce us to hold that there can be no liability to the plaintiff upon an implied promise of indemnity not so extensive. In the present case there is a count for a breach of duty, and also a count for money paid. We think the plaintiff is entitled to recover on one of those counts. If there is such an implied promise, and such a duty arising upon it as we have described, the circumstances would be such that the law would infer a request so as to support the count for money paid. We do not think it any objection to this that the plaintiff paid to discharge his own liability, and not solely on behalf of the defendants. It is true that the plaintiff was directly liable to the lessor, but the defendants were so also, and as between the two, the defendants, having had the whole consideration for which this liability was undertaken in the enjoyment of the estate during the time that the breaches were committed, ought to have paid. The question involved in this case is one which may not unfrequently arise. We have not been able to find any decision directly in point. We have had the advantage of considering fully the views entertained by my brother Cleasby on the subject. We regret to find that there is a difference between us upon the point, and we are not unmindful of the doubts which his views suggest as to the correctness of our judgment. We admit that the passage we have quoted from *Wolveridge v. Steward* was only a dictum not necessary for the decision of the particular case before the court, but it was a dictum contained in a written judgment of the Exchequer Chamber. The view it suggests is, we think, in accordance with the justice of the case, and it is not, as far as we can find, opposed to any direct decision on the point. We are therefore of opinion that the rule to enter the verdict for the plaintiff should be made absolute.

CLEASBY, B.—In this case the plaintiff is lessee by deed of certain premises, which he covenanted to repair. He assigned to one Bartley, and Bartley assigned to the defendants. Both of these assignments contain covenants by the assignee with his assignor to perform the covenants in the lease, and indemnify his assignor against breaches of covenant.

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MOULE v. GARRETT AND OTHERS.

[Ex.]

The defendants afterwards assigned the lease, but while they were assignees there were breaches of the covenant to repair. The assignment by them was dated the 23rd Nov. 1860, and the breaches of the covenant to repair continued afterwards, and the premises became more dilapidated. Some time after the assignment by the defendants the lessor brought an action against the plaintiff as lessee for the breach of the covenant in the lease, and may be taken to have recovered a considerable sum in respect of the dilapidated condition of the premises, including the dilapidations while the defendants were assignees. The present action is brought to recover over against the defendants in respect of the dilapidations during their time. There is no doubt that the defendants were liable in that respect to the lessor, and were also liable to their assignor upon their covenant to repair, and to indemnify, to what extent as regards damages would depend on circumstances which it is unnecessary to consider. But the question in the present case is whether they are liable to the present plaintiff. In the first place it seems clear that the claim in the present case is one for unliquidated damages. The foundation and the sole foundation for the claim is the dilapidated condition of the premises during the time when the defendants were assignees, and whatever the plaintiff has been compelled to pay, the defendants were entitled to prove that during their time they properly repaired, or that the dilapidations were trifling. The count for money paid to the use of the plaintiff cannot, therefore, I think, be sustained. There is also another objection to that count being sustainable, viz., that the money was paid by the plaintiff in discharge of his own covenant as lessee when sued upon it; and he did not incur that liability at the request, express or implied, of the defendants; he incurred it for his own purposes when he became lessee, and before the defendants had or could have any interest in the matter. But another question of more difficulty arises, viz., whether as between the present plaintiff and defendants there is any legal liability by reason of the plaintiff having been compelled to pay under his covenant damages attributable in part to the time while the defendants were assignees. In the first place let us consider the contracts entered into. The plaintiff by the lease covenants with the lessor to repair, and that is the only contract entered into by him. He afterwards assigns his interest; and as he cannot get rid of his liability he protects himself by taking from his assignee, Bartley, an absolute covenant to perform the several covenants in the lease, and to indemnify him, the plaintiff, from all breaches. This is the only contract entered into with the plaintiff. As regards the defendants the only contracts entered into by them are those which result from the deed of assignment to them which they execute, and the effect of this deed is to make them covenant with the lessor to perform the covenants in the lease, and covenant to the same effect with their assignor. The first covenant is founded on the privity of estate between them and the lessor, and the second upon the express contract contained in the deed. It cannot be contended that there is any covenant with the lessee, and the express contracts by deed exclude any implied contract. But a question remains whether by virtue of the relation between the parties, viz., the one being lessee and the other assignees of the lease, there arose a duty, independent of contract, to perform the covenants, and it was contended that there was such a duty, upon the authority of the case of *Burnett v. Lynch* and what was said by Lord Denman in giving judgment in the case of *Wolveridge v. Stewart*. In the first cited case it was held that upon the assignment of a lease by the plaintiff to the defendant by deed poll, the defendant not executing the assign-

ment or entering into an express covenant, yet as the assignee took the estates from the lessee, subject to the covenants, there was a duty on his part of the assignment to perform the covenants, in respect of a breach of which the plaintiff could maintain his action. This decision has never been questioned; but it is to be observed in that case the transaction was between those two parties, and there was a clear privity between them, the one taking the estate from the other. In the case secondly referred to, of *Wolveridge v. Stewart*, it was in substance decided that the assignee of a lease is, in the absence of an express covenant, liable to his assignee only in respect of breaches of covenant which occur before he assigns over. At the close of the judgment it is said:—"For the effect of the assignment is that the lessee becomes a surety to the lessor for the assignee, who between himself and the lessor is the principal bound, while he is assignee, to pay the rent and perform the covenants running with the estate and the surety after paying the debt, or discharging the obligations to which he is liable, has his remedy over against the principal. And he would also in all probability have the like remedy over against each subsequent assignee in respect of breaches committed during the continuance of the interest of each." It is entirely upon the authority of this dictum that it is contended that the present action is maintainable. It is to be observed with reference to this case that the learned judge had just before referred to *Burnett v. Lynch*, and is certainly not speaking of cases in which the several assignees had entered into covenants by deed. It may also, I think, be questioned whether the terms principal and surety are properly applied in this dictum to remote assignee and lessee. In the case of *Humble v. Langston*, which was an action for indemnity against calls, Parke, B. said that the relation between lessee and his assignee was in the nature of that of surety and principal. This must not be read as a decision that they really stood in that legal relation, but the idea is adopted and extended in the dictum referred to in *Wolveridge v. Stewart*. It is there, however, introduced by the words "in all probability." There is some resemblance no doubt between the two relations, because it is the duty in the first instance of the assignee who is in possession, to repair, and his neglect to do so causes the liability of the lessee; but when we consider on what the lessor's claim against him is founded, it is not as surety, but as the person contracting as principal, and in fact, the only person contracting, and it would rather seem that the contract or duty between the lessee and his assignee, if implied, is of the same nature as is generally expressed between them and expressed in this case, viz., one of indemnity, and not of suretyship. The contract of a surety on behalf of his principal is of a special nature with peculiar incidents attached to it; for instance, the giving of time to the principal discharges the surety. But it could hardly be contended that the covenant of the lessee would be discharged by giving time to the assignee. I cannot help thinking that the word surety in the passages referred to is rather used by way of illustration than of defining the legal relationship of the parties, and that any conclusion founded upon the use of the word could not be safely relied on. It appears to me that between such remote parties there is an entire absence of that privity which is required to raise any implied contract between them or any duty in respect of which an action can be brought. No attempt has, up to the present time, been made to enforce such a liability. The question is, does any duty arise out of the relation of the parties independent of contract? It may be tested thus: Suppose upon the sale of a

EX. CH.]

POTTER v. RANKIN.

[EX. CH.

lease near the end of a term, with a prospect of heavy dilapidations, the contract to be that the assignee shall pay a certain premium, and the assignee take upon himself all the repairs for the residue of the term, and this was afterwards carried into effect by the assignment, the assignor covenanting with the assignee to do all requisite repairs and pay for the dilapidations. The assignee would, of course, be liable to the lessor by virtue of the privity of estate; but could it be said that in such a case there was any duty or obligation to indemnify the lessee arising from the relation between the parties? I think not; and if that be correct, it appears decisive of the present question. But further, it seems a very strong objection against implying any such duty as is relied on, that if the plaintiff were to recover against the defendants in the present case, that recovery would not be a bar to a subsequent action in respect of the breach at the suit of Bartley against the defendants upon their express covenant. The question of damages would be a complicated one, but the right to recover can hardly be questioned, and in case the recovery in the present action was not productive of satisfaction, and damages were afterwards recovered against Bartley by the present plaintiff in respect of the non-repair during Bartley's term, the defendants would be liable to Bartley upon their covenant in respect of a portion of the damages recovered in the present action. This difficulty does not exist in the case of *Burnett v. Lynch*, and it forms a real distinction between the two cases. It may further be noticed, in considering the general question whether such a duty arose that premises might be assigned in parts by an assignor to several assignees, one building to one, land to another, and other buildings to others, with particular covenants as between the assignor and assignees as to each, to all which the lessee is an entire stranger; and this increases the difficulty of holding that there is any privity or duty as between the lessee and the several remote assignees. Upon the whole matter, it certainly appears to me that the doctrine of *Burnett v. Lynch* cannot be properly extended to the present case, and that the rule to enter a verdict for the plaintiff ought to be discharged.

Rule absolute.

Attorneys: Robinson and Preston; H. D. Roberts.

EXCHEQUER CHAMBER.

Reported by M. W. M'KELLAR, Esq., Barrister-at-Law.

ERROR FROM THE COMMON PLEAS.

May 13, 1869, Feb. 5, and 14, 1870.

(Before COCKBURN, C.J., KELLY, C.B., CHANNELL, B., LUSH, J., and CLEASBY, B.)

POTTER v. RANKIN.

Marine insurance—Policy on freight—Notice of abandonment.

The ship *Sir Wm. Eyre*, on her voyage out to New Zealand, got aground in a harbour at which she stopped; she completed her voyage, but had received great injury, the extent of which, however, could not be discovered at her destination, as there was no dry dock in which to examine her. The master had to wait in New Zealand nine months for remittances from home, being unable to obtain there a sufficient sum to discharge liabilities which had been incurred through his default. The ship then proceeded to Calcutta, where a charter awaited her, and it was there found that the cost of her repairs from the injury sustained on her voyage out would exceed her value. Notice of abandonment was then given by the owners to the

underwriters of policies on the outward voyage, amongst which was one upon freight chartered homeward from Calcutta, the subject of this action. About three months after the notice of abandonment was given, the ship was totally lost during a cyclone in the Hooghly, and about a month afterwards the charterer from Calcutta stopped payment:

Held, by the Exchequer Chamber (*dissentiente Cleasby, B.*), reversing the decision of the Common Pleas, that the notice of abandonment having been given as soon as the state of the vessel was ascertained, was sufficient to render the loss of both ship and freight constructively total; and further that the rule requiring notice of abandonment with respect to freight attaches only when there is something of appreciable value to relinquish, and that in this case it was not necessary:

Held (by Kelly, C.B., Channell, B., and Lush, J.), that the notice of abandonment of freight was unnecessary for another reason also—viz., because the notice of abandonment of ship was sufficient to make the loss of ship constructively total, and therefore between the parties to this action, the shipowners and the underwriters of the above-mentioned policy on freight, the total loss of freight was actual and absolute.

This was an action between mortgagees in possession of the ship *Sir William Eyre*, and an underwriter of Lloyd's, upon a policy of insurance to cover the outward voyage from Great Britain to New Zealand, commenced at the time the policy was made, upon the freight chartered homeward from Calcutta.

The Court of Common Pleas (Bovill, C.J., Willes and Keating, JJ.), on the 3rd June 1868, discharged a rule nisi to enter a verdict for the plaintiffs.

The pleadings and the judgments of that court are reported L. Rep. 3 C. P. 562; 18 L. T. Rep. 712. This was an appeal by the plaintiffs from that decision.

The following are the material dates and short facts of the case; the details and the correspondence are sufficiently stated in the judgments.

Dec. 1862.—Ship sailed from Glasgow for Otago, New Zealand.

April 24, 1863.—Arrived at Bluff Harbour, New Zealand.

May 16.—Got aground in Bluff Harbour.

July 1.—Finally got off the ground, greatly damaged.

July 4.—Arrived at Otago, where she was detained for nine months, the master having to wait for remittances to satisfy the claims of passengers and owners of cargo, incurred partly through his default. The extent of the damage done to the ship was not discovered at Otago, as there was no dry dock in which to examine her.

April 14, 1864.—Ship sailed from Otago for Calcutta, where a charter was awaiting her.

June 5.—Arrived at Calcutta, where she was subsequently surveyed. The surveyors estimated the value of the ship, after the repairs rendered necessary by the damage sustained in Bluff Harbour had been carried out, at 5264*l.* The smallest tender for repairs was more than 6000*l.*, and the highest was 7500*l.*

Aug. 2.—Notice of abandonment was given by the owners to the underwriters of policies entered into for the voyage to New Zealand.

Oct. 4.—Ship totally lost during a cyclone in the Hooghly.

Oct. 30.—Wreck sold for 1430*l.*

Dec. 8.—The charterer from Calcutta stopped payment.

Sir G. Honyman, Q. C. (with him *Lanjon*), argued for the plaintiffs.

Ex. Ch.]

POTTER v. RANKIN.

[Ex. Ch.]

Watkin Williams (with him *Cohen*), for the defendant.

Cur. adv. vult.

Feb. 11.—The following judgments were delivered :

CLEASBY, B.—This is an action on a policy of insurance on freight. For the purpose of the present case the facts may be shortly stated thus: The vessel, *Sir William Eyre*, was chartered on the 9th Feb., 1863, for a voyage to New Zealand, thence to Calcutta, and from Calcutta to London. The insurance in question was effected two days afterwards, and was for the voyage to New Zealand, and the subject matter insured was freight to be earned under the charter from Calcutta to London. The insurance, therefore, is for the earlier part of the voyage out, and the thing insured is the freight home, so that the perils insured against are at an end long before the cargo by which the freight is to be earned is on board. This is not a usual transaction, because in general the whole voyage is insured by the same underwriters; but there is no valid objection to it. The vessel, before the termination of the voyage insured, got aground, and was with great difficulty got off; and she sustained such damage that, on her arrival at New Zealand, she was in such a state as to make her necessary repairs cost more than she would have been worth when repaired. This was not known at New Zealand, there being no means there of ascertaining the real condition of the vessel. After a great delay, during which the vessel was used as a store ship for coals at a considerable rent, some repairs were done, so as to enable her to proceed to Calcutta, and on April 14, 1864, she proceeded there, and arrived in safety. Upon her arrival she was properly overhauled, and her real condition was ascertained. Thereupon, the vessel itself, as well as the freight being insured, notice of abandonment was, on Aug. 2, 1864, given to the underwriters both on ship and on freight. The ship was, in fact, totally lost while lying at Calcutta, in the cyclone of Oct. 4, 1864; but this loss has nothing to do with the present claim. This action is brought to recover the freight insured as before mentioned; and the question is whether the facts stated entitle the plaintiff to recover for a total loss of the chartered freight. It was not contended that there was any case to recover for a partial loss, and, indeed, upon such a policy no such claim could possibly arise. The Court of Common Pleas had decided in a previous action, *Potter v. Campbell*, 17 L. T. Rep. N.S. 474 (note), brought to recover upon a policy on the ship in respect of the same voyage and damage, that there was no sufficient notice of abandonment, and therefore the plaintiff in that action could not recover as for a total loss of the ship; and they held in the present case, as I understand the judgment, that, there being no absolute total loss of the ship, there was no total loss of the freight; and, therefore, that the plaintiff could not in that way complete his title to recover; and they gave judgment for the defendant. From this judgment error has been brought into the Exchequer Chamber. Two questions have been argued: first, whether there is such a total loss of the freight as to entitle the plaintiff to recover independently of any notice of abandonment; and, secondly, supposing such notice to be necessary, whether the notice given on Aug. 2, 1864, was a sufficient one. In considering the question of total loss, it is necessary in the first place to examine what is the real nature of the interest which is said to be totally lost. It is not, as is usually the case, an interest in anything which exists, and of which possession can be had; as, for instance, a ship, or cargo, or even

freight of cargo on board, of which the lien on the cargo gives a qualified possession; but, in such a case of chartered freight as the present, the interest is only a right to have cargo provided; it can only be enforced by action, and is in the nature of a *chose in action*. It is a right which may be of considerable or of little value. If, for instance, the chartered freight is high in relation to the current rate at the port of loading, and the charterer is a solvent person, then the right is of considerable value; but if the current rate is higher than the freight, or the charterer has become bankrupt or insolvent, it is of no value. It appears as a fact in the present case that Mr. De Mattos, the charterer, stopped payment in December, 1864, and that no cargo would have been provided under the charter after that month. In such a case as the present, that fact, from the form of the policy, would have no effect upon the amount to be recovered in the action, if the perils insured against caused a total inability to earn the freight; it is only adverted to for the purpose of showing how peculiar the subject matter of insurance is when the perils insured against terminate before there is any interest in possession. The first question then for consideration in this case is whether, the damage done being such as to make the cost of repairs exceed the value of the ship when repaired, this of itself has the same effect as the actual loss of the ship, and makes the freight recoverable as totally lost. I am of opinion that it has not. I may observe that this is the proper question to be considered, though the question chiefly argued was whether an abandonment was necessary or not—a mode of argument which assumes that such damage to the ship must, with abandonment of the freight, amount to a total loss of the freight; whereas, in so peculiar a policy as this, the interest may be such as not to admit of abandonment, and so the policy only covers an actual total loss. We are dealing at present with the mere fact of damages to the extent mentioned, and not with the knowledge of that fact by the assured, and any election which he may make thereupon. All other cases of total loss of freight by loss of the ship are necessary consequences of the facts themselves, and this, if it be a case of total loss of the freight by what has happened, must be so too. If the ship goes to the bottom, or becomes a mere wreck, incapable of repair, or is justifiably sold, in each of these cases the total loss of freight is a necessary consequence of the facts themselves. But how can it be said that the necessary consequence of the ship being so damaged is that the freight is totally lost? The utmost that can be said is that the earning it is made very expensive; and this would depend upon the extent to which the repairs would exceed the value, and the amount of freight which would probably be earned by repairing. The general rule is that there is no actual total loss while the thing remains in specie, however much it may be damaged. It must either be destroyed, or its recovery be made irretrievably hopeless. This is the rule laid down in the text books (Arnould, sect. 364), and is the effect of all the authorities. The case of *Roux v. Salvador*, 3 Bing. N.C. 266, relied upon in the argument for the plaintiff, seems at first sight at variance with it, because in that case, which was an insurance on cargo, it was held that hides were totally lost, which, though they existed at the time as hides, were damaged in such a manner and to such an extent that they could not be carried to their destination so as to be there delivered as hides. But that decision is placed upon a satisfactory ground by the judgment of the Queen's Bench in *Knight v. Faith*, 15 Q. B. 649; where it is explained that the decision proceeded upon the ground of the hides being virtually destroyed. The judg-

Ex. Ch.]

POTTER v. RANKIN.

[Ex. Ch.]

ment in that case, which appears to me a most convincing one, corrects some erroneous opinions on the subject of abandonment, which were gaining ground; and the authorities which are fully considered in it justify the rule above laid down. What is said by Lord Abinger in *Roux v. Salvador* is there adopted—viz.: “If he elect to do this” (that is to treat damage as a total loss), “as the thing insured, or a portion of it still exists, and is vested in him, the very principle of insurance requires that he should make a cession of all his right to the recovery of it, that the underwriters may be entitled to the full benefit of what may be still of any value.” In the present case the thing insured is the right to earn the freight, and this is neither destroyed nor irretrievably lost because the ship is damaged to the extent alleged. The condition of realising it, viz., repairing the vessel, is not made impossible, but expensive, and therefore difficult of performance. But this expense and difficulty form the equivalent in such a case to damage to the thing, where the thing exists in specie, and mere damage to any extent does not constitute a total loss. It was argued on behalf of the plaintiff that the damaged condition of the ship in such a case was a commercial total loss of the freight. There are two answers to this, if it has any definite meaning—first, that it might be said with equal force that such damaged condition of a ship was commercially an actual total loss thereof because the vessel was not worth repairing, yet still, without abandonment, there is no total loss; and secondly, that, in point of fact, though the damaged condition of the ship may in some cases make it a losing affair, and therefore not commercial to repair and earn the freight, yet the contrary might be the case, and the commercial result of repairing would depend upon a variety of considerations. It is true that, upon such damage to the ship, if the shipowner elects, as he is entitled to do, to proceed no further with the voyage, and makes this known to the charterer, and so discharges the charterer and the charter is put an end to, there is then absolutely nothing to abandon. What the effect of such election would be upon the policy on freight is another question; but, as long as the charter continues in force, it can hardly be said that there is absolutely nothing to abandon. It often happens that the captain has made considerable progress in repairing the ship before the real extent of the damage is ascertained, and it is only when the owners receive the final survey and accounts that it is made known to them to be a case justifying an abandonment. Now, suppose this to occur, and the master to complete the repairs, and to proceed on the voyage with the ship, acting, as he is bound to do, for the benefit of all concerned. The owners at the proper time abandoned the freight to the underwriters. Would not the effect of this be that they would be entitled to recover upon their policy on freight, and the underwriters would be entitled as assignees—for the abandonment has the effect of an assignment—to the freight earned? And if the ship was lost, either in proceeding to the port of loading, or from thence to the port of discharge, and so no freight earned, would not the owner have completed his title to recover against the underwriters, and the underwriters lose what may be called their salvage? This is not a fanciful case, but abandonments have again and again taken place, not only after the repairs are completed, but after the freight has been earned. This was so in the leading cases on the subject of abandonment to underwriters on freight: *Benson v. Chapman*, 6 M. and G. 792; *Scottish Marine Insurance Company v. Turner*, 3 H. L. Cas. 312n. Thus, such damage as has been mentioned does not necessarily involve as a consequence the loss of a prospective

freight; and it seems to me to follow from this that, as there ought to be a clear and definite rule of abandonment, and not one depending upon the accidental circumstances of each case, and since there must be an abandonment in some cases to entitle the assured to recover, there ought to be in all. Notice was given in this case in conformity with the usage, and the usage makes it the right of the underwriter. Convenience also is in favour of it. For if the notice of abandonment is given, the underwriter knows his position; whereas, if not, he may not know for years whether he is to be held responsible or not. He cannot know the exact extent of damage or the probability of the owner repairing in each particular case; and the rule seems to be a reasonable and convenient one, that the owner should inform him of his determination in the usual way, viz., by notice of abandonment. Another consequence may be noticed. If the notice be given, and freight be afterwards earned under such circumstances as I have mentioned, the underwriter has acquired a title to the freight, and the underwriter who has the benefit of the abandonment as assignee of the freight has also liabilities as shipowner cast upon him, and there are settled rules apportioning the expenses of earning the freight between the owner and underwriter. In applying what has been said to the present case, it must be borne in mind that the captain proceeded from Dunedin to Calcutta, under the charter. In his letter from Calcutta of June 8, 1864, he says, “I have at last arrived at my chartered port, where I find freights low and charterers so scarce, the sole cause of all my stopping at New Zealand;” and he afterwards says that he on that day advertised per charterer’s agent, so that his lay days might begin. Up to that time, therefore, he was sailing under the charter party, and there was no total loss of the freight; and the question seems fairly raised, whether, by reason of any unjustified delay of the plaintiff’s, which had thus taken place, the abandonment of the freight which came afterwards was not too late. I must, therefore, give some opinion upon the sufficiency of the abandonment. The rule appears to be correctly laid down in Arnould, vol. 2, p. 1164, that as soon as the owner has all the requisite information he must abandon immediately, but that in the case of stranding or partial wreck he may wait “a reasonable time, in order that he may have the opportunity of ascertaining with more precision the real extent of the damage.” In the present case it may be taken that as soon as he had the requisite information he abandoned immediately. The question is whether the time taken in obtaining the information was not unreasonable, being attributable in a great measure to the default of the owner and his agents. It is very much a question of fact, and, under ordinary circumstances, if I found my learned brothers had all arrived at a clear conclusion, it is very unlikely that I should differ from them; but in this case the judges of the Court of Common Pleas have arrived at an opposite conclusion, and I am, therefore, bound to form my own opinion. In endeavouring to apply the rule above given, we meet with the following facts: The disaster occurred in May and June 1863, and the extent of damage was ascertained in August 1864, when the abandonment took place. It may be taken that, between the damage and Sept. 4, 1863, there was no delay, and also that between April 14, 1864, and the abandonment there was no delay; and the question comes to this, whether the plaintiffs can justify the delay between Sept. 4, 1863, and April 14, 1864, during which time the vessel was detained at Dunedin for want of funds. The materials for accounting for this want of funds are very imperfect. A long correspondence is given, but important letters are omitted. For

Ex. Ch.]

POTTER v. RANKIN.

[Ex. Ch.]

instance, the plaintiffs in their letter of Dec. 24, 1863, to Dalgetty and Co., say: "We trust that on receipt of our August letter you will have arranged to advance the money requisite, and allow the ship to proceed." The January letter also refers to the August letter as having been sufficiently explicit; but the August letter is not given, and we could have judged from it whether it was the fault of the plaintiffs in giving insufficient instructions, or of Messrs. Dalgetty in not attending to them. Another omission is in not giving the accounts which were inclosed in the letters. The letter of Dalgetty and Co. of Feb. 16, 1864, incloses an account showing a balance of 2116*l.* due to them for disbursements, subsequent to Jan. 17, 1863, on which day a letter inclosed another account, showing a balance of 450*l.*, which was drawn for. Neither of these accounts is given, and they would have shown exactly what payments had been made, and what money received for freight and passage; in their absence this was left to contradictory statements and argument. These documents should have come from the plaintiffs, as they have to account for the delay. We know that the expenses of getting the ship off were 1378*l.* 14*s.* (letter of Dalgetty and Co. July 17, 1863), and we know by another letter of the same date that this was liquidated by means of money received for passage money or freight, and the bill for 450*l.*; but how the immense subsequent expenses, viz., 2116*l.* 2*s.* 10*d.* and 351*l.* 15*s.* 8*d.*, in addition to what was received for freight, and the sum of 758*l.* received for hire of the ship, arose—how much for the temporary repairs, how much for claims against the ship for damage to cargo, and other defaults of the master, we do not know, as far as I can collect, except the breach of the Emigration Act, amounting to 150*l.* The conclusion at which I have arrived is that, for the delay between Sept. 4 and April 14, the master, the plaintiffs, and Messrs. Dalgetty were all to some extent to blame. The correspondence of the plaintiffs contained complaints of Messrs. Dalgetty, for not making advances according to instructions, and the latter were always complaining that they had insufficient instructions. Such a delay could not have occurred without someone being in fault, and it is accounted for in this way: either the plaintiffs did not authorise Messrs. Dalgetty to clear the ship, or if they did, then the latter were backward in doing so. It appears to me that, from whichever of these causes the delay originated, it cannot be justified as against the underwriters. It is a fair inference that if the instructions contained in the letter of August 26 had been as explicit as the plaintiffs thought they were, and as they ought to have been, the ship would have been cleared and despatched in Nov. 1863, instead of April 1864; and in that way this very long delay was the fault of the plaintiffs themselves. The captain was to blame for increasing the charges on the ship by his own default and misconduct to a large amount, though, in the absence of the accounts, we cannot say how much. It may have been so large as to have increased the difficulty of clearing the ship, and so have contributed to the delay. He was also in fault for not acquainting his owners with the extent of damage. They complain in their letter to him of Dec. 1, 1863, that he had never sent them the surveys. The ship had either been actually aground, or from time to time taking the ground from some day in May, previous to the 22nd, when she first floated, until July 1; and her weight being of course very great, the burthen being 1316 tons, serious damage was probable. Accordingly, it appears by the survey of July 10 that "she was much strained fore and aft; cast of mainmast seven inches down from its proper place; all the iron knees between deck strained." This appears to me to indicate the probability of damage to the framework of the ship;

but it certainly appears that, though the captain wrote on July 17, ten days after the survey, he gives them no idea of the effect of this survey, and their letters of Sept. 24 to him and to Messrs. Dalgetty show that they had a very imperfect idea of what had happened, and they made no provision accordingly. The final survey at Port Chalmers of Sept. 4 agrees with what we should expect from the first, recommending that the ship should proceed in ballast on the intended voyage, and that she should "be put in a dry dock or patent slip for further examination"—not for repairs, but for further examination. It strikes me that, as soon as it is made out that such a damaged vessel cannot be made a seaworthy vessel for a cargo without going into a dry dock for examination, it becomes a case in which no delay can be justified as against the underwriters in procuring that examination. It is only necessary to add upon this part of the case that the letter of plaintiffs of Oct. 24, with directions to clear the ship, would be received at the end of Dec. 1863 or the beginning of Jan. 1864. I can find no excuse whatever for the delay between this time and the 14th April, when the vessel sailed for Calcutta. In their January letter of the 18th, Messrs. Dalgetty make no reference to the ship starting. In their February letter of the 16th they only express their regret at having been blamed for the detention of the ship. In their March letter of the 18th all they say is, "This vessel is still in port discharging her coals, but we expect her to get away by the end of the month;" and she did sail on the 14th April. There may have been some reason for this, so as to excuse the apparent neglect of Messrs. Dalgetty, but that could not excuse the delay as against the underwriters. When the assured has all the necessary information, he must abandon at once; and five days, though in a somewhat peculiar case, have been held too long an interval. But he has a reasonable time for acquiring the information, and there must be no delay in doing so. It certainly appears to me for the reasons given, that in this case the very long interval between the disaster and the abandonment is not properly accounted for; that the delay between September, 1863, and April, 1864, or some substantial part of it, was the fault of the plaintiffs or their agents, and that in that way the abandonment was out of time. I very much question whether in any case, where the further survey of a damaged vessel is ordered, the assured can be guilty of unreasonable delay, and afterwards, if the survey leads to abandonment, excuse themselves by saying we did not contemplate and had no reason to contemplate the abandonment during the delay. I rather think not. But, in the present case it appears to me that there was enough in the nature of the accident, and in the surveys at Port Chalmers, to prevent the plaintiffs from recovering for a total loss if they were guilty of delay in ascertaining the real extent of damage. The foregoing conclusions are sufficient for the decision of this case, viz., (1) that the alleged damage to the ship did not of itself constitute a total loss of the freight; and (2) that the owner has by unreasonable delay lost the opportunity of making it into a total loss. The case has been so far considered with reference to the grounds discussed in the argument. But before concluding, I wish to add the following: I have endeavoured to show that in such a case as the present an abandonment is not necessarily inoperative, and therefore inapplicable. The conclusion arrived at may be a doubtful one. If it was clearly established that, in so peculiar a case as this, the transaction was such as not to admit of abandonment at all, then another question would arise—viz., whether such a policy covered anything but an actual total loss of the freight by actual total loss of the ship. The judgment of the Court of

Ex. CH.]

POTTER v. RANKIN.

[Ex. CH.]

Common Pleas puts the decision upon two alternatives, and this is one of them; and it may, I think, be well contended that, if there cannot be an abandonment, there cannot be a constructive total loss. The conclusion may not appear to meet the justice of the case; but, if the matter is examined, it is accounted for by this—viz., that under such a policy there cannot be a partial loss. In the case of an insurance on ship or cargo, if there is damage to any extent, the assured may treat it as a partial loss, and recover his damages; or he has the option, if the damage is sufficient, of converting the partial loss into a constructive total loss by abandonment. But in a policy on prospective freight, like this, where, when the risk terminates, there is no interest except in contract, the case is different. There cannot be a partial loss; and, therefore, it may be contended that there cannot be a turning of a partial loss into a constructive total loss, and that the policy only covers an actual total loss of freight by total loss of ship. There is only one other matter which was particularly noticed during the argument, and I can hardly pass it over. Up to this time the case has been considered as if the owner had only insured the freight, and there was no insurance on the ship. But it occurred to me that, as there was also an insurance on the ship in this case, and an abandonment of the ship to the underwriters, the abandonment of the ship, if sufficient, might have a bearing upon the case. It seems contrary to principle that what is done under one contract should affect the rights acquired under another distinct one; but the answer is given in the judgment of the court below. The objection referred to is discussed in Phillips on Insurance, s. 1649; and, after giving a full answer to it, and showing what the rule was in England from the cases on the subject, he adds (s. 1650): "The fact that the underwriters on freight may be affected by the circumstances of the ship being insured and abandoned is an irregularity in jurisprudence. The doctrine adopted in the United States is preferable, as it makes the irregularity less than it is under the English doctrine." In the present case, the only interest in freight which the owner possessed was the right to have cargo provided, and he was under a corresponding obligation to be at the port of loading to receive the cargo, subject of course to the usual exception of perils of the seas. Now, by abandoning to the underwriters on ship, he avails himself of this exception in the charter party, and elects not to be bound to receive a cargo, and discharges himself from it; and, as he cannot transfer to the underwriters on ship any obligation to complete the voyage, it follows that the charterer has no person bound under the charter party to take his cargo, and he is of course discharged from it himself. The consequence is that the assured, by his own act abandoning to the underwriters on ship, destroys the right which was his only interest in the subject matter of insurance—freight; and, having done this for his own interest, and to complete his demand against the underwriters, and so destroyed the right to earn freight at all, can he come against the underwriters on freight upon this contract of indemnity? It is obvious that, in such a case, the interest in the freight being destroyed, there could be, by the act of the owner, nothing to abandon to the underwriters on freight. It certainly appears unreasonable that a man who, in consequence of sea damage, properly abandons the ship, should be prejudiced by doing so as against the underwriters on freight. But it has been so adjudged. It is only necessary to refer to the case of *The Scottish Marine Insurance Company v. Turner* in the House of Lords, 1 McQ. 234. In that case the assured abandoned to the respective underwriters on ship and freight. The ship had been repaired, and proceeded on her

voyage, and it was not known that the damage was such as to justify an abandonment until after the arrival of the ship with her cargo on board at the port of discharge. The effect of the abandonment of the ship was to transfer to the underwriters not only the ship, but also the freight; and the freight was thus lost in consequence of the perils insured against to the assured, and he brought his action in Scotland upon his insurance on freight. The Court of Session held, with apparent reason, that he was entitled to recover, the real cause of the loss to him being the perils insured against, and the abandonment of the ship being a proper act superinduced by those perils; and they thought it made no difference that the freight was earned by the captain, who became agent for the ship underwriters, as it was lost to the plaintiff. But the House of Lords reversed this decision, and held that the freight was lost to the assured by his own election in abandoning to the underwriters on ship, and not by the perils which caused that election, and that he could not recover. If the loss of freight in this case be regarded as the consequence of the owner's election to abandon the ship, then if the abandonment of the freight at Calcutta was sufficient, so was the abandonment of the ship; and the latter may have had the effect of destroying the plaintiff's right to recover. My brother Lush, in the course of the argument, gave a conclusive answer to this objection, if the fact was as he supposed—viz., that, at the time of the abandonment of the ship at Calcutta, the charter was gone, and there was no existing interest under it whatever. I had rather considered the case generally, as if the abandonment had taken place at Port Chalmers. At the same time, after the captain's letter from Calcutta before referred to, I do not see how the charter can be said to have been at an end. I know this view, founded upon the effect of the abandonment of the ship, finds no favour with my learned brothers; and I therefore advance it with diffidence, and leave it with what has been already said. If the sufficiency of the abandonment had not been argued, it might have been necessary to consider it further; and, I may add, that, as soon as an admitted irregularity in jurisprudence is introduced, we must not be surprised if we are led to conclusions which are apparently unsatisfactory. But the reasons before given are those upon which I rely, and which lead me to the conclusion that there is no sufficient ground for reversing the judgment of the court below, and that it ought to be affirmed.

COCKBURN, C. J.—This was an action on a policy of insurance on freight, to be earned by a ship named the *Sir William Eyre*, under a charter party with one De Mattos, wherein the ship was described as then on a voyage to New Zealand, and whereby it was agreed that she was to sail to New Zealand with cargo for owner's benefit, and, having discharged, should proceed to Calcutta, and there load from the freighters a full and complete cargo, and proceed therewith to London. The policy applied only to the chartered freight from Calcutta to London, and attached only on the preliminary voyage from London to New Zealand. It described the interest as "on homeward chartered freight," and the voyage insured as "from the Clyde to Southland, New Zealand, while there, and thence to Otago, New Zealand, and for thirty days in port there after arrival." The ship arrived at Bluff Harbour, Southland, on 20th April, 1863. Whilst there she took the ground and sustained damage but was got off and floated on the 22nd May. On the 29th May, a violent gale coming on, she again grounded, and was not got afloat again till the 6th June; and before she could be got into the Channel she grounded a third time, and was not finally got

Ex. Ch.]

POTTER v. RANKIN.

[Ex. Ch.]

off till the 1st July. She then left for Port Chalmers, the port of Dunedin, where she arrived on the 4th July. A survey was held on her at Bluff Harbour, and others were held on her at Port Chalmers, and it was found that she had sustained much damage; but the extent of the damage could not be there ascertained, as it was necessary for that purpose that she should be taken into a dry dock or put on a patent slip, neither of which existed in New Zealand, or were to be found anywhere nearer than Sydney. In point of fact, as the sequel showed, the amount of damage, though not sufficient to prevent the vessel, after having undergone partial repair at New Zealand, from proceeding in ballast on her voyage to Calcutta, was such as to necessitate such an amount of repair in order to render her seaworthy to carry cargo, as to warrant the owner, had he then been aware of the actual extent of the damage, in treating the loss as a constructive total loss. There was nothing, however, in the extent of damage discovered at New Zealand to lead the master to apprehend that such was the state of the vessel. In a survey held on her at Bluff Harbour, dated May 27, 1863, though the surveyors report that the vessel "has strained in some degree aft," and that "the mainmast appears to have settled below its original sheathing about two inches," and recommended that, "as they are unable to ascertain if any damage is done to the vessel below water, she should be resurveyed and her bottom examined at the first convenient port she arrives at," they go on to state that, "so far as they can see, she has sustained no damage which will prevent her from proceeding on her voyage," and that they "are of opinion that she may with safety proceed to her final destination." Further surveys were held on the ship at Port Chalmers on July 10, and on Aug. 25 and 29. The surveyors, having ascertained, as far as could be done, the injuries the vessel had sustained, while they recommended certain specified repairs, and further advised "that the vessel's top-sides, decks, waterways, and stanchions shall be thoroughly caulked, and that she shall be docked at the first port of arrival," expressly stated that "on each survey they examined the pumps, and found that the ship was making but an inch of water per day," and further, that having been under the ship's bottom, they found that on the starboard side only a narrow strip of copper, about four feet long, by two inches broad, was wanting; that her stern had a little copper off, and that on her port side and bottom they found nothing whatever the matter, except a narrow strip two inches wide and fourteen feet long. The cargo having in the meantime been discharged, a further survey was held on Sept. 14, 1863, and the surveyors having, as they state, "had bilge planks out on both sides in the hold abreast of the mainmast,"—while they recommend that certain things shall be done to the ship, and further, that at the next port available at which the vessel may call, she should be put in a dry dock or on a patent slip for further examination, and also that on such occasion certain other things should be done—expressly declare that they "find the vessel perfectly tight, and have no hesitation in recommending the captain to proceed in ballast on his intended voyage as soon as the necessary repairs recommended have been completed." On none of these surveys does the real state of the ship, as afterwards disclosed, appear to have been even surmised; and the recommendation that she should be put in a dry dock or on a slip at some future port, seems rather to have been suggested as a matter of proper precaution, to see if any other repairs should be necessary to make her perfectly seaworthy and safe, than from any apprehension of extensive damage beyond that which had been already ascer-

tained. I see no reason to doubt that the master participated in this view, and entertained a full belief of being able, after the repairs recommended by the surveyors had been effected at Port Chalmers, to prosecute his voyage and bring his cargo home, even though a further examination should be had at Calcutta, and further repairs might, on such examination, be found to be necessary. The master would have proceeded to get the necessary repairs done, but found himself in difficulty for want of funds. The freight receivable in respect of the outward cargo was to be received by the master at New Zealand, and would have been sufficient to meet the ordinary expenses of the ship; but considerable expenses had been incurred in getting the ship off on the different occasions when she took the ground at Bluff Harbour, and, in consequence of her detention there, it became necessary to hire a steamer to take on the passengers; and it further appears that numerous claims had been made by passengers, who had come out in the ship as emigrants, on account of breaches of the provisions of the Passengers Act, and legal proceedings having been instituted to enforce such claims, the master had found himself compelled, as a matter of prudence, to compromise with the claimants at a considerable sacrifice. Claims were also made by consignees of cargo in respect of damage and short delivery, which the master was in like manner compelled to settle. Through the expenses thus incurred, not only were the proceeds received by the master in respect of freight exhausted, but considerable advances had been made to him by the plaintiff's agents at Dunedin, Messrs. Dalgetty, Rattray, and Co., the consignees of the ship. Further funds being required for the repairs found by the surveyors to be necessary, Dalgetty, Rattray, and Co. being aware that the plaintiffs were not the owners, but only the mortgagees of the ship, declined to advance the funds required to pay for these repairs and to clear the ship, without specific directions from the plaintiffs, and wrote to them to that effect by letter of August 17. The master thereupon advertised for a loan of 2400*l.* on bottomry, but, finding it impossible to obtain it at lower interest than 65 per cent., abandoned that course, and resolved to wait for instructions from home. The plaintiffs do not appear to have received the letter of Messrs. Dalgetty, Rattray, and Co. till November. On the 25th of that month they wrote them a strong letter of remonstrance and complaint, on account of their not having advanced to the master the necessary funds, desiring them at once to do so, taking the master's draft on them for the amount. On receipt of this letter on Feb. 16, 1864, Messrs. Dalgetty, Rattray, and Co. advanced the necessary funds to the master, amounting to 2116*l.*, to pay for the repairs and release the ship, taking the master's draft on the plaintiffs, which was honoured in due course. Here, again, I cannot doubt that the plaintiffs entertained the full expectation which the communications of the master, transmitting his protest, and of the surveyors would be calculated to produce—that the ship, having been repaired at Port Chalmers, would proceed to complete her voyage, and, though possibly some further repairs might prove to be necessary at Calcutta, would bring the cargo from thence home, according to the charter. Thus far it does not appear to have occurred to anyone to imagine that the ship had sustained such an amount of damage as would make her not worth the expense of repairing. Funds having been furnished, the master proceeded to get the repairs done; and, so far as I can see, without any undue delay, though some time was consumed in getting the vessel cleared of coals which had been stored in her, the captain having let her out as a coal hulk, with a view of turning her to some use

EX. CH.]

POTTER v RANKIN.

[EX. CH.

and account for the benefit of his owners until funds should be found to enable the repairs to be done—a proceeding which appears to me not to have been unreasonable or improper. On April 14, 1864, the necessary repairs having been completed, the *Sir William Eyre* left Port Chalmers, and proceeded to Calcutta, and, on her arrival there, was placed in a dry dock, when it was discovered that the injuries she had sustained were far more extensive than the surveyors at New Zealand had supposed, and that it would cost more to repair her than it was worth while to lay out on her. This being communicated to the plaintiffs, notice of abandonment was forthwith given to the underwriters on freight. The Court of Common Pleas has held that the plaintiffs are not entitled to recover, on the grounds—(1) that, in order to recover as for a total loss on the insurance on freight, notice of abandonment was necessary; and (2) that, though notice of abandonment was given on the discovery of the state of the vessel at Calcutta, such notice was too late. I find myself unable to concur in the view of the Court of Common Pleas on either of these points. It is no doubt true that the rule that, in order to claim as for a constructive total loss, the assured must give notice of abandonment, applies to insurance on freight as it does to insurance on ship or goods; but the rule, to whatever species of insurance it is applied, must always be subject to this limitation, that it attaches only where there is something of appreciable value, however small that value may be, to relinquish to the underwriter. Thus, where goods are on board, and the ship becomes a constructive total loss, the shipowner, in order to claim for a constructive total loss on freight, must abandon to the underwriter the right to hire another vessel, and carry the cargo to its destination, and so earn the freight. But where the interest to be made over to the insurer is of so shadowy and unsubstantial a character that it cannot be supposed that it could have been of any benefit whatever to the underwriters, or that the latter, as reasonable men, would have thought of availing themselves of it, so that for all practical purposes abandonment would have been a merely idle and useless formality, the assured ought not, in my opinion, to be tied down to the necessity of giving notice of it, especially in these times when it is notorious that the practice of underwriters is never to accept the notice. Now, it is difficult in the present case to discover any possible advantage which could have accrued to the insurer on freight from notice of abandonment. By the state to which the vessel had been reduced by sea damage, the plaintiffs, not being bound to repair her, were released from the obligations of the charter-party; there being, in my opinion, an implied condition in such charter-party that, if the ship, on her way to fetch the cargo, perished, the owner is released from his obligation to fulfil his contract with the freighter, while, on the other hand, the latter, being bound only to load a cargo by chartered ship, was under no obligation to accept another vessel. There was therefore no right or interest in the owners in respect of freight which they could abandon to the underwriters. The only effect of notice of abandonment under such circumstances would have been that the underwriters might, if so minded, have themselves chartered a ship, and proposed to De Mattos to let them bring home the cargo, taking their chance of his accepting their offer in preference to that of anyone else. But I am clearly of opinion that so speculative and remote a possibility cannot afford a ground for holding notice of abandonment to be necessary in such a case. Moreover, we know that, in point of fact, De Mattos, to whom the vessel was chartered, was on the eve of insolvency, and that his agents at Calcutta would not

have loaded a cargo on his account, even if less delay had occurred in the arrival of the *Sir William Eyre* at Calcutta. It is difficult to imagine that, the contract between the freighter and the shipowner being at an end, and the underwriters on freight, who on notice of abandonment would have stood in the shoes of the owner, having no right whatever to call on the freighter to send cargo by another ship, the underwriters, even if notice of abandonment had been given them when first the ship arrived at Dunedin, would, under such circumstances, have engaged another ship at Calcutta, in order to bring home the cargo, and earn the freight, upon the empty speculation of a balance in their favour between the chartered freight and the actual freight, in case the freighter should find a cargo and suffer them to carry it. It is, in my opinion, enough to say that, to necessitate notice of abandonment to the underwriters, there must be an actual, tangible, and appreciable right or interest capable of being transferred; as, for instance, in the case of freight, where the cargo is already on board, and the shipowner would have the right of sending it on to its destination in another ship, and so earning the freight. It is, however, unnecessary to pursue this subject further, as the majority of the court are of opinion that, if notice of abandonment was necessary, sufficient notice was given. The authorities on the subject of the time within which notice of abandonment must be given, no doubt establish that, so soon as the circumstances which justify the treating the loss as constructively a total one are brought to the knowledge of the assured, notice of abandonment must be given without loss of time. And if this be the full extent of the obligation of the assured, as I think it is, the requirement was in this instance satisfied, inasmuch as it is undoubted, that the true condition of the ship was only first discovered on her being docked and examined at Calcutta, and that, as soon as the extent of damage and of the repairs consequently necessary were made known to the plaintiffs, they forthwith gave notice of abandonment to both underwriters on ship and on freight. The Court of Common Pleas have, however, engrafted on the general rule just referred to this further extension, viz., that, if the subject-matter of the insurance has sustained injury, and there is reason to believe that upon a more complete examination, the extent of damage may prove such as to entitle the assured to treat the case as one of total loss, such examination must be made at the earliest practicable moment; whereas, in this case, according to the view taken by the Court of Common Pleas, the final examination of the vessel was delayed for an unreasonable period. It may be doubtful whether a delay in proceeding to such final examination, occasioned by a *bona fide* endeavour to perform a further portion of the voyage would be a delay which would deprive the assured of his right to abandon when the actual state of the vessel is afterwards discovered. But, accepting the rule laid down by the Court of Common Pleas, I think it can only be applied to a case where the assured believes, or has reason to believe, in the existence of unascertained injury which may prove sufficient to warrant an abandonment, and contemplates the further examination of the vessel with a view to ascertain whether he may claim as for a constructive total loss. Now this essential element is wanting in the present case. The surveys to which I have referred lead, as has already been stated, satisfactorily to the conclusion that the recommendation that the vessel should undergo a further examination had no reference to any expectation of the discovery of such further damage as would justify abandonment; and that such examination was contemplated only with the view of securing the seaworthiness of the vessel for the

Ex. Ch.]

POTTER v. RANKIN.

[Ex. Ch.]

homeward voyage. The conduct of the master in endeavouring to procure funds to repair and release the ship, and that of the assured in adopting the large outlay required to be made on her immediately after receiving the communication from the master transmitting the protest and surveys, equally show that there was no expectation in their minds of the existence of ulterior damage sufficient to create a constructive total loss. The decision of the Court of Common Pleas is erroneous by reason of this distinction having been overlooked, or from its having been assumed that the possibility of claiming as for a constructive total loss, and of a further examination of the vessel with a view to that result, was present to the minds of the plaintiffs at the time of the delay complained of. I am of opinion that such was not the case, and that the circumstances were not such as to call upon the assured to make a further examination of the vessel with a view to ascertain whether a constructive total loss could be claimed for or not; and that notice of abandonment having been given as soon as the true state of the vessel was ascertained and known, such notice, if any notice of abandonment were necessary, was sufficient. I have dealt thus far with the two propositions on which the judgment of the Court of Common Pleas proceeded. It has, however, been suggested that there is a further ground on which the plaintiff's claim ought to be rejected, viz., that a shipowner who, having insured both ship and freight, abandons the ship to the underwriters on ship in order to claim for a constructive total loss, loses the right to claim on the policy on freight, inasmuch as by his own act he incapacitates himself from carrying on the cargo, and so earning the freight. This position appears to me to be altogether untenable in principle, and one which would lead to very inconvenient consequences. If correct, it would obviously be applicable to a case where the cargo on which freight was to be earned was already on board. It would equally apply to the case where the ship was not insured, but the owner, as a prudent man, declined to repair. It would tend to put an end to policies on freight altogether, as in every case of constructive total loss of the ship the policy on freight would be inoperative, unless the assured elected to repair the ship, which, on the hypothesis, he ought not, as a prudent owner, to do. But the conclusive answer appears to me to be that the ship having been incapacitated from earning the freight by the peril insured against, and the owner not being under any obligation to repair her in order to earn the freight, but, on the contrary, as a prudent man, being justified in abandoning her, the loss of the freight in such a case does not arise from the act of the party, but from the sea peril insured against. There being then, so far as I am aware, no authority for this novel position—I say novel, because though there must have been numerous instances of policies on freight as well as on ship, in which the ship has been abandoned to the underwriters on ship, without the latter taking to the ship and earning the freight, one has never heard of the underwriters on freight resisting the claim of the assured on that ground—and as it seems to me untenable in principle, I see no ground for adopting it. The decision of the Court of Common Pleas, must therefore be overruled, and the verdict entered for the plaintiffs.

LUSH, J.—Two questions were argued before us in this case; the one, whether notice of abandonment was necessary; the other, whether, if so, it was given in reasonable time. Having come to the conclusion satisfactory, to my own mind, that no notice of abandonment was necessary, I do not pro-

pose to discuss the second question, nor to say more upon it than that I concur in the opinions of my learned brethren, the majority of whom base their judgments on that ground. The object and effect of a notice of abandonment are nowhere more clearly stated than in the judgment of Lord Abinger in *Roux v. Salvador*, 3 Bing. N. C. 286:—"If," said he, "in the progress of the voyage the subject of insurance becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of the contract to pay the sum insured. But there are intermediate cases. There may be a capture, which, though *prima facie* a total loss, may be followed by a recapture, which would revert the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable without any hope of repair, or by which the goods are partly lost or so damaged, that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may for his own benefit, as well as for that of his underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured or a portion of it still exists and is vested in him, the very principle of indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures at his own cost for realising or increasing that value. In all these cases, not only the thing insured, or part of it, is supposed to exist in specie, but there is a possibility, however remote, of its arriving at the port of destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it." The subject of insurance in the present case is the sum contracted to be paid by the charterer for the carriage of a cargo from Calcutta to Europe, and which cargo he engaged to ship on the arrival of the vessel at Calcutta in a fit condition to receive it. The risk undertaken was sea peril on the outward voyage to New Zealand. It is an admitted fact that the vessel did, in the outward voyage to New Zealand, receive such damage by sea peril as necessitated repairs to an amount exceeding her value when repaired, and that upon the discovery of the extent of damage (which was not made for many months afterwards, nor until she arrived at Calcutta), the plaintiffs elected not to repair. That they had a right so to elect is not denied. It is clear that an owner is not, under such circumstances, bound to repair, in the interest either of the underwriter on ship or of the underwriter on freight. It is true that if the ship is insured, he must, in order to recover for a total loss against that underwriter, give him notice of abandonment; but that is a duty springing out of that particular contract, or rather a condition of his right to claim the whole insurance. The underwriter on freight is entitled in like manner to the salvage of that which he has insured, upon paying a total loss, but he has nothing to do with what remains of the ship. His obligation is the same whether the ship is insured or not insured, or whether the owner, being insured, chooses to

Ex. Ch.

MCGAREL v. MOON.

[V.C. M.]

abandon and claims for a total loss, or to retain the wreck, and claim for partial loss. That which, in the language of maritime commerce, constitutes the loss of a ship is damage to an extent not worth repairing, followed by a determination not to repair. As respects her capacity to save freight, a ship in such a condition is as much lost to the owner as if she had sunk or broken up. In the argument it was contended for the defendant that the election not to repair was deferred for an unreasonably long time, and that the owners might and ought to have ascertained the state of the vessel, and made their election at an earlier period. Assuming this argument to be well founded, it appears to me that it has no bearing on the case. What might have been the consequence if the owners, with knowledge of the extent of the damage, had delayed making up their minds whether or not they would repair till the time for loading had gone by, it is not necessary to inquire; for as soon as they knew the extent of the damage they made up their minds, and it is assumed in the case that if at the time the ship had been sound they might have claimed from the charterer the fulfilment of the charter. What benefit would the defendants have derived from an earlier decision? Suppose the plaintiffs had known of the extent of the damage while the ship remained at Bluff Harbour, and had then elected not to repair. If there was nothing of the subject of insurance to abandon, the defendant's position would have been neither better nor worse than if the ship had sunk or gone to pieces in Bluff Harbour. He could not in that case have complained that no notice of the loss had been given him. However inconvenient, or even prejudicial, it may sometimes be to an underwriter not to receive early notice of a loss, the assured is under no obligation to give it. A notice of abandonment must be given within a reasonable time, but notice of loss is no part of the contract either express or implied. If the underwriter wishes to have notice of a loss he must stipulate for it in the policy. There being then what, as between these parties, was a total loss of the ship, the question is, did that loss, having regard to the state of things existing at the time when the owner elected not to repair, entail as a consequence a total loss of the chartered freight? If the cargo had been on board, so that there was a possibility of earning the freight by sending it on by another vessel, the case would have admitted of other considerations. It is however, needless to inquire whether in the events which happened the defendant would in such case have been entitled to notice of abandonment or not; for no part of the cargo was on board. The ship was never in a condition to receive it, and for that reason the owner was never entitled to call upon the charterer to load. Under these circumstances what was there at any time to abandon of the subject matter of the insurance? No power of earning the chartered freight could have been thereby transferred by the assured to the defendant; not being the underwriter on ship he had no right to have her abandoned to him in order to repair her himself, nor could he have called upon the charterer to load his cargo in another ship of his providing. He could not by an abandonment have been subrogated into the place of the assured, for he would not have had thereby either the ship or the charter, either the means of earning or the right to earn the freight in question. It had, therefore, become impossible for either the assured or the underwriter to save the subject of insurance or any part of it. The assured could not, unless he did repairs which he was not bound to do, and had decided not to do; and the underwriter could not, because he could not take the ship and repair her, nor compel the charterer to substitute another ship. The loss, therefore, was

total and absolute. For these reasons I am opinion that the judgment of the court below ought to be reversed.

KELLY, C. B. (delivering the judgment of himself and Channell, B.)—I have only to add, on behalf of my brother Channell and myself, that, concurring as we do substantially in the judgment of the Lord Chief Justice, we also think that, supposing it doubtful whether, if no notice of abandonment of either ship or freight had been given, the underwriters upon freight would have been liable; yet, inasmuch as notice of abandonment was in fact given to the underwriters upon the ship, and, as we are clearly of opinion, given in time, all that remained of the ship itself, or the proceeds of the ship if it had been sold, belonged to the underwriters on the ship, and it became impossible for the owners to earn the chartered freight, of which, therefore, there was then an actual, and not a constructive, total loss. With respect to the delay in the notice of abandonment, the cause of that delay having been the refusal of the plaintiff's agents in New Zealand to supply the funds required to repair and clear the ship, which could not have been anticipated by the plaintiffs, who, as soon as it became known to them, instructed them to make the necessary advances, which were made accordingly; and the ship having sailed for Calcutta as soon as the repairs were completed, we think the delay satisfactorily accounted for, and the notice of abandonment in time. Then as to *The Scottish Marine Insurance Company v. Turner*, 1 Macq. 2; H. of L. Cas. 334; and *Stewart v. The Greenock Marine Insurance Company*, 1b. 328 (upon the authority of which *Turner's* case was decided): there the freight alleged to have been totally lost had been, in fact, earned, and the underwriters on ship, to whom the ship had been abandoned, had become entitled to it; whereas the freight in the present case, being prospective chartered freight, never was and never could be earned, and was as totally lost to the owners when the ship had passed to the underwriters on ship, as if it had been actually sunk in the sea upon the voyage to New Zealand.

Judgment for appellants.

Attorneys for appellants, *Thomas and Hollams.*

Attorneys for respondents, *Field, Roscoe, and Co.* for *Bateson, Robinson, and Morris*, Liverpool.

Equity Courts.

V.C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOK, Esqrs.,
Barristers-at-Law.

Monday, March 14.

MCGAREL v. MOON.

Practice—Exceptions to answer—Fictitious allegations.

It is not necessary to state imaginary facts to found an interrogatory; therefore where a bill alleged that an advance had been made by the directors of one company to another, but did not allege that such advance had been made with the sanction of the shareholders, the fact being unknown to the plaintiff, an interrogatory "whether such advance was sanctioned by the shareholders" was allowed.

This case came on to be heard on exceptions to the answer for insufficiency. The plaintiff in the suit was a shareholder in the Central Wales and Central Wales Extension Railway Companies, now amalgamated with the London and North-Western Railway Company, and this bill was filed by him to obtain a re-transfer of 2600 shares in the Central

V.C. M.]

MCGAREL v. MOON.

[V.C. M.]

Wales Railway Company, and 20,000*l.* Central Wales Extension stock, which, through the intervention of his stockbrokers were transferred by him in July or Aug. 1865, into the names of the defendants, Moon, Westhead, and Stewart, directors of and representing the London and North-Western Railway Company, who had agreed to make an advance of 100,000*l.* to the Central Wales Extension Railway Company, and as a security for which advance these shares and stock were to be held by the London and North-Western Railway Company. It appeared that in the year 1865 the Central Wales Extension Railway Company and the Neath and Brecon Railway Company, which is also now amalgamated with the London and North-Western Railway Company, being in want of money, proposed applying to the London and North-Western Railway Company for a loan; an application for that purpose was first made by the Central Wales Extension Railway Company, upon which a sum of 100,000*l.* was advanced, as the bill alleged, to such company, upon the security above-mentioned. It appeared, however, to be doubtful whether the advance was in fact made to the Central Wales Extension Railway Company or to the Neath and Brecon Railway Company.

As to the first exception—

The bill alleged that a special committee had been appointed by the London and North-Western Railway Company to manage the transaction with the Central Wales Extension Railway Company, and the interrogatory asked the defendants to set forth the names of the members of that committee, or any other committee appointed for the purpose. The defendants in their answer stated that it was not the fact that a special or any other committee was appointed to manage the transaction. In another part of the answer it was stated that in 1865 a general committee was appointed to review all matters which had been referred to the special committees, before laying them before the board of directors, but the names of the persons forming this general committee were not stated.

The plaintiff excepted to the answer for insufficiency.

Pearson, Q. C. and Methold, for the exception contended that it was necessary for the plaintiff's case that he should know who were the members of any committee to which the transaction had been in any way referred.

Bristowe, Q. C. and Speed, for the answer—We have completely traversed the allegation in the bill. No special or any other committee was appointed to manage the transaction, and therefore it is idle to be told to set forth the names of parties who had no existence. We are not bound to do more than answer the questions put to us. The general committee is not the committee referred to in the bill.

The VICE-CHANCELLOR thought the answer was sufficient, and disallowed the exception.

As to the second exception. The 20th paragraph of the bill alleged that on the 2nd Aug. 1865 the defendants Moon, Westhead, and Stewart, as the trustees of the London and North-Western Railway Company, advanced and paid out of the corporate funds of such company to the defendant Woolley, as agent for the Central Wales Extension Railway Company, the sum of 50,000*l.* (being part of the 100,000*l.* agreed to be advanced). The interrogatory founded on that allegation asked, "Was not the said sum of 50,000*l.* advanced and paid under the authority and with the sanction of the directors of the London and North-Western Railway Company, and whether or not by the shareholders in such last-

mentioned company, as an advance to the Central Wales Extension Railway Company?" The answer stated that the advance was sanctioned by the directors of the London and North-Western Railway Company, and set forth the minutes and memoranda of the meetings of the directors with reference to the loan of the 100,000*l.*, but stated nothing as to the sanction of the shareholders.

The plaintiff excepted to the answer to this interrogatory as insufficient, on the ground that the defendants Moon and Westhead and the London and North-Western Railway Company had not set forth "whether the advance and payment of the 50,000*l.* were sanctioned by the shareholders of the last-mentioned company as an advance to the Central Wales Extension Railway Company, or in some other and what manner."

J. Pearson, Q. C. and Methold for the exception.—It is material to our case to ascertain whether the advance was made to the Central Wales Extension Railway Company or to the Neath and Brecon Railway Company; and, therefore, we want to know what was done at the time of the advance, and especially what communication was made on the subject by the directors of the London and North-Western Railway Company to its shareholders, without whose consent no advance could be made. The answer does not say one word as to the shareholders, but only as to the directors.

Bristowe, Q. C. and Speed for the answer.—We object to answer the interrogatory in question on the following grounds: First, there is no allegation in the bill as to the sanction of the shareholders upon which to support the interrogatory; secondly, the question as to their sanction is wholly immaterial and irrelevant, because the shareholders have nothing whatever to do with the subject; thirdly, this is a mere fishing interrogatory, an answer to which would not be material to the relief sought by the bill, and might be used for some other purpose in some other suit. There is nothing in this bill to warrant this interrogatory, and where this is the case a defendant is not obliged to answer the interrogatory. This has been the uniform practice.

Mitford on Pleading, 5th edit., pp. 53, 54;

Daniell's Ch. Pr. 4th edit., p. 441.

If the matter interrogated upon is material, it should be alleged in the bill.

Methold in reply.—This interrogatory is pertinent to the case made by the bill, and therefore the defendants must answer it. We are not bound to introduce fictitious statements into the bill on which to found our interrogatories. He cited,

Marsh v. Keith, 1 Dr. & Sm. 342;

Hudson v. Grenfell, 3 Giff. 388;

Mansell v. Feeney, 2 J. & H. 313;

Daniell's Ch. Pr., 4th edit., 363.

The VICE-CHANCELLOR.—This is a bill to impeach a transaction, and it may be important for the plaintiff to know whether the London and North-Western Railway Company did concur in that transaction. The plaintiff did not know the fact, and therefore he could not with propriety or safety make any allegation either one way or the other. But it was said that if the information sought by the interrogatory was material to the plaintiff's case, he should have made some allegation in his bill upon which to found his interrogatory, and I was at first inclined to think there was some force in the observation, but on further consideration I think that if a fact of which the plaintiff knows nothing may prove material to the relief he seeks, as in *Marsh v. Keith*, 1 Dr. & Sm. 342, he is entitled to ask for information as to the fact without alleging pure fictions in his bill. In the present case it seems to me the in-

interrogatory is justified by the allegation in the bill, and that the defendants are bound to answer it. There can be no difficulty in answering whether the transaction in question was or was not done with the sanction of the shareholders. I am of opinion, therefore, that the interrogatory is proper, and ought to be allowed.

Solicitors for the plaintiff, *Maynard and Son*.
Solicitor for the defendants, *Blenkinsop*.

Jan. 19 and 20, Feb. 8 and 9, and March 23.

THE IMPERIAL MERCANTILE CREDIT ASSOCIATION
v. COLEMAN.

Company—Contract by director—Disclosure of interest.

C., a director of a joint-stock company, purchased certain railway debentures at 95 per cent. Subsequently, while still a director, he proposed to the company that they should purchase these debentures at 98½ per cent., but he did not disclose to them the nature and extent of his interest in the debentures. The company accordingly purchased the debentures at that price, the result of the transaction being that C. realised a considerable profit on them, being the difference between 95 and 98½ per cent.

Held, that C., not having disclosed his interest in the debentures to the company, was not justified in deriving any profit for himself from the transaction, and must, consequently, pay over to the company the whole amount of his profit, with interest at 5 per cent.

The Imperial Mercantile Credit Association was registered on the 24th June 1864, for the objects (amongst others) of negotiating loans of all descriptions, and of transacting the business of a capitalist. On the 11th May 1866 the association stopped payment, and is now being wound-up voluntarily under the supervision of the court, pursuant to a special resolution passed on the 28th May 1866, and confirmed on the 24th June 1866, and to an order made on the 26th June 1866. The defendants Coleman and Knight were stockbrokers, carrying on business under the firm of Knight, Coleman, and Co., and Coleman was a director of the association during the whole period from its incorporation to the commencement of the winding-up.

The association was virtually an amalgamation of the Imperial Financial Company (Limited), and the Mercantile Credit Association (Limited), and its incorporation was provided for by an agreement between the two companies dated the 3rd June 1864, in pursuance of which each of those companies duly passed and confirmed a special resolution for its own voluntary winding-up, and the association took over the business of both of them as from the 31st May 1864. The joint business of the amalgamated companies during the interval between the date of the agreement and the registration of the association, was conducted by a temporary board styled the board of the Imperial Mercantile Credit Association (Limited), and composed of certain of the directors of each of the said companies, who became also the first directors of the association. The defendant Coleman was a member of such temporary board, and was also a director of the Imperial Financial Company. While the association was in course of construction, the London, Chatham, and Dover Railway Company were seeking to exercise certain powers for the increase of its capital, and for borrowing, which had been given to it by the London, Chatham, and Dover Railway Act 1863, and also the powers which it was contemplated to obtain by the London, Chatham, and Dover (New Lines) Act 1864, which last-mentioned Act was passed on the 14th July

1864. The Chatham Company was, by the former of the said Acts, authorised to construct certain railways called the Metropolitan Extension (Eastern section), and for the purposes of those extensions to raise a certain amount of share capital, and to borrow 283,000*l.* on mortgage of the same extensions, and was by the latter of the said Acts authorised to construct certain railways called the Kent Works which were thereby constituted a portion of the said Metropolitan Extensions (Eastern Section), and for the purposes of such works to raise a certain sum by new shares in the said Metropolitan Extensions (Eastern Section), and to borrow 73,300*l.* on mortgage of the same section, which afterwards became, in its thus enlarged dimensions, known as the Greenwich and Woolwich line. Messrs. Peto and Co. were the contractors for the new lines, as they had been for other lines of the Chatham Company.

On the 4th Jan. 1864, the defendant Coleman, on behalf of his firm, who were the brokers and agents of Peto and Co., wrote to Sir Morton Peto a letter, in which he stated he could arrange to place the whole of the B shares and the debentures above referred to for a commission of 5 per cent. in cash and 5 per cent. in A shares, and he thought that it would probably take about two months to place the B shares. In reply to such letter, Sir Morton Peto, on the 5th Jan. 1864, wrote to the defendant Coleman, accepting his proposal. On the 7th June 1864, a meeting was held by a committee of the temporary board of the association, at which a proposal was submitted from Messrs. Knight, Coleman, and Co., that the association should undertake to place 356,300*l.* (the aggregate of the said sums of 283,000*l.* and 73,300*l.* authorised to be borrowed on mortgage) 6 per cent. debentures, five years to run, Metropolitan Extensions, Greenwich and Woolwich, Eastern Section, London, Chatham, and Dover Railway Company, at a commission on the debentures of 1½ per cent., and it was resolved to recommend the proposal to the board for acceptance. Accordingly the proposal was submitted to a meeting of the board held on the 10th June 1864, at which the defendant Coleman was present, but previously to the proposal being submitted, Coleman stated to the meeting that he was interested in the sale of these debentures, and offered to leave the room whilst the proposal for their sale to the association was being dismissed, but the chairman said this was unnecessary.

The question then arose as to whether the association could enter into the transaction, upon which Mr. Morris, the solicitor of the association, who was present, referred to the articles of association, and advised the meeting that provided a director declared at the time of any business being submitted to the board that he was interested therein, the association could enter into the business, and he referred particularly to the 83rd article, which provided as follows:

The office of a director shall be vacated if he contracts with the company, or is concerned in or participates in the profits of any contract with the company or participates in the profits of any work done for the company, without declaring his interest at the meeting of the directors at which such contract is determined on or work ordered, if his interest then exists, or, in any other case, at the first meeting of the directors after the acquisition of his interest; and no director so interested shall vote at any meeting, or on any committee of the directors, or any question relating to such contract or work.

It did not appear, however, that Coleman explained to the meeting the actual nature of his interest, though he stated in his answer to the bill that in the month of May previous to the committee meeting above mentioned, he submitted the proposal to Messrs. Barker and Sandeman, the managers of the association, and discussed the matter with

V.C. M.]

THE IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

[V.C. M.]

them; also that in the course of that discussion and with a view to the proposal being submitted to the committee meeting, he showed Messrs Barker and Sandeman the correspondence between his firm and Peto and Co. above referred to. This, however, Messrs. Barker and Sandeman positively denied. The board then passed a resolution accepting the proposal, but Coleman did not vote on the occasion, or take any part in the discussion. Eventually the whole of the debentures were issued, and various sums, amounting in the whole to 305,705*l.*, were paid by the association to the defendants, Coleman and Knight, or to the Chatham Company, on account of such debentures, the association taking credit for 5344*l.* 10*s.*, as commission at 1½ per cent. on the sum of 356,300*l.*, the amount of the debentures. Of these sums so paid by the association to the defendants, a sum of 64,655*l.* 10*s.* was paid to the defendants on the 5th July 1864, and out of this sum they paid over to the Chatham Company 52,185*l.* only, and carried the difference, viz., 12,470*l.*, to their profit and loss account in their own books as the amount of their commission under their alleged agreement with Peto and Co., contained in the letters of the 4th and 5th Jan. 1864.

The association maintained that although they had undertaken to place the 356,300*l.* debentures for a commission of 1½ per cent., or, in other words, to purchase them at 98½ per cent, yet that the defendants had arranged with the Chatham Company to place them at 5 per cent, or in other words, to purchase them at 95 per cent., and that accordingly the sum of 12,470*l.* 10*s.*, the amount of the difference, ought to be handed over by the defendants. On the other hand, the defendants maintained that they were entitled to the benefit of their agreement with Peto and Co.; and alleged that they acted solely on behalf of Peto and Co., and denied that they had anything whatever to do with the Chatham Company.

This bill was then filed by the liquidators of the association, praying that the defendants might be declared liable, and decreed jointly and severally to pay over to the association the said sum of 12,470*l.* 10*s.*, with interest at 5 per cent.

Cole, Q. C. and *Jackson*, for the plaintiffs, argued that, inasmuch as the defendant Coleman was a director of the association, and therefore stood in a fiduciary relation towards them, he was bound to give them the full benefit of the transaction, and not to retain it for himself. That in fact the case was governed by the general principles of equity as to persons in a fiduciary position purchasing the property of their *cestuis que trust*. Coleman did not declare his interest within the meaning of the 83rd article of association. They cited

Foster v. Oxford, Worcester, and Wolverhampton Railway Company, 13 C. B. 200;

Aberdeen Railway Company v. Blaikie, 1 Macq. 461; 23 L. T. Rep. 315;

Fawcett v. Whitehouse, 1 R. & M. 132;

Hichens v. Congreve, 4 Russ. 562; 1 R. & M. 150, note;

Beck v. Kantorowicz, 3 K. & J. 230;

Benson v. Hawthorn, 1 Y. & C. Ch. 326;

Bank of London v. Tyrrell, 27 Beav. 273;

8 & 9 Vict. c. 16, ss. 86, 87.

Sir *Roundell Palmer, Q.C.*, *Mellish, Q.C.*, and *James Kaye*, for the defendants.—The defendants, in submitting the proposal for the sale of the debentures to the association, only acted in the ordinary course of their business as stockbrokers. The association were desirous of having Coleman on their board, in consequence of his being a member of a firm of stockbrokers in large practice. Their object was to secure the services as directors of persons who thoroughly understood

the business of the association, and the 83rd article of association was framed especially as an inducement to such persons to act. There is nothing in the Companies Act 1862, prohibiting contracts by directors, which are left to the general law; the Act merely disqualifies directors who contract from acting as directors (1st Sched. Table A. 57), but under this 83rd article of association, a director is expressly allowed to contract, provided he discloses his interest and does not vote. Accordingly, Coleman stated at the meeting of the directors, that he had an interest in the debentures, and he also explained his position to the managers of the association prior to the committee meeting, with a view to its being brought under the notice of the committee. The association have no right to alter their contract with the defendants, having deliberately entered into it with full knowledge of the facts of the case. There is no agency or trusteeship in the present case. The defendants were the owners of the debentures, and had acquired their interest in them months before the association came into existence. They cited:

7 & 8 Vict. c. 110, s. 29;

Ernest v. Nicholls, 6 H. L. C. 401;

Bluck v. Mallalue, 27 Beav. 398;

Tyrrell v. Bank of London, 10 H. L. C. 26;

Great Luxembourg Railway Company v. Magnay, 25 Beav. 586.

Cole, Q.C., in reply, cited:

Ex parte James, 8 Ves. 337.

The VICE-CHANCELLOR (after stating the facts and arguments).—The question is, whether the defendants were owners of these debentures. The ownership is attempted to be made out by a correspondence between the defendant Coleman and Sir Morton Peto, in which Coleman said he would arrange to place the whole of the B. shares and debentures about to be issued by the Chatham Company for a commission of 5*l.* per cent. in cash, and 5*l.* per cent. in A shares; and he supposed that it would probably take about two months to place the B shares. His proposal was accepted by Sir Morton Peto on the 5th Jan. 1864. I cannot, however, accede to the argument that this correspondence made the defendants the owners of the debentures. There was no contract whatever with the Chatham Company, to whom they belonged, to take them, and I cannot consider that Mr. Coleman's letter amounts to anything more than an engagement with Sir Morton Peto to use his best exertions to place the debentures for the commission named, and my opinion is that an action even could not have been sustained against Coleman for a breach of that undertaking. Much importance was also attached to the fact that this correspondence was shown to Barker and Sandeman, the managers of the association, long before the contract was entered into. The fact is positively denied by Barker and Sandeman; but whether it was so or not, is, in my opinion, wholly unimportant, as it is quite clear that they had no authority whatever to bind the company to waive any rights arising out of any irregular or unjustifiable conduct on the part of its directors. It was also contended that the defendants acted in this transaction merely as the brokers of Peto and Co., but that circumstance would not, in my opinion, afford any justification to Coleman for charging the company, of which he was a director, a larger price for the debentures than he himself had paid for them. Much reliance has been placed by the defendants' counsel on the 83rd clause of the articles of association, which prescribed what acts should be a disqualification of a director. It is provided that he shall vacate his office "if he contracts with the company, or is concerned in a participation of the

V.C. M.]

STONE v. THOMAS.

[CHAN.]

profits of any contract with the company, without declaring his interest at the meeting of the directors at which such contract is determined on." It was urged that this clause was intended to supersede the rules of the court which preclude a director from deriving profit from any transaction with the company of which he is a director, but I am of opinion that it had not that effect, but was merely intended to describe what acts should vacate the office of director; and even if it had the effect ascribed to it, I think it was incumbent upon Mr. Coleman not only to have stated at the meeting of the 10th June 1864 that he had an interest in these debentures, but also to state accurately what that interest was. He would, in fact, have been bound to state that he was offering the company at 98½ per cent., that which he was purchasing at 95 per cent., but this he did not do. That his co-directors knew or suspected that he was getting some greater advantage by the transaction than the ordinary broker's commission I think highly probable; but no such knowledge on their part could absolve him from his duty to the shareholders, as was expressly decided by Knight Bruce, V.C., in *Benson v. Heathorn*, 1 Y. & C. Ch. 326. I cannot, therefore, see anything in the transaction to relieve Mr. Coleman from the ordinary obligations of a director towards the company, whose interests were committed to his charge. When he proposed that the company should take the debentures at 98½ per cent. he knew that he should procure them at 95 per cent. I am clearly of opinion that he was not justified in charging the higher price, and putting the difference in his own pocket. It is of the highest importance that it should be distinctly understood that it is the duty of directors of companies to use their best exertions for the benefit of those whose interests are committed to their charge, and that they are bound to disregard their own private interests whenever a regard to them conflict with a proper discharge of such duties. These are the principles which were acted upon in the cases relied upon by the counsel for the plaintiffs. [His Honour then referred to the cases, and continued:] Upon the principle of these authorities, and upon what I consider to be the soundest principles of justice, I think I am bound to treat the acquisition of these debentures by Mr. Coleman as a purchase of them on behalf of the company of which he was a director, and that it was consequently his duty to procure them at the lowest possible price, without any private advantage to himself. In violation of the obligation which was thus imposed upon him, he conducted the purchase in such a manner as to make a profit of 12,470l. 10s. for himself and his partner, and that sum he is bound to restore. There must, therefore, be a decree for the payment of that amount with interest at 5 per cent. from the 5th July 1864, the day on which it was received by Knight, Coleman, and Co., and carried to their joint account. Mr. Coleman must also pay the costs of the suit. The counsel for the defendants did not make any distinction between the two defendants, but as Mr. Knight did not occupy any fiduciary position with regard to the company, I do not see any ground for making the decree against him. He does not appear, however, to have incurred any separate costs, and I think, therefore, that the bill should be dismissed as against him without costs.

Solicitors for the plaintiffs, *Ashurst, Morris, and Co.*
Solicitors for the defendants, *Maynard, Son, and Co.*

COURT OF APPEAL IN CHANCERY.

Reported by T. BROOKSBANK and E. STEWART ROCHE, Esqrs.,
Barristers-at-Law

Friday, Jan. 28.

(Before the LORD CHANCELLOR (Hatherley).)

STONE v. THOMAS.

Bankruptcy Act 1861—Creditors'-deed—Jurisdiction of the Court of Chancery—Special circumstances.

Bill filed by a creditor of J. Hayward against the trustees of a creditors'-deed, which had been executed by him, and had been duly registered under the 192nd section of the Bankruptcy Act 1861. The bill charged that part of the property had been sold to one of the trustees at an undervalue, and prayed that the trusts of the deed might be administered by the court, and the trustees made responsible for the loss.

Case brought before the Lord Chancellor in the first instance at the request of Stuart, V.C., in consequence of a supposed discrepancy between Riches v. Owen, L. Rep. 3 Ch. App. 8290, and Martin v. Powning, 20 L. T. Rep. N. S. 133; L. Rep. 4 Ch. App. 356, as to the jurisdiction of the court:

Held, that the jurisdiction of the Court of Chancery was not ousted by the Bankruptcy Act 1861 in cases of this description. But as the administration of the trusts of creditors'-deeds had been handed over to the Court of Bankruptcy, this court would not exercise its concurrent jurisdiction, unless there were special circumstances which rendered the relief that could be obtained in the Court of Bankruptcy inadequate to meet the justice of the case. In the present instance there were no such special circumstances. On the contrary, the relief sought could be obtained in bankruptcy with much less expense and delay. The bill was dismissed with costs.

This was a motion for decree, under the following circumstances; J. Hayward, on the 7th of June, 1867, executed a composition-deed under the Bankruptcy Act 1861, and thereby conveyed all his real and personal estate to the defendants, William Thomas, Edward Miller, and George Wilton, upon the usual trusts for sale, and for division of the proceeds among his creditors. The deed was of the ordinary character of such documents, and there was nothing remarkable in it, except that all the three trustees were creditors of Hayward, and the deed contained a power in the event of any question arising between any one of the trustees and the estate, for the two other trustees to enter into any agreement, or take any measures for adjusting such claim, as effectually as if the trustee interested in the question had not been nominated a trustee. J. Hayward was, at the time of the execution of the composition-deed, carrying on the business of a coal merchant; and the trustees, shortly after entering on their duties, sold the stock-in-trade and goodwill of it to William Thomas, one of themselves; and in April 1866, William Thomas, with some other persons, formed themselves into an incorporated company under the Companies Act 1862, and the stock-in-trade and business were transferred to the company. The company were not made parties to this suit. The same year the trustees paid to the creditors two dividends, amounting to 9s. in the pound. At the time when the dividends were paid, it was a question between the plaintiff and the trustees whether the plaintiff, who had had considerable business transactions with Hayward, was a creditor of, or a debtor to the estate. Much correspondence ensued between them, and ultimately the trustees acknowledged that the plaintiff was a creditor of the estate, but no agreement could be come to between them as to what

CHAN]

STONE v. THOMAS.

[CHAN.]

was the amount of the debt, and no dividend was paid to him.

In this state of things the plaintiff filed his bill on the 7th Aug. 1867, on behalf of himself and the other creditors under the deed, except the defendants, to have the trusts of the composition-deed executed under the direction of the court, and also to have the sale of the coal business set aside on the ground that it had been purchased at an undervalue by one trustee from his colleagues. The question of the jurisdiction of the court was not raised by the defendant on the pleadings in any manner, and the cause came on to be heard, on motion for decree, before Stuart, V.C. but at his Honour's request, application was made to the Lord Chancellor to allow the cause to be heard before his Lordship in the first instance, his Honour being of opinion that, having regard to the decisions in the Court of Appeal in *Riches v. Owen*, L. Rep. 3 Ch. App. 820; and in *Martin v. Powning*, 20 L. T. Rep. N. S. 133; L. Rep. 4 Ch. App. 356; and of Lord Justice Giffard in *Bell v. Bird*, L. Rep. 6 Eq. 635; 18 L. T. Rep. N. S. 901; it was expedient that this course should be adopted.

Dickenson, Q.C., and *Begg*, for the plaintiff, submitted that this was a suit not merely to administer a trust-deed and take accounts, but also to set aside a sale by trustees to one of their own body, which, by their own acknowledgment, was at an undervalue, and therefore fraudulent. There could be no doubt of the original jurisdiction of this court in suits of this description, and it was not the habit or duty of the court to abandon or delegate the exercise of its original jurisdiction, on the ground that another court was competent to deal with the case. The Act of 1861 did not oust expressly the jurisdiction of the Court of Chancery, and they would not import negative words into the Act so as to take away the jurisdiction. *Riches v. Owen* distinctly showed that the court still had jurisdiction, and the judgment in *Martin v. Powning* did not deny—indeed it asserted—the concurrent jurisdiction of the court, and the result of that decision was that, in cases of mere administration, the Court of Chancery would leave the matter to be dealt with by the Court of Bankruptcy, but that if there were anything extraordinary in the case with which this court could deal more conveniently than a court of bankruptcy, this court would entertain the suit. That was the case here, and even if this question had been raised in the Court of Bankruptcy in the first instance, that court, if it had been of opinion that the sale complained of might be set aside, would have directed a suit to be instituted in this court, for the purpose of trying the point. Moreover, in *Martin v. Powning* and in *Bell v. Bird*, the question of jurisdiction was raised, on demurrer or plea; that was the proper way of taking the objection. The defendant had allowed this case to come to a hearing on motion for decree, and this court would not now, after all the expense of the suit had been incurred, refuse to exercise its concurrent, and, in this case, beneficial jurisdiction. They quoted:—

Athenæum Life Assurance Society v. Pooley, 3 De G. & J. 294; 28 L. J., N. S., 119;
Galsworthy v. Durrant, 2 De G. F. & J. 466.

Greene, Q.C., and *Hadden* for the defendants, the trustees of the deed, contended that *Bell v. Bird* distinctly affirmed that in matters of this description the jurisdiction of the Court of Bankruptcy was exclusive; and if it were not exclusive that was no reason why the Court of Chancery should interfere here. The case of *ex parte Lacey*, 6 Ves. 625, showed that under the old practice the Court of Bankruptcy could set aside a

sale by an assignee, and that court had now the same powers under the Act of 1861 with regard to these composition-deeds as it had before in cases of bankruptcy. They further submitted that it was not necessary the objection to the jurisdiction should be taken by demurrer. They referred to Mitford on Pleading, p. 176.

Ex parte James, 8 Ves. 337;
Ex parte Lacey, 6 Ibid. 625;
Ex parte Lawrence, 1 De G. J. & S. 307;
Ex parte Pilkington, L. Rep. 3 Ch. App. 404;
Thompson v. Durham, 1 Hare, 358;
Preston v. Wilson, 5 Ibid. 185;
Laycock v. Johnson, 6 Ibid. 199.

G. Daw for the debtor Hayward.

Dickinson, Q.C., in reply.

The LORD CHANCELLOR (Hatherley).—This case has been brought before me on the original hearing because of a supposed discrepancy in the decisions of the various branches of this court. The deed in the present case is in the common form, except that as all the three trustees were creditors, there is a proviso empowering two of them to settle the debt of the third trustee. But certain circumstances have taken place which are said to be so special as to justify this suit. One of the trustees has purchased a part of the property, and it is charged against him that he bought it at an undervalue, and that this being a purchase by a trustee from himself, the plaintiff ought to have the ordinary remedy in this court of setting the purchase aside and having the property resold, and the trustee fixed with the loss if there should be any. That is the principal speciality. As regards the jurisdiction of this court three questions arise; first, whether the court has any jurisdiction in the case of a creditor's deed; secondly, what special circumstances are required to show that the Court of Bankruptcy cannot give adequate relief before the court will exercise its jurisdiction; and thirdly, whether it is not too late in this case to take an objection to the jurisdiction of the court after the answers have been put in and the witnesses examined. As to the first question, I feel no doubt that there is jurisdiction in this court if it thinks fit to exercise it. I do not think that *Martin v. Powning*, or any other case has decided that the jurisdiction of this court is ousted by the Court of Bankruptcy. But the case has declared that in the case of a creditor's deed jurisdiction over the whole matter has been given to the Court of Bankruptcy, and that it is more convenient that the trusts should be administered there, and that this court will not interfere unless there are some special circumstances to call for such interference. I take it that the rule as to the jurisdiction is this: that the jurisdiction of this court is not ousted unless there is an express enactment in the statute which provides a new jurisdiction. This has been exemplified in many cases in which the courts of common law have had jurisdiction given them, as in the case of discovery, which was formerly exclusively within the jurisdiction of this court. The difference between a trust-deed and the bankruptcy of a debtor is, that where there is a bankruptcy the whole machinery is in the Court of Bankruptcy, and the jurisdiction of the Court of Chancery is put an end to. The assignees are officers of another jurisdiction. But with respect to trust-deeds, the question may arise whether the Court of Bankruptcy has power to give adequate relief in all cases. I take it that in ordinary cases the Court of Bankruptcy is fully adequate to carry into execution the trusts of these deeds, and that the Legislature has given it power to deal with the trustees as with assignees, and the debtor as with a bankrupt; but the Legislature has

CHAN.]

Ex parte ANDERSON; *Re* ANDERSON.

[CHAN.]

not thought proper in express terms to oust the jurisdiction of this court. Where, as in *Martin v. Powning*, the whole object is to deal with the assets, the Commissioner is perfectly competent, and this court will refuse to grant relief. But if there is anything *dehors* the administration of the assets in which the Commissioner cannot give adequate relief, recourse may be had to this court. The head note of *Martin v. Powning* is perfectly accurate when it says that "the court will not in ordinary circumstances entertain a suit for the administration of the trusts of a deed registered under the Bankruptcy Act 1861." In that case the court made these observations: "With respect to the first question, it has been correctly stated by the respondent's counsel that before the Bankruptcy Act 1861, this court habitually exercised jurisdiction over composition-deeds and trust-deeds for the benefit of creditors in the same manner as over other trusts; and in *Riches v. Owen*, which was a case of a deed registered under the Act of 1861, the court appointed a receiver, but in that case the deed was a deed of inspectorship, the plaintiffs were the trustees of the deed, and were suing the insolvent debtor for the purpose of enforcing the deed against him, and the interference of the court was limited to the appointment of a receiver for the protection of the property, and we have not been referred to any case, nor do we think that any case can be found in which the court has entertained a suit for the administration of the trusts of a deed registered under the Act, and in *Bell v. Bird*, the court refused to entertain such a suit. The Act of 1861, has placed the trust-deeds registered under its provisions in a position widely differing from that occupied by composition-deeds and trust-deeds for the benefit of creditors under the old law; for by the Act of 1861, if the proper majority of creditors be obtained, and the other requisites be observed, the deed becomes binding on the minority in the same manner as if they had executed the deed (sect. 192); and the 197th section gives to the deed effects similar to those of an adjudication of bankruptcy, and provides that the debtor, the creditors who execute, assent to, or are bound by the deed, and the trustees, shall in all matters relating to the estate and effects of the debtor be subject to the jurisdiction of the Court of Chancery, and have the benefit of and be liable to all the provisions of the Act, and that the creditors and trustees shall have the same powers, rights, and remedies as creditors or assignees in bankruptcy, and that except where the deed shall expressly provide otherwise, the Court of Bankruptcy shall determine all questions arising under the deed according to the law and practice of bankruptcy, and shall have power to make and enforce all such orders as it might have made if the debtor had been adjudged bankrupt, and his estate were administered in bankruptcy. Is there then, anything in this case which would render the relief in Chancery more effectual than in bankruptcy? I have no hesitation in saying there is not. The facts are simply these: Two years before the filing of the bill, one of the trustees bought part of the assets, and immediately afterwards sold it to a company. The whole matter resolves itself into a question of account. If it shall turn out that the property was sold at an under-value, the trustees can be made to account; but there can be no resale, for the company which bought the property are not before the court. There is no pretence for saying that there is anything in this case which cannot be set right in bankruptcy. But it is said that it is too late for the defendants now to take the objection. I cannot, however, say that the defendants were entirely wrong in the course they have pursued. The case of *Martin v. Powning* was not decided at the time of the

filing of the bill, so that it was not clear that a demurrer would lie. There were also personal charges against the defendants, which they might think proper to answer. On the other hand, the plaintiff himself might have stopped the suit when *Martin v. Powning* was decided. I have said that there is nothing to justify the court in interfering, but I may add that there is much in this case to show how mischievous its interference would be, and it is clear that the creditors would get no benefit from the suit. The deed in this case was an honest one. Except the present charge, no fault has been found with the trustees. The plaintiff admits that there is only a balance of about 167*l.* due to him. When the account was sent to him, making him out a debtor to the estate, he did not discover the error in the account for a whole year, and then found out that some items had been charged twice over. In the meantime 9*s.* in the pound had been distributed. Two days before the bill was filed a distinct offer was made to pay him 9*s.* in the pound on what should turn out to be due to him; but without taking the trouble to settle the amount payable, the bill was at once filed. There has been a great deal of controversy about the valuation. The correctness of Foote's valuation is not questioned, and it turns out that the difference of the value put upon the property when the defendant bought it, arose principally from the fact that some of the stock had been sold, so that the under-value complained of cannot be more than 160*l.* The plaintiff wishes all this gone into his chambers, when a single application to the judge in Bankruptcy would have answered all the purpose. I do not deny that there may be cases in which it would be right to apply to this court for relief—the appointment of a receiver is such a case—but I think that in general, application should first be made to the commissioner in bankruptcy, and if full relief cannot be obtained, recourse may be had to this court. The bill is quite unnecessary, and must be dismissed; and as there has been an offer made to pay a dividend on the plaintiff's debt before the bill was filed, I shall dismiss it with costs, which I should not otherwise have done.

Solicitor for the plaintiff, *C. M. Stretton*, agent for *Loosemore*, Tiverton.

Solicitor for the defendants, *T. H. Dixon*, agent for *Ransom*, Wellington, Somerset.

April 23 and 26.

(Before Lord Justice GIFFARD.)

Ex parte ANDERSON; *Re* ANDERSON.

Bankruptcy — Injunction — Jurisdiction to grant — Stranger to the bankruptcy — Sale of property assigned to him by the bankrupt — Alleged fraud — Undertaking as to damages — Undertaking to institute proceedings to set aside assignment — Practice — Appeal — The Bankruptcy Act 1869, sects. 13, 65, 66, 71, 72.

*Under the Bankruptcy Act 1869, sects. 65, 66, 72, the Court of Bankruptcy has jurisdiction in a summary way to grant an injunction to restrain a stranger to the bankruptcy from selling property assigned to him by the bankrupt when the assignee under the bankruptcy alleges that the assignment to the stranger was fraudulent, and makes out a *prima facie* case such as would have induced the Court of Chancery upon bill filed to grant an interim injunction to restrain the sale till the hearing of the cause; and such an injunction may even be granted *ex parte*, and may be granted in a bankruptcy which originated under the B. A. 1861. But when such an injunction is granted, the assignee under the bankruptcy ought to give an unqualified undertaking to be answerable in damages to the person*

CHAN.]

Ex parte ANDERSON; *Re* ANDERSON.

[CHAN.]

whose dealing with the property is restrained, and ought also to undertake at once to institute proceedings to set aside the assignment by the bankrupt to him.

The order granting such an injunction, even though made in a bankruptcy which originated under the B. A. 1861, is an order made entirely under the B. A. 1869, and if made by a County Court must, if appealed from, be appealed from in the first instance to the Chief Judge in Bankruptcy, and not directly to the Court of Appeal in Chancery.

Re Palmer, 22 L. T. Rep. N. S. 323, distinguished.

*A., a few days before he was adjudicated a bankrupt, assigned a number of pictures to C. in consideration of a sum of money. C. paid the money, and the pictures were delivered over to him, and he placed them with an auctioneer to be sold, and they were advertised for sale accordingly. The assignee under the bankruptcy, upon an allegation that the sale to C. was fraudulent and at an undervalue, obtained *ex parte* from the County Court an injunction to restrain the sale which had been advertised. By the order of the County Court the assignee under the bankruptcy was made to undertake to be answerable in damages to C. out of any moneys which might come to him in the bankruptcy.*

On appeal, this order for an injunction was affirmed, but the assignee in the bankruptcy was compelled to give an unqualified undertaking to be answerable to C. in damages, and also to undertake forthwith to institute proceedings to set aside the sale to C.

This was an appeal by Mr. Charles King Anderson, from an order made by the registrar of the County Court at Walsall, granting an injunction to restrain him, his servants and agents, and in particular, Messrs. Christie and Manson, auctioneers, of London, from selling certain pictures which he had deposited with Messrs. Christie and Manson to be sold, and which had been advertised by them for sale accordingly.

The pictures in question had belonged to Mr. Matthew Anderson, who was the uncle of Mr. C. K. Anderson, and had been, with other property, assigned by him by a deed dated the 18th Dec. 1869, to C. K. Anderson absolutely in consideration of a sum of money which was calculated as enough to pay to the creditors of Mr. Anderson a composition of 6s. 8d. in the pound upon the respective amounts of their debts. The money was paid by Mr. C. K. Anderson, and the composition was paid to the majority in number of Mr. Anderson's creditors, but two of the largest creditors refused to receive it, alleging that the sale was fraudulent and at an undervalue. In consequence of their opposition, Mr. Anderson was, on the 24th Dec. 1869, adjudicated a bankrupt upon his own petition. When the Bankruptcy Act 1869, came into operation, the proceedings under the bankruptcy were by an order of the Lord Chancellor transferred to the County Court at Walsall. C. K. Anderson at once took possession of the pictures under the assignment to him, and sent them to London, and instructed Messrs. Christie and Manson to sell them, and they advertised them for sale accordingly, on the 18th March 1870. The assignee in the bankruptcy, who was the largest creditor, and one of those whose opposition had led to the bankruptcy, knew of the proposed sale, but did not at once take steps to prevent it. But on the 11th March 1869, upon an *ex parte* application by the assignee to the registrar of the County Court, which was supported by evidence to show that the assignment to C. K. Anderson was fraudulent and ought to be set aside, an order was made granting an injunction to restrain C. K. Anderson, his servants and agents, and in particular Messrs. Christie and Manson, from selling the pictures. By this order the creditors' assignee was

compelled to undertake to abide by any order which the court might make as to payment (out of any moneys received or to be hereafter received by him in this matter) of damages, in case the court should be hereafter of opinion that C. K. Anderson had sustained any loss by reason of the order which the assignee ought to pay out of such moneys. From this order C. K. Anderson appealed.

Roxburgh, Q. C., and Bagley on behalf of the appellant, argued (1) that there was no ground for granting the injunction upon the merits of the case; (2) that the undertaking as to damages was insufficient; (3), that there was no jurisdiction under the Act of 1869 to grant an injunction against a person outside the bankruptcy, at any rate in a bankruptcy the proceedings in which originated under the Bankruptcy Act 1861. Certainly such an order ought not to have been made *ex parte*. They referred to and commented upon

The Bankruptcy Repeal Act 1869, s. 20:

The Bankruptcy Act 1869, ss. 13, 65, 66, 71, 72;

Caldecott v. Cook, Moo. & Mal. 522.

Lee v. Hart, 11 Ex. 880.

De Gex, Q. C., and Ernest Reed on behalf of the creditors' assignee, objected that the order appealed from was made under the Bankruptcy Act 1869, and that, therefore, by virtue of sect. 71 of that Act the appeal ought to have been taken in the first instance to the Chief Judge in Bankruptcy. On this point they distinguished *Re Palmer*, 22 L. T. Rep. N.S. 323. This objection was, however, not insisted upon, as the court suggested that it would save expense to have the matter decided upon at once by the Court of Appeal. They then argued that the Act of 1869 gave ample jurisdiction to make the order under appeal, and that a sufficient case was shown for granting the injunction. They relied in particular on the difference in the language of sect. 72 of the Bankruptcy Act 1869, as compared with that of sect. 12 of the Bankruptcy Law Consolidation Act 1849, as showing that the Court of Bankruptcy has now power to deal with third parties. They cite

Kimbray v. Draper, L. Rep. 3 Q. B. 168; 17 L. T. Rep. N. S. 540;

Exley v. Inglis, L. Rep. 3 Ex. 250; 18 L. T. Rep. N. S. 645.

Roxburgh, Q. C. was heard in reply.

Lord Justice GIFFARD said.—The question of jurisdiction in this case, no doubt, is of considerable importance. But, as I have had an opportunity of considering that question, not only antecedently, but for some time yesterday, I am prepared to dispose of this case at once. Now the first question that arises upon it is whether the appeal is brought in the right court, and although Mr. De Gex has very properly waived that question, of course it is necessary I should give an opinion upon the subject. The case of *Re Palmer*, 22 L. T. Rep. N. S. 323, before me the other day, was an appeal in respect of an order of discharge, and, in consequence, it was an appeal in respect of an order which was made under the Act of 1861. The only operation that the Act of 1869 had upon that Act of 1861 was that that which gave jurisdiction was the fact of there having been a transfer. But the order was made under, and the discharge depended completely and entirely on, the Act of 1861; and, besides that, under the Act of 1861 the bankrupt had thirty days for the purpose of appeal, and had a right to appeal direct to this court. I was of opinion that under those circumstances the right of direct appeal to this court was not taken away, and accordingly I entertained the appeal and varied the order that was made. If this order can be sustained (upon which I will state my

CHAN.]

Ex parte ANDERSON; Re ANDERSON.

[CHAN.]

opinion presently), it is quite clear that it is an order dependent entirely on the Act of 1869; it is an order which the court can make, because the proceedings were transferred, but the power giving the court authority to make any such order, if power there be, emanates entirely from the Act of 1869. Therefore this case is in no way concluded by the case which I decided the other day.

That being so, if we come to look at the Act of Parliament itself, the matter I think is reasonably clear. First of all there is the 20th section of the repealing Act, and that in substance really provides that the Act of 1861 shall be repealed, but that, as regards pending proceedings, and all proceedings which originated under the Act of 1861, so far as the powers of the Act of 1861 are concerned, the Act shall not be considered as having been repealed, and it is enacted that the repeal shall take away none of the rights which were conferred by the Act of 1861. Therefore where the proceedings have originated under the Act of 1861, I take it you have to consider the Act of 1861 and the Act of 1869 together, for the purpose of determining what is the proper court for the appeal, and the moment you come to the conclusion that the proceeding is a proceeding dependent absolutely and entirely on the Act of 1869, and has nothing to do with the bankrupt's discharge or the like, that moment you have in point of fact an order which is dependent on the Act of 1869. And besides the 71st section, the 72nd section is distinct in terms "that no such court as aforesaid shall be subject to be restrained in the execution of its powers under this Act by the order of any other court, nor shall any appeal lie from its decisions except in manner directed by this Act." Then the manner directed is an appeal first of all to the Chief Judge, and then an appeal from the Chief Judge here. Therefore, if the question had not been waived, I should have been obliged to have dismissed the application on the ground that the appeal was not brought to the proper court.

It will therefore be proper to preface this order by stating in terms that the assignee waived the fact of there not having been an intermediate appeal to the Chief Judge of bankruptcy. Upon that waiver, of course, I can deal with the case, and the first question that I have to consider is a question of jurisdiction. I quite agree that it is an important one. As regards the facts which raise the question of jurisdiction, I do not at all propose to enter into them; it is enough for me to say that it is alleged on the part of the assignee that there is certain property which belongs to the estate of the bankrupt. It is alleged on the part of the appellant, as controverting the case made by the assignee, that that property is taken by virtue of a purchase and by virtue of a deed, which he says is a valid purchase and a valid deed, and to that the assignee rejoins that that is a deed and that that is a purchase which ought to be set aside and cannot be valid as against him as representing the creditors.

Now, without going into the facts at all, it is quite enough for me to say that there is a question to try, at what (if there was a suit in Chancery) would have been the hearing of the cause, as to the validity of this deed, and that, if the facts which appear in this examination had been detailed in a bill and supported by evidence, a case would have been made upon which an interim injunction would have been granted. That being so, the next thing I have to look to is the question of jurisdiction. Now this bankruptcy did not originate under the Act of 1869, but preceded the Act of 1869; it originated under the Act of 1861. But under the 130th section of the Act of 1869, the Lord Chancellor has power to transfer, and he has transferred, amongst other things, this particular business, the particular

proceedings in bankruptcy, to the local district Bankruptcy Court, being the County Court. Well, that being so, my opinion is, that where proceedings have been so transferred, the Bankruptcy Court to which they have been transferred has just the same jurisdiction (of course subject to what the provisions of the Act of 1861 in many respects may be), as regards the 71st and 72nd sections of the Act, and the 65th and 66th sections of the Act, as if the proceedings had originated under the Act of 1869. Those provisions apply to modes of procedure, and modes of procedure only; they take away, as far as I can see, no right. I can see no sort of inconvenience that would arise from saying that they are to be construed retrospectively, and it is quite in accordance with principle, it is quite in accordance with convenience, and it is quite in accordance with the terms used, that they should be construed retrospectively, and should be construed as applying to bankruptcies which have preceded the Act of 1869, but of which the court has seisin by reason of the transfer made by the Lord Chancellor.

That being so, the mode in which I have to consider the case is whether there would be jurisdiction or not assuming that the proceedings had commenced under the Act of 1869. Now the 13th section I quite agree is not a section, which, as I think, has a retrospective effect, nor do I think it has any operation whatever on the present case. The 13th section is in these terms:—"The court may at any time after the presentation of the bankruptcy petition against the debtor, restrain further proceedings in any action, suit, execution, or other legal process against the debtor in respect of any debt proveable in bankruptcy, or it may allow such proceedings, whether in progress at the commencement of the bankruptcy, or commenced during its continuance, to proceed upon such terms as the court may think just. The court may also at any time after the presentation of such petition appoint a receiver or manager of the property or business of the debtor against whom the petition is presented, or any part thereof, and may direct immediate possession to be taken of such property or business, or any part thereof."

Well now I take it that the object of this section was really to preserve the property pending the petition. It was, in fact, giving the Court of Bankruptcy power to intervene, although there should not be before it a person who could in the ordinary sense of the term be plaintiff in an action at law, or plaintiff in a suit in equity. Its object was, that the moment the petition was presented there might be a receiver, there might be a manager, at the instance, we will say, of the creditor who presented the petition, or at the instance of the bankrupt who presented the petition, so that there might be some *interim* management under which the property might be preserved up to the time when there should be an adjudication in bankruptcy.

I believe I said just now that I did not think the 13th section had any retrospective effect. I should correct myself in one respect as regards that, because if there should have happened to have been any such case as a petition presented and no adjudication made under the Act of 1861, yet when the Act of 1869 came into operation I apprehend then the 13th section might have been brought to bear upon such a state of circumstances; but what I meant to say, and what I mean, is, that the 13th section has no application whatever to such a case as this, where there has been a complete adjudication, and where you have before the court an assignee who, if there was an action at law, could be plaintiff, or, if there was a suit in equity, could be plaintiff. And it is the absence of a proper plaintiff which renders the 13th section necessary, and rendered it necessary that there should be special

CHAN.]

Ex parte ANDERSON; *Re* ANDERSON.

[CHAN.]

powers conferred by that 13th section. But I cannot at all construe it as cutting down the extent of the jurisdiction given by the subsequent sections of the Act. It is, in fact, a distinct enactment standing by itself, for the mere purpose of preserving property until there is an adjudication, and until there is a person before the court who can stand in the position of a real plaintiff.

Then we come to the 65th, 66th, and 72nd sections of the Act. The 65th is in these terms. "The London Court of Bankruptcy shall continue to be a court of law and of equity, and principal court of record, and the Chief Judge in Bankruptcy shall have all the powers, jurisdiction, and privileges possessed by any judge of Her Majesty's Courts of Common Law at Westminster, or by any judge of Her Majesty's High Court of Chancery, and the orders of such judge shall be of the same force as if they were judgments in the Superior Courts of Law, or decrees in the High Court of Chancery." Then it provides that the chief judge may sit in chambers. Well, I think that very clearly gives the chief judge complete jurisdiction, and gives at least as extensive a jurisdiction as if he were sitting in the Court of Chancery, and as if, having proper plaintiffs before him, a bill had been filed.

So much for the 65th section. Of course in this case the matter being in a local court of bankruptcy, we must turn to the 66th section. The 66th section is this: "Every judge of a local court of bankruptcy shall, for the purposes of this Act, in addition to his proper powers as a County Court judge, have all the powers and jurisdiction of a judge of Her Majesty's High Court of Chancery, and the orders of such judge may be enforced accordingly in manner prescribed."

Well, that certainly in its language is as plain as anything possibly can be. It says in so many words that a judge of the Court of Bankruptcy shall have all the powers of a judge of Her Majesty's High Court of Chancery, and that the orders of such judge may be enforced accordingly in manner prescribed.

But the matter does not rest there, because there is the 72nd section. But before going to that I think it may be well to turn to the 12th section of the Act of 1849, because that will show how very different the terms of the 72nd section are from the terms of the 12th section of the Act of 1849, the 12th section of the Act of 1849 being that in reality which laid down and defined the jurisdiction of the Bankruptcy Court as it existed under that Act. The 12th section is this: "That the court in the exercise of its primary jurisdiction by virtue of this Act shall have superintendence and control in all matters of bankruptcy, and shall hear, determine, and make orders in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate and effects of the bankrupt, or of any estate or effects taken under the bankruptcy and claimed by the assignees for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees in their character of assignees by virtue or under colour of the bankruptcy, and also in any matter of bankruptcy whatever as between the assignees and any creditor or other person appearing and submitting to the jurisdiction of the court," and then as to certificates of conformity, and so on. That in terms confines the jurisdiction to persons actually within the bankruptcy, or coming and submitting to the jurisdiction.

Well, if we turn to the 72nd section of the Act of 1869, the contrast in the terms is very strong indeed. The terms of the 72nd section are these, "Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act, shall have full power to decide all questions of pri-

orities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy coming within the cognisance of such court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice, or making a complete distribution of property in any case; and no such court as aforesaid shall be subject to be restrained in the execution of its powers under the Act by the order of any other court, nor shall any appeal lie from its decisions except in manner directed by this Act; and if in any proceeding in bankruptcy there arises any question of fact which the parties" (with respect to the word "parties" there, Mr. Roxburgh argued that it meant parties to the bankruptcy—in my opinion it means parties to the litigation) "which the parties desire to be tried before a jury instead of by the court itself, or which the court thinks ought to be tried before a jury, the court may direct such trial to be had, and such trial may be had, accordingly in the London Court of Bankruptcy in the same manner as if it were the trial of an issue in one of the Superior Courts of Common Law, and in the County Court in the manner in which jury trials in ordinary cases are by law held in such court."

Those words, in my opinion, give the court complete jurisdiction in all cases such as this to decide everything that may be considered necessary, with a view to the distribution of the bankrupt's estate. Well, is or is not a question such as this a question which ought to be decided with a view to the distribution of the bankrupt's estate? I am clearly of opinion that it is a question which it is essential should be so settled, and with reference to questions of this kind I have no doubt it was the intention of the Legislature that the bankruptcy courts should be complete and sufficient in themselves, and that they should for the purpose of everything included in the 72nd section exercise, at least, all the powers conferred upon any judge of the Court of Chancery. Of course, if the assignee had come here and filed a bill, beyond all doubt the Court of Chancery might first of all have granted an injunction, and afterwards have taken upon itself to decide the question whether the purchase was valid or the deed was valid—to decide the title to the property, and to decide how it should be dealt with. That being so I am of opinion that in this case there was jurisdiction to make this order.

Well, I do not think there are grounds for discharging the *ex parte* injunction, although I should have been better pleased if it had been applied for at some earlier period. These matters are very much within the discretion of the court, and seeing that the court had before it the examination of all these persons, that is not a discretion with which I should be disposed to interfere. Of course, all courts must be perfectly well aware that this is a jurisdiction which is of a very delicate nature, which ought not to be hastily exercised and with respect to which, except in cases of great necessity, these *ex parte* applications ought by no means to be encouraged. Then there come two other points upon the order which I think are material. The first is as to the form of the undertaking. I have no hesitation in saying that the court ought to follow the forms which have been universally adopted in the Court of Chancery. In the Court of Chancery it is at a somewhat recent date that these undertakings have been introduced, but they are quite essential for the ends of justice. They form the only means by which if from misrepresentation or otherwise an *ex parte* or any other interim injunction is improperly granted, the person prejudiced by that interim injunction, if it has been wrongly granted, can have redress. And whether it be assignee in bankruptcy or executor or liquidator, or be it who it may, the court

CHAN.]

SHIP v. CROSSKILL.

[ROLLS.

has invariably adopted the rule of taking an unlimited undertaking not to pay out of the assets of the bankrupt, or the testator or the estate, but an unlimited undertaking to pay personally, and I think there ought to be inserted in this order an unlimited undertaking in precisely the form which is adopted by the Court of Chancery in all orders of the kind.

Then I think there is a precaution which ought to have been taken which is not necessary in the Court of Chancery, because when you get into Chancery a bill is filed, and you necessarily make the whole of your case, and if the injunction is obtained there are means by which you can compel the prosecution of the suit, which, of course, must rest for its foundation, in a case such as this, upon the case made for the purpose of setting aside the deed and setting aside the sale. Now, of course, where you go without pleadings upon an *ex parte* application, or even not *ex parte*, but on notice of motion, it does not follow that in that notice or in that order there should be upon the face of it anything actually stated about the setting aside of the deed or about the setting aside of the purchase. But I do think it essential for the ends of justice that where there is an interim injunction, it should be on the assumption not only of an undertaking as to damages, but that the party who obtains the interim injunction should undertake to prosecute the proceedings which are requisite for the purpose of determining that question on the footing of which the injunction has been granted, and therefore this order ought unquestionably to have contained an undertaking on the part of the assignee, to take proceedings in the local Bankruptcy Court within some limited period (we may mention what limited time presently, but it ought to be within some limited time), for the purpose of setting aside the deed, and for the purpose of setting aside the purchase and recovering the property.

Subject to those two alterations, I think the order ought to stand, and the course which I propose to take is this. The assignee of course must have his costs out of the estate. If the assignee had insisted on the objection of the notice not being in the proper court, I should not have dismissed this application with costs, for I think very likely the parties were misled by the case in this court the other day, besides which it is a new proceeding under this Act of Parliament, and the practice has not been at present settled; but what I think will do justice between the parties is this, that the deposit shall be returned, but that, if the assignees fail in setting aside the deed and the purchase, then the appellant shall have his costs of this appeal. On the other hand, if the assignee succeeds in setting aside the deed and the purchase, the appellant shall pay all the costs of the appeal. I think that will be right and just between the parties, and therefore that will be the order I shall make. It will be like making the costs costs in the cause. The real truth is, that the courts below, when they become habituated to it, will follow as nearly as possible the precedents of the Court of Chancery. They must adapt their practice to the procedure on motion, and not on the filing of a bill, but the most unreserved undertaking as to damages must be given, and an injunction when granted must also be on the condition that there is an undertaking to institute proceedings forthwith for raising the question which is to determine the right to the property. For I do not think it at all fair to a respondent to a proceeding such as this that it should be put upon him, whether he likes it or not, to go at once at his own risk to dissolve an *ex parte* injunction. With these observations I think we may consider the case

disposed of. If you have any doubt as to the exact terms of the order you can mention it to me.

Solicitor for the appellant, James Crowdy.

Solicitor for the respondent, W. H. Duignan, agent for Duignan, Lewis, and Lewis, of Walsall.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

March 14, 15, and 21.

SHIP v. CROSSKILL.

Company—Bill against directors for recovery of money paid on shares—Principal and agent—Breach of trust—Fraud.

The prospectus of a company, of which the capital was to be one million in 20,000 shares of 50l. each whereof the first issue was to be 10,000 shares, stated that more than half the capital being already subscribed for, the list would remain open only a few days and the remaining shares would be allotted in strict order of application. Relying on the prospectus, S. applied for shares, which were duly allotted to him. His name was afterwards struck off the list on the ground that the objects of the company indicated by the memorandum of association (which was registered after S. took the shares) exceeded those stated in the prospectus. The company was afterwards ordered to be wound-up.

S. then filed a bill against the former directors and the company alleging that he had been deceived by false representations in the prospectus, and that the defendants having received his money for the purposes specified in the prospectus, and having wilfully applied it to other purposes, were guilty of a breach of trust; and the bill prayed that they might be declared jointly and severally liable to make good the amount paid to them by S.:

Held that, S. having failed to establish a case of misrepresentation against the directors, the bill must be dismissed.

The fact that the memorandum of association of a company extends the objects indicated by the prospectus does not render the directors personally liable to repay money paid in respect of shares by a person who has taken shares on the faith of the prospectus, unless they have been guilty of a distinct fraud.

Henderson v. Lacon, 17 L. T. Rep. N. S. 527; L. Rep. 5 Eq. 249; and Stewart v. Austin, 15 L. T. Rep. N. S. 407; L. Rep. 3 Eq. 299, examined.

In May 1864, certain persons being desirous of founding a company to be called the Scotch and Universal Finance Bank, under the Limited Liability Act, issued a prospectus, in which it was stated that the capital of the projected company was to be 1,000,000l. (with power to increase to 5,000,000l.) in 20,000 shares of 50l. each. The first issue was to be 10,000 shares, on which 1l. was to be paid on application, 4l. on allotment, and 5l. in three months. The prospectus contained the following words:—"More than half of the capital being already subscribed for, the list will remain open only a few days, and by a resolution of the board, the whole of the remaining shares will be allotted in strict order of application *pro rata*." The prospectus then stated the objects proposed to be effected by the company, which, in addition to the usual business of banking, comprised the purchase and sale of the precious metals in all their forms, and the importing and exporting of bullion, &c. The prospectus was followed by the usual form of application for shares.

In May 1864, James Ship, the plaintiff, received through the post a copy of the prospectus, &c., and on the faith of the representations therein contained, he, on the 28th May 1864, signed the form of appli-

ROLLS.]

SHIP v. CROSSKILL.

[ROLLS.]

cation for fifty shares, and paid to the company's bankers the sum of 50*l.*, being the deposit money of 1*l.* per share required by the terms of the prospectus to be paid upon application for shares.

The company was registered on the 1st June 1864, and on the same day a letter of allotment was sent to Ship, informing him that the fifty shares for which he had applied had been allotted to him, and that the sum of 200*l.*, making up 5*l.* per share payable on allotment, must be paid on or before the 15th inst. Accordingly, on the 13th June, he paid the sum of 200*l.* to the company's bankers.

In Dec. 1864, a petition was presented to wind-up the company. Ship, whose name was upon the register, moved, before the winding-up order was made, under the 35th section of the Companies Act 1862, for an order to have the register altered by striking out his name. Wood, V.C., before whom the motion was made ordered his name to be struck out of the register (12 L. T. Rep. N. S. 256). The official liquidator appealed, and the Vice-Chancellor's order was affirmed by the Lords Justices. An appeal was then made to the House of Lords, who substantially affirmed the decision of the courts below: (*Downes v. Ship*, 19 L. T. Rep. N. S. 75; L. Rep. 8 E. & I. App. 343.)

The present bill was filed by Ship in June 1865, after the Lords Justices had affirmed the Vice-Chancellor's decision in his favour. The object of the suit and the other circumstances of the case are stated in the judgment.

Jessel, Q. C., and Locock Webb appeared for the plaintiff.

The Lord Advocate for Scotland (Young, Q. C., Sir Richard Baggallay, Q. C., Mackeson, Q. C., Ferrers, C. T. Simpson, Nalder, F. A. Lewin, and Fooks appeared for the several defendants.

The following cases were referred to:—

Henderson v. Lacon, 17 L. T. Rep. N. S. 527; L. Rep. 5 Eq. 249;

Stewart v. Austin, 15 L. T. Rep. N. S. 407; L. Rep. 3 Eq. 299;

Colt v. Woolaston, 2 P. Wms. 153;

Green v. Barrett, 1 Sim. 45.

March 21.—Lord ROMILLY.—This is a suit praying that, under the circumstances which are stated in the bill, the defendants, who were the directors of a company called the Scottish and Universal Finance Bank (Limited), have constituted themselves trustees for the plaintiff of the sums of 50*l.* and 200*l.* paid by him, and that they are jointly and severally liable to make good to the plaintiff these two sums, together with interest at the rate of 5*l.* per cent.; that an account may be taken, and that they may be decreed to pay the amount within a short time. The facts of the case it is unnecessary to recapitulate, for they are very notorious and well-known to everybody, through *Ship's* case, which was decided originally by the present Lord Chancellor, when Vice-Chancellor, affirmed by the Lords Justices, and afterwards in substance affirmed by the House of Lords. The facts, as far as they are material to the decision of this case, are these: In May 1864 certain persons decided to found a company called the Scottish and Universal Finance Bank. They issued a prospectus, and registered the company, but I think it unnecessary to refer to the fact that there was a company originally registered on the 3rd May with a different memorandum of association, which was afterwards withdrawn, and another substituted, which the registrar could only have registered in the event of the other not being in existence, and which second one was issued on the 1st June, with an enlarged memorandum of association. The prospectus represented that they

were going to do certain things. The memorandum of association very much extended the objects of the company, and gave it power to do things which would not have been anticipated from the representations made by the prospectus. The result of this was that when Mr. Ship heard of it, in the month of December following, at a time when an application was about to be made to wind-up the company, he made a motion under the 35th section of the Companies' Act 1862, for the purpose of having his name withdrawn from the list. [His Lordship stated the result of *Ship's* case, and of the appeals in that case, and continued.] In June 1865 Mr. Ship filed this Bill for the purpose I have already mentioned, to make all the directors personally, severally, and individually liable to pay him the amount which he had paid to the company. I expressed an opinion at the time when this case was argued, and I repeat that expression of my conviction, that for that purpose it must be established that there was by the prospectus a misrepresentation made by the persons sought to be made answerable, knowingly false, made by them with a view to deceive, and which did deceive, the plaintiff. *Ship's* case unquestionably is one of the highest authority, it has been always followed, and has regularly formed the principles of the court in these cases since. But what was decided in that case has, in my opinion, nothing at all to do, as I stated at the time, with what has to be decided in the present case. All that that case decided was this—that if you issue a prospectus undertaking to do certain things, and by the memorandum of association you found a company doing things much more extensive, and of much wider application, then a person who has taken shares upon the faith of the prospectus cannot be compelled to remain a member of the society, but may have his name taken off the list of shareholders, or, if the company is being wound-up, off the list of contributories. And though it is not so stated, I apprehend that it would follow from that that the person who has his name so taken off the list would be entitled to be repaid by the company the amount that he had paid to the company under that misapprehension. But in that respect he would only be a creditor of the company, and could only prove in case the company was being wound-up; or, in case the company was a going concern, he could only bring an action for the amount. For that purpose it would not be at all necessary to file a bill; but that would not affect in the slightest degree the individual directors of the company. To make them personally liable they must have been guilty of a distinct fraud. I think that is established in all the cases. I fully adopt the distinction expressed by Lord Redesdale, with reference to what is called constructive fraud, where persons have really been guilty of no moral fraud, but by a species of construction of equity, they are said to be guilty of a fraud, in which case Lord Redesdale was of opinion that the Statute of Limitations would run, and would bar the remedy against them. However I have nothing to do with that at present. I am of opinion that it is quite established, and I think the two cases which were cited to me, and which were endeavoured to be explained away—one of them at least—by Mr. Jessel, clearly establish the view of the case that I am now taking. They are the case of *Henderson v. Lacon* (*sup.*), and the case of *Stewart v. Austin* (*sup.*), both of which cases I have brought into court with me for the purpose of considering. Lord Hatherley lays down very distinctly in *Henderson v. Lacon*, that if the directors make a false representation, knowing it to be false, and if that deceives a person, they are answerable for it, and that accordingly they must be made liable for the

ROLLS.]

SHIP v. CROSSKILL.

[ROLLS.]

consequences; it must, however, be a material representation. In *Henderson v. Lacon*, the false representation was this—they stated in the prospectus that the directors and their friends had taken a very large number of the shares. On referring to the case I find that the words are these: “The directors and their friends have subscribed a large portion of the capital.” That is the expression; and it appeared that so far from having subscribed a large portion of the capital, even calling every person who had subscribed their friend, there were only about 144 shares subscribed for. It would be absurd to say that that was a correct representation. This is very material with a view to considering what is the false representation complained of in the present case. Then what does the Lord Chancellor—then the Vice-Chancellor Sir William Page Wood—say with respect to that? In the first place he connects them all with the issuing of the prospectus. He says:—“Now as to the issuing of the prospectus, I have the admission of all the directors that it was issued by their authority; as to three who were present at the meeting of the 15th March, the case is perfectly clear;” and then the other admitted that he knew of it and that he sanctioned it. It was a statement of what they themselves had done; therefore they knowingly made a representation to the public that they themselves and their friends had subscribed a large portion of the capital, knowing well that at the time they made that statement the fact was not so, and that they had in fact subscribed nothing but what was merely sufficient to enable them to hold the office of directors; and accordingly Lord Hatherley, if I may be allowed to say so, very properly held that they were all guilty of a fraud, that they had made a false representation which had deceived the plaintiff, and that they were all liable. The case of *Stewart v. Austin* is perfectly distinct from that. The case there was that the directors had made no representation at all. The plaintiff had been struck off the register of the company by the order of the court exactly on the same ground as here—on the ground of excess in the objects of the company, as shown by the memorandum which was registered after he became a member, over those objects which were stated in the prospectus, on the faith of which prospectus he took the shares. Then he filed a bill for the return of his deposit against the directors who had issued the prospectus of the company. It is true that he did not allege a fraudulent intention; but if the facts create a fraud it is perfectly unnecessary to allege the fraudulent intention nor will the word “fraud” create fraud if the facts themselves do not establish it. Lord Hatherley held in that case that there was no fraudulent statement on the part of the directors at all, and that they were the agents, no doubt, of the plaintiff, who had given them the money for the purpose of applying it in a particular manner. They had applied it in a different manner, that is to say, they had applied it for a more extensive purpose, and he was entitled to be struck off the list of contributories. But that did not constitute a fraudulent act on the part of the directors, and Lord Hatherley is distinct and clear upon that subject. I am unable to distinguish *Stewart v. Austin* from the present case. There really is no distinction between them, with the exception of the passage I am going to refer to in a moment, whether that constitutes a misrepresentation in the prospectus or not; but, assuming there to be no misrepresentation in the prospectus, the principle of the case of *Stewart v. Austin* is exactly the principle applicable here, namely, that making a company extend to objects larger than those specified in the prospectus entitles a shareholder to have his name taken off the list of shareholders, and not

to be a contributory; but at the same time it does not entitle him to go against the directors themselves, and say that they are trustees for him of all the money received from him. In fact this is quite a new attempt, so far as this it concerned, and of the numerous cases in which this court has struck off the name of a shareholder from being a contributory—when I say a shareholder I mean a person who subscribed for shares—on the ground that the objects of the company extended beyond what were published in the prospectus, I do not know a single case where the directors have been made liable where there has not been personal misconduct or personal fraud on the part of the directors themselves. What is the fraud which is here alleged against the directors, for it comes to that exclusively? The alleged fraud is this, that in the prospectus they used these words:—“More than half of the capital being already subscribed for, the list will remain open only a few days, and by a resolution of the board the whole of the remaining shares will be allotted in strict order of application *pro rata*.” In the first place, it was attempted to be argued that that extended to the whole 5,000,000*l.*, to which there was power to increase the capital, the original capital being 1,000,000*l.*, in 20,000 shares of 50*l.* each, with power to increase to 5,000,000*l.* But the prospectus says:—“First issue 10,000 shares; 1*l.* on application, 4*l.* on allotment, and 5*l.* in three months. It is not intended to call up more than 25*l.* per share.” Then it refers to one or two other things, such as, “If more shares are applied for than are allotted, the surplus of the deposit money will be applied to the payment due on allotment;” and then, “More than half of the capital being already subscribed for,” &c., as I read before. I am of opinion that the words “More than the half of the capital” extend properly and according to all grammatical and reasonable construction to the first issue, namely, the 10,000 shares, and that they were not intended to apply to the 20,000 shares. This is the thing that is complained of. The prospectus was issued on the 3rd May. At the time when the prospectus was actually issued—when the words were written—there were not more than half of the shares subscribed for; but on the 1st June, before Mr. Ship took the shares, not only were there more than half of the shares subscribed for, but the whole of the shares had been subscribed for, and many persons had been refused shares. Can anybody say that this misled him, and that he was in any way whatever deceived by it? Supposing he had gone to the company’s office and said, “Is it true that more than half of the shares have been subscribed for?” When he went on the 28th May they would have said, and with perfect truth, “Yes, more than half of the shares have been applied for.” I think more than the whole number had been applied for at that time, and then they took them, as they said, alphabetically. It is true that this company was very much run after; it certainly was not a bubble company at all, it cannot be put upon that footing. It was a company that failed egregiously, for I think it was wound-up six months after its registration, like many of these companies; but there can be no pretence for saying that there was anything like *mala fides*, or any of that species of defect which Lord Cairns, in a case that was cited to me, very clearly and distinctly laid down as one of the essential ingredients of fraud. That being so, I am of opinion that there is no fraudulent misrepresentation here. It is not a representation that the directors have done anything. In the first place, how are they attached to it? The most important of them is Mr. Crosskill. I will read one passage from his answer upon this subject. In the seventh paragraph he says, “I believe that a prospectus, to the pur-

ROLLS.]

DEAN v. BENNETT.

[V.C. J.]

port and effect set forth in the second paragraph of the bill, was, but without my privity, assent, or authority, printed and published. I believe that this prospectus was intended to refer to the company incorporated by the memorandum of the 1st of June, stated in the 29th paragraph of the bill, being the proposed company of which I had consented to become a director, but I do not know and cannot set forth as to my belief or otherwise whether this prospectus was printed or published after I had in manner aforesaid consented to become a director of the proposed company, or before the 5th of May, 1864, or at what time it was printed or published. I was in no way party or privy to the preparation, printing or publication of the said prospectus. I never sanctioned it, and never saw it, and, till after the bill in this cause was filed, did not know the terms thereof." I am of opinion, following Lord Hatherley's judgment, that it is essential to establish that he had taken some part in the representation, and that he knew it. There is one gentleman, Mr. Downes, as to whom I think there is some proof that he knew it, but he is the only one. As to Mr. Legg, he had positively nothing whatever to do with it. They used his name without his authority, and he had nothing at all to do with it and knew nothing at all about it: and the greater number of the other directors are very poor, and the suit has not been prosecuted against them. They do not appear, and no steps are taken against them. But, with respect to Mr. Downes, I am of opinion that there is nothing whatever proved against him of any fraudulent representation or the like. I am struck with this also, that this seems to have been the view taken by the judges in the other courts. I hold in my hand the papers which were printed for the use of the House of Lords in *Downes v. Ship*, which are put in evidence in this case; amongst them is the judgment of the Lords Justices, who made a very clear distinction and gave a very clear judgment upon the subject. It is important to observe that Turner, L. J., does in that case, as I do in this, throw out of the question the memorandum of association of the 5th of May, and he says: "I have no idea that Mr. Ship ever intended to become a member of this company according to its constitution under the memorandum of the 5th of May, and I assume the case therefore to depend wholly upon the memorandum of the 1st of June," which unquestionably is so, because the other had no existence at all. After some discussion as to the costs, Knight Bruce, L. J., makes some observations about it; and Mr. Daniel, one of the counsel, says, "Your lordships have not said anything about the question of fraud." They dismissed both the motions that were brought before them with costs, because the appeal was wrong, and Knight Bruce, L. J., says, in reply to Mr. Daniel, "Not a word." And Turner, L. J., says, "I may say that I do not think there was any fraud on the part of your clients." The whole case was before them upon that appeal; and Turner, L. J., a judge who unquestionably was not in the habit of using expressions loosely or lightly, deliberately says, "I am of opinion there was no fraud." He volunteers that, and yet this bill is filed immediately afterwards in order to fix the directors on the ground of fraud, and upon the ground of making them liable as trustees, which can only be in the case of fraud. Without going into the details of the evidence, I am of opinion that the case fails, and as the bill alleges fraud it must be dismissed with costs.

Solicitor for the plaintiff, S. A. Rice.

Solicitors for the defendant Crosskill, Maynard Son and Co.

Solicitors for the other defendants, Harrisons; Valpy and Chaplin; Lee-Collyer, Bristowe, Withers, and Russell; W. Ruck; Ashurst, Morris and Co.

V. C. JAMES'S COURT.

Reported by the Hon. ROBERT BUTLER, Barrister-at-Law.

Tuesday, Feb. 22.

DEAN v. BENNETT.

Baptist congregation—Trust deed—Dismissal of minister—Notice of meeting not specifying charges—Time of giving notice—Informal notice—Invalid resolution.

By the terms of the trust-deed of a Baptist congregation, the minister was liable to be removed by the decision, order, or direction of the church made and declared at a meeting of members who had been communicants for six months previously, of which notice should have been given as therein mentioned; and confirmed and approved at a second such meeting.

Disputes having arisen, notice was, on a particular Sunday, given of a meeting to be held on the following Saturday, "for the purpose of bringing charges against and considering the dismissal of" the minister. No specification of the charges was read, or was ever issued to anyone. The meeting was held, and a resolution was passed that the minister be dismissed. On the following Sunday a second notice was given of a second meeting to be held on the following Saturday "for the purpose of confirming and ratifying" the resolutions passed at the first meeting, but without specifying the resolutions which it was proposed to confirm. The second meeting was held, and the former resolutions were confirmed and ratified:

Held, that the second notice was invalid, because it did not specify the resolutions which were intended to be confirmed, and consequently that the resolutions passed at the second meeting were invalid:

Held also, that the omission to specify the charges which were intended to be brought against the minister, rendered the resolutions which were passed at the first meeting invalid.

By a settlement dated in 1795, certain lands at Barnoldswick, Yorkshire, and the chapel or meeting house erected thereon, called the old chapel, were vested in trustees upon certain trusts, but which trusts contained no provision for the dismissal of the minister of the chapel.

On the 7th July 1845 an agreement was made between the then trustees and the defendant, the Rev. Thomas Bennett, whereby he agreed to supply the pulpit and discharge the pastoral duties.

In 1852 a new chapel was built, and a new deed of settlement, dated the 9th Dec. 1852, was executed, which contained provisions as to the dismissal of the minister.

It was provided that every minister of the church should be liable to be forthwith removed by the decision, order, or direction of the church made and declared at one meeting, and confirmed and approved at a second meeting, to be called for that purpose in manner therein mentioned. It was also provided that all decisions, orders, and directions of the church, relative to any of the purposes specified and set forth therein, or any other matter or thing whatsoever, should be from time to time made and declared by the male and female members of the church, who should have been communicants for at least a previous period of six calendar months or a majority of them actually present at a meeting, of which notice should have been given publicly in the said chapels, or in one of them, during Divine worship on Sunday morning at least four days before the time of holding such meetings respectively. It was further provided that, whenever the church should have to consider the appointment of a minister or ministers, or the dismissal of a minister or ministers or other matters therein mentioned, the notice to be publicly given in manner aforesaid,

V.C. J.]

DEAN v. BENNETT.

[V.C. J.]

should expressly state the object of such meeting, and each of the decisions, orders, and directions, to be made and declared at any such last mentioned meeting, should be reconsidered at a second meeting of the church, to be convened by public notice, to be given in manner aforesaid, expressly stating the object thereof; and such decisions, orders, and directions of each such first meeting should not be construed or held to be binding until confirmed and approved at a second meeting.

From and after 1852 Mr. Bennett officiated as minister of both the old and new chapels.

On Sunday, the 20th Sept. 1868, the following notice was read by members of the congregation in both the chapels during Divine service:—

We, the undersigned, being respectively trustees, deacons, and members of the church and congregation of Christians at Barnoldswick, in the county of York, commonly known by the name of Particular Baptists, hereby give notice that a meeting of the male and female members of the said church who shall have been communicants for at least a previous period of six calendar months, will be held in the old chapel belonging to the said church in Barnoldswick aforesaid, on Saturday next, the 26th Sept. instant, at three o'clock in the afternoon, for the purpose of considering the dismissal of the Rev. Thomas Bennett as the present minister of the said church, and of making and declaring such decisions, orders, and directions on the subject of the said meeting, as the majority of the members present at such meeting may think proper. Dated at Barnoldswick aforesaid, this 19th Sept. 1868.

HENRY DEAN,	}	Trustees.
JOHN BROWN,		
THOMAS EDMONDSON,	}	Deacons.
JOSEPH WILCOCK,		
WILLIAM BERRY,	}	Members.
JOHN EDMONDSON,		

The meeting of the 26th Sept. was accordingly held, and a resolution was proposed and seconded to the effect "that the church dismiss the Rev. Thomas Bennett from the office of minister on the ground of some statements referring to Mr. Bennett's business affairs, and that his ministry cease from this day." To this an amendment was proposed and seconded to the effect "that this meeting adjourns the consideration of the dismissal of the Rev. Thomas Bennett from the office of minister for the period of twelve calendar months, from the 26th Sept. 1868." The amendment was put and carried by a majority of 59 to 47.

On Sunday, the 18th Oct. 1868, the following notice was read during the morning service in the old chapel, and during the afternoon service in the new chapel, by the officiating minister (Mr. Bennett having been excluded from the pulpits of both the chapels):—

We, the undersigned, being respectively deacons and members (&c., stating, in the same terms as the former notice, that a meeting would be held on Saturday, the 24th Oct.), for the purpose of bringing charges against and considering the dismissal of the Rev. Thomas Bennett, as the present minister of the said church, and of making and declaring such decisions, orders, and directions on the subject of said meeting, as the majority of the members present may think proper, or any other business.

Dated at Barnoldswick aforesaid, 18th Oct. 1868.

JOSEPH WILCOCK,	}	Deacons.
THOMAS EDMONDSON,		
JOHN EDMONDSON,	}	Members.
WILLIAM BERRY,		

On the 23rd Oct. the defendant caused a counter notice to be served upon John Edmondson, Thomas Edmondson, William Berry, and Joseph Wilcock, giving them notice "that the object named in the notice read on the 18th Oct. for a meeting on the 24th, is illegal, and the notice is illegal, and that any acts done by the said meeting will be of no effect."

On the 24th Oct. 1868, a meeting was held, at which a resolution was passed that, in consequence of certain offences therein alleged to have been committed by Mr. Bennett, the meeting unanimously agreed "that he is not a fit and proper person to occupy the position of pastor and that his office as pastor cease forthwith."

On Sunday, the 25th Oct., the following notice was read by the officiating minister at the old chapel during morning service, and also during afternoon service at the new chapel:—

We, the undersigned, being respectively deacons and members (&c., stating, in the same terms as the former notices, that a meeting would be held on Saturday, 31st Oct.), for the purpose of confirming and ratifying the resolutions passed at the church meeting, held Oct. 24th, 1868.

Dated at Barnoldswick aforesaid, 25th Oct. 1868.

JOSEPH WILCOCK,	}	Deacons.
THOMAS EDMONDSON,		
WILLIAM BERRY,	}	Members.
JOHN EDMONDSON,		

On the 31st October, accordingly, the meeting was held, and a resolution to the effect that the minutes of the meeting of the 24th October "be passed, confirmed, and ratified," was unanimously carried.

The bill was filed on the 15th of March, praying that the defendant might be restrained from taking or endeavouring to take possession of the pulpits in the chapels at Barnoldswick, vested in the plaintiffs as trustees of the settlement of 1852, or either of them, and from acting or officiating in any manner whatsoever as minister thereof, and from in any way disturbing or interfering with the performance of divine worship in the chapels, or either of them, and from in any way intermeddling or interfering with the trust property vested in the plaintiffs by the new deed of settlement.

On the 8th May 1869, a motion for an injunction was made and ordered to stand to the hearing, on the plaintiffs' undertaking not to allow anybody to preach in the new chapel without the defendant's consent.

The cause now came on upon motion for decree.

Amphlett, Q.C., Fry, Q.C., and Ingle Joyce, for the plaintiffs, cited:—

Perry v. Shipway, 1 Giff. 1; 4 De G. & J. 353.

Kay, Q.C., and Wickens, for the defendant, were not called upon.

The VICE-CHANCELLOR.—In this case the bill has been filed for the purpose of having it declared that the defendant has been properly removed from his office as minister, and for an injunction consequent upon that declaration. The whole matter resolves itself into a very simple question as to the validity of the dismissal purported to have been effected by resolutions of two meetings convened by two notices. The first notice appears to me to have been properly and sufficiently given by persons properly and sufficiently authorised to call meetings of this congregation, and it was a meeting summoned "for the purpose of considering the dismissal of the Rev. Thomas Bennett" (this was a meeting preliminary to the two upon which reliance is placed) "as the present minister of the said church, and of making and declaring such decisions, orders, and directions on the subject of the said meeting as the majority of the members present at such meeting may think proper." At that meeting, by a majority, the consideration of the question was postponed for a period of twelve months, which does not seem to me to be a reasonable or proper mode of dealing with the question, and therefore I am not surprised that the persons who were dissatisfied with that took an opportunity of summoning another meeting. They did so accordingly, by a notice which was as follows:—"We, the undersigned, do summon a meeting for the purpose of bringing charges against and considering the dismissal of the Rev. Thomas Bennett as the minister of the said church." That seems to be signed also by persons duly authorised to summon such a meeting. Now, "for the purpose of bringing charges against a person" is a matter which

V.C. J.]

BUCKINGHAM v. SELICK. MOYE v. SPARROW.

[V.C. J.]

requires that everything shall be done according to the strictest forms and principles of justice; and it appears to me that if a meeting was summoned for the purpose of bringing charges, those charges ought to have been communicated to Mr. Bennett before the meeting was called, that he might have an opportunity of knowing what he was to meet. At that meeting a resolution was passed rescinding the resolution of the previous meeting, upon the ground that the scrutiny had not been given. Of the intention to pass such a resolution no notice whatever was given. The second resolution was that, in consequence of Mr. Bennett having done various serious matters which are alleged against him, it was resolved that he was not a fit and proper person to occupy his position, and that his office should cease forthwith. It does not appear by what evidence those charges were supported, or in what way they were investigated, or that any evidence, in fact, was given in respect of them except that a certain person who was present, and who appears to have taken a very active part in the proceedings of this disturbed congregation, was required to read remarks made by a commissioner in bankruptcy. That certainly was not a mode in which anybody ought to be tried for any offence or to be convicted. Those resolutions were, however, passed, and then it is said a subsequent meeting was held for the purpose of confirming those resolutions, and that those resolutions were duly confirmed accordingly. Now I hold that that second notice was perfectly insufficient and invalid in point of law, because it being a notice to confirm resolutions, there was no way in which the congregation could be informed of the resolutions, and the only mode by which that notice could have been properly given was a notice intimating the resolutions which had been passed, and convening a meeting for the purpose of considering those resolutions. That notice I hold to be invalid. The second meeting for confirming the resolution, therefore, is void, and upon that ground I am of opinion that the plaintiff's bill has failed, and must be dismissed with costs, which will include the costs of the motion.

Solicitors: *R. and W. B. Smith*, agents for *George Robinson*, Skipton; *Ridsdale and Craddock*, for *Richardson and Turner*, Leeds.

Saturday, April 30.

BUCKINGHAM v. SELICK.

Practice—Order for sale under 31 & 32 Vict. c. 40 (Partition Act).

In a suit for the sale of property under the above Act, where inquiries were directed, the court will not make an order for sale on the hearing of the cause. The order must be made on further consideration.

This was an administration suit, in the course of which some of the parties, jointly interested with others, being desirous that the property should be sold and divided, applied to the court under the 31 & 32 Vict. c. 40 (the Partition Act) at the hearing of the cause, to direct such inquiries as to the nature of the property, and the persons interested in it and other matters as it might think necessary, and for an order for sale of the property.

P. A. Kingdom, for the plaintiff, cited *Silver v. Frost* (a) mentioned in *Silver v. Udall*, L. Rep. 9 Eq. 227, in which case the Master of the Rolls made an immediate decree for a sale without waiting for the further consideration of the cause. He also cited

Peters v. Bacon, 20 L. T. Rep. 729.

(a) This case is not reported.

B. Babington and *W. Coode* appeared for some of the defendants.

The VICE-CHANCELLOR was of opinion that under the 9th section of the Act—which enacts that if any person who, if this Act had not been passed might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration—the court, whilst directing inquiries to be made, had no jurisdiction at the hearing of the cause to make an immediate order for sale. Such order can only be made on further consideration when the result of the inquiries was known.

Solicitors: *Kingdon and Cotton* agents for *Delmar*, of Stratton; *Shephard and W. Harris*, agents for *P. B. Glubb*, of Torrington.

MOYE v. SPARROW.

Amendment of decree—Mistake.

Where counsel were instructed to state that which, upon inquiry, was found to be incorrect. On such discovery being made, the court will order the decree to be amended.

This was a motion to amend the decree in the suit of *Moye v. Sparrow*, reported at 20 L. T. Rep. N. S. 154, by replacing the name of the defendant, William Barnard, on the list of contributories.

At the hearing of the cause the plaintiff's counsel were instructed to state that William Barnard was insolvent, which statement at the time was accepted as true, and the bill was dismissed as against him. The decree was made on the 26th Jan. 1870, and the defendants, who were made contributories, immediately set about making inquiries after Barnard, who they discovered was in the possession of a dairy with a large number of cows and other stock.

Upon this discovery being made, an affidavit was filed on the 22nd April stating these facts. Barnard then filed an affidavit stating that his cows and stock were all mortgaged for the amount he had to borrow to set himself up in business.

Eddis, Q. C. appeared in support of the motion.

Fry, Q. C. appeared for Barnard.

The VICE-CHANCELLOR said that he had dispensed with all inquiries as to Barnard on account of the statement by counsel that he was in a state of insolvency. This having been discovered not to have been the fact, and there being nothing in Barnard's affidavit to show that he was insolvent, he must be placed on the list of contributories, and the minutes must stand as prepared by the defendants. The plaintiffs to pay the costs of this motion.

Solicitors: *Sharpe, Parker, and Pritchard*, agents for *Cardinall*, of Halstead; *Aldridge and Thorne*, agents for *Harris and Norton*, Halstead.

C. P.] PENTON v. MURDUCK—BROOMFIELD AND OTHERS v. THE SOUTHERN INSURANCE CO. [Ex.]

Common Law Courts.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING,
Esqrs., Barristers-at-Law.

Saturday, Jan. 29.

PENTON v. MURDUCK.

*Infectious disease—Bailment of animal infected with—
Liability of bailor.*

The declaration alleged that the defendant had a horse and well knowing it to be glandered, and to be in an infectious state, delivered the said horse to the plaintiff to be kept by the plaintiff for the defendant in a stable of the plaintiff with another horse of the plaintiff, and without informing the plaintiff that the said horse was glandered; by means of which the plaintiff, not knowing that the said horse was glandered, was induced by the defendant to, and did place the said horse in a stable of the plaintiff with the said horse of the plaintiff, and the said disease was then communicated by the said horse of the defendant to the said horse of the plaintiff, so that the said horse of the plaintiff had to be killed. After verdict for the plaintiff, it was

Held, on a motion in arrest of judgment, that the declaration disclosed a good cause of action.

The declaration stated that the defendant wrongfully kept a horse, well knowing the same to be glandered, and to be affected with an infectious, contagious, and fatal disease called glanders, and well knowing the premises, wrongfully delivered the said horse to the plaintiff to be kept and taken care of by the plaintiff for the defendant in a stable of the plaintiff with another horse of the plaintiff, and without informing the plaintiff that the said horse was glandered or had the said disease; by means of which premises the plaintiff, not knowing that the said horse was glandered or had the said disease, was induced by the defendant to and did place the said horse in the said stable of the plaintiff with the said horse of the plaintiff, and the said disease was then communicated by the said horse of the defendant to the said horse of the plaintiff, and the said horse became then infected with the same fatal disease, and had to be killed.

Plea, not guilty.

The case was tried at the Middlesex Sittings in Hilary Term, and resulted in a verdict for the plaintiff.

Waddy now moved in arrest of judgment. *Hill v. Balls*, 2 H. & N. 299; 27 L. J. 45, Ex. is an authority to show that this declaration discloses no cause of action. There is no statement of concealment, fraud, or warranty. It is compatible with this declaration, that the defendant at the time believed the plaintiff to know the state the horse was in, and on that account did not tell him.

BOVILL, C. J.—I am of opinion that this declaration does disclose a breach of duty on the part of the defendant towards the plaintiff. The question is raised after verdict, and I assume that the necessary evidence was given in support of the declaration. The declaration says in substance, that the plaintiff having no knowledge that the horse was glandered, the defendant brought the horse while affected with glanders to the plaintiff, and the defendant, knowing the condition in which the horse was, gave it to the plaintiff to be taken care of in a stable of the plaintiff with another horse of the plaintiff. The declaration also shows that the defendant was aware, and the plaintiff was ignorant, of the condition of the horse. The defendant, having under

these circumstances, induced the plaintiff to put this horse into his stable with another horse belonging to the plaintiff, all that the law requires to give a cause of action is satisfied. The distinction between this case and *Hill v. Balls* is that the latter case was one between buyer and seller. Besides, as was pointed out by Martin, B. in giving judgment in that case, it was consistent with that declaration, that the defendant "told the auctioneer that the horse was glandered, and to sell him as such." Here any such supposition is entirely excluded by the declaration. The case then stands on this ground: the defendant delivers a well-known dangerous article to the plaintiff for the purpose of placing it in the plaintiff's stable with another horse of the plaintiff. The defendant must have contemplated the natural consequences of such an act, and must bear the responsibility of it.

M. SMITH, J.—I am entirely of the same opinion. The declaration substantially says, that the defendant induced the plaintiff to put a horse into the same stable with a horse belonging to the plaintiff; the defendant well knowing that the horse was glandered, while the plaintiff was ignorant of it. I think that that shows a good cause of action. It was the duty of the defendant not to allow a glandered horse to be put with a sound horse, without informing the owner of the latter of the true facts of the case. The declaration says that the defendant knew, and the plaintiff was ignorant, of the state of the defendant's horse, so that the case in the Exchequer does not apply.

BRETT, J.—The declaration alleges not only that the defendant delivered a glandered horse to the plaintiff, but that he delivered it to him for the purpose of placing it with another horse belonging to the plaintiff, and induced the plaintiff to put it with the other horse. If that was so, and if the defendant knew his horse was glandered, and knew the nature of glanders, it was his duty to tell the plaintiff of the state of the horse. This he did not do. The declaration says that the plaintiff was ignorant of the circumstance. I certainly think, that, if a man delivers a horse to his neighbour that is likely to infect his neighbour's horse, it is his duty to disclose the state of his horse, and that if he omits to do so, he is liable for the natural consequences of his omission. With regard to the case in the Exchequer, there was no allegation that the horse was to be put in a particular stable or near another horse, as was pointed out by my brother Martin. That is, however, alleged here. On these grounds, I think there should be no rule.

Rule refused.

Attorney for defendant, A. Crossfield.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Tuesday, April 26.

BROOMFIELD AND OTHERS v. THE SOUTHERN INSURANCE COMPANY.

Bottomry bond—Insurance of—Constructive total loss.

The master of a ship executed a bottomry bond upon the ship, the condition of which was that if the ship should arrive at the end of her voyage, and on such arrival the amount of the bond should be paid to the lenders, or in case of the loss of the said ship, such an average as by custom should have become due on the salvage, or if on the voyage the ship should be utterly lost, cast away, or destroyed in consequence of the perils of the sea, then the bond should be void. The bottomry bondholder effected an insurance on the bottomry bond

Ex.]

BROOMFIELD AND OTHERS v. THE SOUTHERN INSURANCE COMPANY.

[Ex.]

against perils of the sea, &c. The ship was by the perils of the sea so much damaged as to be not worth repairing, and was sold by the master for a sum much less than the amount of the bond:

Held, that the condition of the bond only referred to an actual total loss of the ship, and not to a constructive total loss; and that there had, therefore, been no loss of the bond within the policy of insurance, and the bondholder was not entitled to maintain an action upon it against the insurers.

Stephens v. Broomfield, L. Rep. 2 P. C. 516, discussed and followed.

The declaration was in substance as follows:—

It stated that William Baillie, as master of the ship *Great Pacific*, of the port of Liverpool, being at the port of Sydney, in New South Wales, on the 29th March 1867, executed and delivered to the plaintiffs a bottomry bond on the ship. This instrument was set out verbatim in the declaration. After reciting that the plaintiffs had agreed to advance to the master a certain sum of money for the necessary reparations, refittings, provisions, stores, outfit, and the other necessary and lawful disbursements and expenses of the ship, so as to enable her to proceed with her voyage, it contained a mortgage of the ship and freight for securing the advance so made, and the premium agreed upon in respect thereof, and the condition of the bond was that if the said ship or vessel should, with all reasonable speed, sail from the port of Sydney aforesaid, and duly prosecute and complete the said intended voyage or voyages, and that without deviation except as aforesaid; the perils, damages, casualties, and accidents of the seas, rivers, and navigation excepted; and if the above bounden William Baillie, his executors or administrators, or some or one of them, or the owners of the said ship, would well and truly pay, or cause to be paid unto the plaintiffs, the principal money advanced, together with the interest or premiums thereon, before the expiration of twelve hours after the safe arrival of the ship at the port of discharge in the United Kingdom; or in case of the loss of the said ship or vessel, such an average as by custom should have become due on the salvage; or if on the said voyage the said ship should be utterly lost, cast away, or destroyed in consequence of fire, enemies, men-of-war, pirates, storms, or other unavoidable perils, damages, or casualties of the seas, rivers, and navigation, then the bond or obligation to be void and of no effect, or otherwise to remain in full force and virtue.

It was then further alleged that the plaintiffs caused to be made with the defendants a certain policy of insurance. By this policy the insurance was agreed to and declared to be an insurance at and from Sydney to Callao and the Chincha Islands, thence to Cork for orders, final port of discharge to be in the United Kingdom on bottomry bond in or of the ship called the *Great Pacific*. The perils insured against were the ordinary risks covered by a policy of marine insurance. The declaration further averred that after the commencement of the said risks insured against, and during the continuance of the same, the said ship became and was by divers of the perils in the said bottomry bond mentioned, as well as by the said policy insured against, wholly lost on the said insured voyage, and in consequence thereof the master of the said ship during the said insured voyage properly and necessarily sold the said ship, and the proceeds of the sale of the said ship amounted to a sum much less than the said amount for which the said bottomry bond had been given and which was the subject of the said bottomry as aforesaid; and by reason of the premises the defendants became and were liable under the said policy to pay to the plaintiffs a certain sum in proportion

to the sum so insured by them as aforesaid, to wit, a sum of 800*l.*; and all times elapsed and all conditions were performed and fulfilled necessary to entitle the plaintiffs to have the defendants pay to them the said sum of 800*l.* and to maintain the present action, yet the defendants did not pay to the plaintiffs the said sum or any part thereof.

Demurrer and joinder.

Plaintiffs' points: First, that the whole amount mentioned in the bottomry bond is not payable under the bottomry bond in the case of a constructive total loss of the ship, and that the insurers of the bottomry bond are in such case liable for a certain proportion of the amount insured; secondly, that in case of a constructive total loss of the ship, the policy sued on when taken in connection with the bottomry bond which is the subject matter of insurance, makes the defendants liable; thirdly, that the count demurred to discloses a total loss of the ship, in respect of which the defendants are liable.

Defendants' points: The declaration does not show that the ship was utterly lost within the conditions of the bottomry bond; secondly, it is consistent with the declaration that the ship was only partially lost; thirdly, the declaration does not show a loss of the bond, and consistently with the declaration the bond is still valid and in full force.

Honyman, Q.C., with him *Watkin Williams* for the defendants: The declaration only shows a constructive total loss of the ship. It is clear law that in general the doctrine of constructive total loss does not apply to bottomry bonds, and that where the ship continues to exist in specie, there is no loss of the bond within the meaning of the policy of insurance upon it: (*Thompson v. The Royal Exchange Assurance Company*, 1 M. & S. 31.) In *Stephens v. Broomfield*, L. Rep. 2 P. C. 516, a case arising out of the same transaction as the present, it was held on that very ground that the bottomry bondholder was entitled to the whole of the proceeds of the sale of the ship as against a mortgagee. It was then decided that a constructive total loss was not a loss within the meaning of the condition of the bond. It follows from the same reasoning, that there is no loss of the bond within the meaning of the policy, for until the ship has been in fact totally lost, the bond continues in full force: (See also 1 Parson's Maritime Law, 409.)

Mellish, Q. C., with him *H. James, Q. C.*, and *Cohen*.—It has no doubt been decided by the case of *Thompson v. The Royal Exchange Assurance Company*, 1 M. & S. 31, that where the master has not been discharged by the loss from paying the whole amount of the bond, there is no loss under a bottomry insurance. It seems somewhat extraordinary that in a case where the value of the security has been so reduced in value as not to equal a tenth part of the sum due on the bottomry bond, it should be held that there is no loss on the insurance, and Mr. Phillips throws out some doubt whether *Thompson v. The Royal Exchange Assurance Company* ought to be supported. I feel, however, that I cannot ask this court to overrule it, and that only a court of error can do that. It only follows, however, from that case, that as long as the master is liable for the amount of the bond, the underwriter not being an insurer of the solvency of the master, there is not a loss within the policy, and it would follow from that, that if the bond were so worded that the master would be discharged if there had been a constructive total loss, and the salvage had been paid to the bondholder, then there would be a loss of the bond by which the bondholder would have lost the difference in value between the amount of the salvage and the bottomry bond. Nothing could be more reasonable than for the master to say that on

Ex.]

FAIRLIE v. FENTON AND OTHERS.

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payment over of the proceeds of the salvage to the bottomry bondholder, he should be discharged. For it is very hard on the master that he should remain liable under such circumstances. The question is, whether this be not the meaning of the condition of the present bond. There are three contingencies mentioned in it; the first and the last are perfectly plain. The only question is, as to the meaning of the second; it is no doubt ambiguously worded, but is it not the most reasonable construction that it provides for a state of things not met by the first and third, merely the case of the ship not being prevented from performing the voyage by an actual total loss, but being so much damaged as to make it a case of constructive total loss; and that the meaning is that in such a case, if all the proceeds of salvage are paid over to the bottomry bondholder, the master shall be discharged. [MARTIN, B.—May it not mean such an average as would cover the amount of the bond?] It does not say so. We say that we are entitled to the difference between the proceeds and the amount of the bottomry bond. The real effect of the bond is that the ship is mortgaged or pledged to us for the amount of our bond, and we insure that amount. All the Privy Council had to decide in the case of *Stephens v. Broomfield*, was whether the bottomry bondholder took precedence of the mortgagee. It was quite unnecessary really to touch the question whether the master was discharged by the loss, and on that question, according to *Thompson v. The Royal Exchange Assurance Company*, the case depended. [MARTIN, B.—It was necessary to decide the question whether the loss referred to by the words you rely upon would include a constructive total loss, for if they did not, the interest of the mortgagees in the proceeds of the sale could not arise, inasmuch as only a constructive total loss occurred. The only meaning of the words appears to me to be, to secure to the bondholder any salvage on a loss; the proceeds of the sale are not salvage within the meaning of this clause.] This is clearly a distinction intended to be drawn between the case of a total and partial loss. [CLEASBY, B.—There are really only two alternatives in the condition, each introduced by the word "if."]

KELLY, C. B.—I am of opinion that our judgment must be for the defendants. Whatever construction may be put on the clause of the bond in question, I do not see how it can be said that there has been any loss of the bond within the meaning of the policy.

MARTIN, B.—I am of the same opinion. This is the case of an assurance against the loss of the bond by the loss of the ship. It has been held that in such a case an actual total loss is meant. Mr. Mellish says that the words which he relied on in this bottomry bond make a difference, although he says they are very difficult to give a precise meaning to. Now, I think it is extremely plain, that whatever the effect of them may be, they do not advance his case. On the loss of the ship the lender on bottomry is to become entitled to the average due on salvage. The money received on the sale of the ship cannot be called salvage within this proviso, and in order that it may come into effect there must be a loss of the ship within the meaning of the term loss, as applicable to bottomry bonds, i.e., an actual total loss.

PICOTT, B.—I am of the same opinion. Though the bond is in some parts somewhat obscurely worded, it is plain when one comes to look at it that there are really only two alternative contingencies in the condition, viz., the ship's arrival at the end of her voyage and payment of the money or the

loss of the ship. This must mean an actual loss, according to the well-established law as to bottomry bonds.

CLEASBY, B.—I am of the same opinion. As pointed out by the judgment in the Privy Council, the clause Mr. Mellish relied on is not a special one, but is to be found in the form of a bottomry bond given in the latest edition of Abbott on Shipping. It is quite clear that the doctrine of constructive total loss is not applicable to bottomry bonds.

Judgment for defendants.

Attorneys for plaintiff, *Westall and Roberts.*

Attorneys for defendants, *Thomas and Hollams.*

Tuesday, April 26.

FAIRLIE v. FENTON AND OTHERS.

Contract—Principal and agent—Broker—Right to sue.

The plaintiff, E. F., a cotton broker, entered into a contract on behalf of his principal for the sale of cotton to defendants, and signed a note in the following terms:—"I have this day sold you" (the defendants) "on account of T., one hundred bales Oomrawuttee cotton . . . signed E. F., broker:"

Held, that the plaintiff could not maintain an action against the defendants for non-acceptance of the cotton, the true construction of the contract being that the plaintiff acted as a broker merely, and was not a party to the contract.

This was an action for non-acceptance of cotton. The defendants pleaded, *inter alia*, a traverse of the contract.

Joinder of issue.

The plaintiff was a cotton broker, and entered into a contract for the sale of certain cotton on behalf of his principal, to the defendants, of which he signed a sold note in the following terms:

London, Aug. 20, 1869.

Messrs. J. and R. Fenton.

Per Messrs. Ronaldson and Stringer.

I have this day sold you on account of Mr. T. A. Timmins, of Manchester, to arrive in Liverpool, per *Evelyn*, from Bombay, on the terms of the printed rules of the Cotton Brokers' Association of Liverpool as endorsed N. O. 100, one hundred bales, Oomrawuttee cotton, on the basis of 10½ per lb. for fair. No allowance to sellers, but in case of inferiority of quality, the cotton to be taken by the buyers at an allowance to be settled by arbitrators in the usual manner. To be taken from the warehouse; any slight variation in marks not to vitiate the contract. Brokerage per cent.

(Signed) EVELYN FAIRLIE, Broker.

At the trial it was objected that the plaintiff appearing merely to have executed the contract as broker, and his principal being named on the face of it, he could not maintain the action. The verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter a nonsuit. A rule *nisi* was accordingly obtained, against which

Pollock. Q.C., and Barnard showed cause.—The plaintiff is entitled to maintain this action. In *Sargent v. Morris*, 3 B. & Ald 281, Bayley, J., says, "I take the rule to be this: if an agent acts for me and on my behalf, but in his own name, then inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely agent unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action either in the name of the party by whom the contract was made or of the party for whom the contract was made." This case falls precisely within the principle here laid down. Here the plaintiff signed in his own name, though on behalf of another. In *Williams v. Millington*, 1 H. Bl. 81, it was held that an auctioneer employed to

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FAIRLIE v. FENTON AND OTHERS.

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sell the goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer though the sale was at the house of such third person, and the goods were known to be his property. There Lord Loughborough said, "It is not a true position that two persons cannot bring separate actions for the same cause; the carrier and owner of goods may each bring actions of tort; the factor and owner may each have actions on a contract." It is well established that when an agent has any beneficial interest in the performance of the contract, as for commission, &c., he may maintain an action in his own name (see 1 Chitty on Pleadings, 7th edit., 8, where the case of a broker is expressly mentioned). In Lush's Practice also, 3rd edit., vol. 1, p. 11, it is said, "thus a broker, factor, auctioneer, or commission agent, may sue upon contracts made with them in that capacity." The modern cases also show that whenever a person entering into a contract on behalf of another has not used language clearly precluding himself from suing, he is entitled to do so. The instances in which it has been held that the broker or agent might be sued are just as much in my favour as though they had been cases where he was suing; for the question whether an agent can sue on a contract depends upon the same conditions as the question whether he can be sued. With respect to this latter question it has been held repeatedly that unless the agent by the most express and absolute words negatives any liability on his part, unless he says on the face of the contract, "I am merely the scribe, and no party," he may be rendered personally liable. In *Tanner v. Christian*, 4 E. & B. 595, a written agreement was expressed to be made between C. for and on behalf of N. of the first part, and T. of the second part. And Lord Campbell, in giving judgment, said that the real question was whether the defendant was intended to be personally liable on the contract; and that looking to the whole frame of the agreement he had come to the conclusion that he was. In *Parker v. Winlow*, 7 E. & B. 942, a memorandum of charter-party was expressed to be made between P. of the good ship *C.*, and W. as agent for E. W. and Son. It was signed by W. without restriction, and it was held that W. was personally liable as charterer. Here the words of the contract are, "I have sold;" and the word broker after the signature is mere description. Lord Campbell says, in giving judgment in that case, "I can have no doubt myself that the defendant is personally liable. He makes the contract, using apt words to show that he contracts, and the only ground suggested for rebutting his personal liability is that he says he is agent for another; but he may well contract and pledge his personal liability, though he is agent for another. If he had signed the contract as by procuration for E. Winlow and Son, he might have exempted himself from liability; but on principle, and on the authorities cited, an agent is personally liable if he is the contracting party, and he may be so though he names his principal." In *Lennard v. Robinson*, 5 E. & B. 125, where the charter-party stated that it was agreed between the owner of the ship *N.* and R. and F. of London, and was signed "by authority of and as agents for Mr. H. H. S., of Memel, R. and F." it was held that R. and F. were personally liable. See, also, *Mahony v. Kekule*, 14 C. B. 390. From all these cases it is clear when from the frame of the contract it appears that where the intention was that the agent should contract personally, he may sue or be sued on the contract even though it appear that he is really acting on behalf of another. [CLEASBY, B., referred to Story on Agency, 6th edit., pp. 111, 113, as showing a distinction between brokers and auctioneers, or factors.]

Brown, Q.C., and *J. W. Mellor* in support of the rule. This case involves a question of the highest commercial importance, viz., whether, when a broker makes a contract as such and names his principal, he can sue or be sued. If he can sue, the effect is very considerable, for he can then always get the price into his hands, which he has no right to do unless the custom of the trade allows him, for the other party is justified in paying him forthwith if he be liable to be sued. The principles of the law on the subject are clear. The broker may sue where he does not disclose the name of his principal, for then it is merely the case of an undisclosed principal, in which case it is well settled that either principal or agent may sue. A factor may sue because he is entrusted with possession of the goods, and has a right to receive the price. The auctioneer also has a special interest in the goods, and a lien on the price. But the broker has no interest whatever in the performance of the contract, nor any possession of or special property or interest in the goods. So soon as the contract is completed he is entitled to his commission. He has no right to touch the purchase-money, nor any lien on it. Therefore his case is quite different from that of a factor, auctioneer, or policy broker, all of whom have some special interest or lien. In *Williams v. Millington*, 1 H. Bl. 84, the judgment is expressly based on the peculiar character of an auctioneer. Lord Loughborough says, "an auctioneer has a possession coupled with an interest in the goods which he is employed to sell—not a mere custody like a servant or shopman . . . but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay." He is entitled to receive the price, and in *Robinson v. Rutter*, 4 E. & B. 954, in an action by an auctioneer for the price of a horse, the defendant pleaded that plaintiff had sold the horse as auctioneer, agent, and trustee for K, and that defendant had paid K before action, and the plea was held bad. In *Fisher v. Marsh*, 6 B. & S. 416; 12 L. T. Rep. N. S. 604, Blackburn, J. says, "The general rule is that when an agent makes a contract, naming his principal, the contract is made with the principal, not with the agent. But even when the principal is known, a contract in writing may be made by an agent with a third person in such terms that he is personally bound to the fulfilment of it as if he says, 'I, for my own self, contract.' In such a case there is a personal contract by the agent, and he may sue or be sued on it, although the principal may interfere and claim the benefit of it, as was decided in *Higgins v. Senior*, 8 M. & W. 834, where the cases are collected." Now it is clear that this case falls within the general rule so laid down, and not the qualification afterwards mentioned. The plaintiff here contracted as broker only, naming his principal; the latest authorities show that in such case he cannot sue. The case of *Fawkes v. Lamb*, 31 L. J., 98, Q. B. is really on all fours with the present. Blackburn, J. there says "the plaintiff was avowedly and to the knowledge of the defendant acting as broker for a third person, and all contracts made through his instrumentality when so acting were *prima facie* made with that third person. But though *prima facie* this was so; there was nothing either in law or mercantile practice to prevent one known to be a broker from entering into a contract in his own name so as to make himself a contracting party with the rights and liabilities of a contracting party. An agent may lawfully say. 'I act for A. and B. but I will make the contract myself though on his account, so that you shall have me responsible as if I myself were the contracting party.' Such a bargain is in effect made wherever the agent enters

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In the Goods of SAVAGE.

[PROB.

into a written contract in his own name, though he be known to be an agent." It is clear then that in the case of a mere broker when the principal is disclosed, *prima facie* the contract is with the principal, and he must sue. Then there is nothing in this contract to show that the broker made himself personally liable as a contracting party; he therefore cannot sue. *Bramble v. Spiller*, 21 L. T. Rep. N. S. 672, is also conclusive in our favour.

KELLY, C. B.—Many cases have been mentioned by Mr. Pollock, in which the agent may sue on contracts by which the principal is disclosed. In no case, however, does it appear that an action has been maintained by a broker, apparently acting as such. The rule of law is clear and well settled as to a broker. Of course he may so frame the contract, which he executes, as to make himself personally liable. But when the contract is in the ordinary form, where a broker enters into a contract as broker describing himself as such, and naming his principals, he cannot sue or be sued. Such contracts constantly occur, and no instance ever occurred in my recollection and no case has been cited in which a broker had maintained an action on such a contract.

MARTIN, B.—I am of the same opinion. I had at first, I confess, a sort of general impression that a broker had such an interest in the contract as would entitle him to maintain the action. It is so laid down in Chitty on Pleadings and in Lush's Practice. I am now satisfied, however, that when an agent states on the face of the contract that he makes it on behalf of another, and that he is merely acting as broker, that is to say, as a middleman between the contracting parties, and has no interest in the contract, he is not entitled to maintain an action upon it. He does not enter into the contract as a party; he only contracts that he has authority to contract on behalf of his principal.

PIGOTT, B.—I am of the same opinion. We have to construe the terms of the contract, and see whether the plaintiff is a party to it. It is clear on the face of the contract that he is not, and that he acted only as a broker. In *Baring v. Corrie*, 2 B. & Ald. 143, 147, Abbott, C. J., says that a broker is not entrusted with the possession of goods, and ought not generally to sell in his own name. The plaintiff here acted only as broker and middleman to bring the parties together.

CLEASBY, B.—I doubted slightly at first from the particular terms of this contract, but I never had any doubt on the general question as to the position of the broker when he acts merely as middleman. A broker merely acting as such has nothing to do with the delivery of the goods or the receipt of the price of them. See Story on Agency, 6th edit., 111, 113. If payment be made by the purchaser to the broker it is at his own risk. The difference is well established in this respect between a broker and an auctioneer or factor. With respect to the terms of this particular contract I am now satisfied that the plaintiff appears on the face of it merely to be acting as broker. The result is that this rule must be made absolute.

Rule absolute.

Attorneys: Phillips and Willicombe; Walker and Sons.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Feb. 15.

(Before LORD PENZANCE.)

In the Goods of SAVAGE.

Will destroyed—Codicil remaining—Codicil admitted to probate.

A testator left a testamentary paper, which was described as "a codicil to my will." The will was not forthcoming, and there was reason to believe that the testator had destroyed it. The court held, following and explaining *Black v. Jobling*, that the destruction of the will did not presume the revocation of the codicil, and that since the Wills Act a codicil could only be revoked in one or other of the several modes prescribed by the statute.

John Savage, late of Beaufort Buildings, Bath, in the county of Somerset, died Jan. 18, 1870. Some time before his death he executed a will which was not forthcoming, and which there was every reason to believe had been destroyed by him. On Aug. 2, 1869, he executed the following codicil:—

This is a codicil to my will. After the death of my dear wife, save and except the Cotty estate containing 300 acres, more or less, I give all the land I have to my son William absolutely, and I also give to my son William the Vale of Neath debenture stock, value 1000*l.*, to cover the bond I have given to Robert Holdsworth and Francis Savage, my son, as trustees of his marriage settlement for securing the sum of 600*l.* and interest. Witness my hand this 2nd day of August 1869, at Mappowder, Dorsetshire. Signed by the said John Savage as a codicil to his will in the presence of us, &c., James William James, farmer, Mappowder, Charles Giles, groom, Mappowder.

After executing the codicil he placed it in an envelope, and handed it to his son, with whom he was at the time staying on a visit. Rachel Wright Savage, the deceased's wife, survived him two days.

Pritchard now moved on behalf of the eldest son that letters of administration be granted to him with the codicil annexed.

LORD PENZANCE—I think the grant ought to go. The question is discussed in *Black v. Jobling*, and some trouble was taken there to review the previous decisions. Before the statute the principle enunciated was that a codicil fell to the ground, together with the will, upon the revocation of that will; but that if the party could establish that the testator intended the codicil to stand by itself, the court would give effect to it, notwithstanding the revocation. At that time the court used to go at large into the question what papers the testator intended to be testamentary. But then came the statute, which says that "no will, codicil, or any part thereof shall be revoked otherwise than as aforesaid (marriage), or by another will or codicil executed in manner hereinbefore required, or some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence or by his direction. Therefore, if after the statute it is to be held that the codicil is revoked, by the mere fact of the will being revoked, the court would be going in the teeth of its actual language. Therefore, if this had been the first case since the Wills' Act, I should have had no doubt of the codicil being unrevoked. There has, however, been a decision on the subject, but as the meaning of the court has not been made perfectly clear in *Black v. Jobling*, the court will refer to the case again. The previous decisions were hardly satisfactory. There are two of Sir H. J. Fust in Notes of Cases. The first is *In the Goods of Hallwell* 4 N. C. 400, and there the court did not appear to

ADM.]

LAW v. WALLERSTEIN; THE GRAPESHOT.

[ADM.]

have had its attention directed to the words of the statute, but upheld the codicil on the ground that it was the only substantive testamentary paper of the deceased. The next was the case of *Clogstown v. Walcot*, 5 N. C. 628, and there the language of the judge was as follows:—"Nothing can be clearer than this, that when the testator destroyed the will he expected that its destruction would have no effect on the codicil. Under the old law the effect of destroying a will was by presumption to defeat the operation of the codicils of that will, but there must be an intention to destroy." Now that is hardly satisfactory, because the statute says nothing of an intention to destroy. The statute says a codicil shall not be destroyed otherwise than by one of the several modes which it specifies. When the matter came before Sir C. Cresswell, *In the Goods of Cozens*, 2 S. & T. 364, the court said, "I think it has been established by the cases cited at the bar, that previous to the passing of the Wills Act a codicil was *prima facie* dependent on the will, and that the destruction of the latter was an implied revocation of the former; and, moreover, that Sir H. J. Fust was of opinion that no alteration of this principle was made by the passing of the statute." That is not exactly so, because what Sir H. J. Fust said was, that there was an alteration, which was that the statute made it necessary there should be an intention to destroy. That was the way in which the case was handled in *Greenwood v. Cozens*, and it seemed to me that the matter had never been properly considered, and I said as much in *Black v. Jobling*. The result is, that in my opinion the words of the statute are imperative, and the decisions which have taken place since the statute do not appear to me to have proceeded on any consideration of the statute, or any consideration how far the imperative words can be got rid of. The result is that the testator, having left behind a paper properly executed as a testamentary paper in the form of a codicil, that codicil must stand, unless revoked in some manner indicated by the statute. The testator having destroyed his will and left his codicil still standing, the natural inference is that he did not intend to destroy it. But I do not go on his intention, I go on the words of the statute. A testator having once executed a testamentary paper, that paper, be it will or codicil, must be held valid, unless revoked in the particular manner required by the statute. The grant of administration with the codicil annexed will therefore go as prayed.

Solicitor: G. R. Longden.

SUPREME COURT OF THE UNITED STATES—IN ADMIRALTY.

LAW v. WALLERSTEIN;
THE GRAPESHOT.

Bottomry—Necessity for repairs—Necessity for credit—Distinction where claim against owners and against ship—Express and implied hypothecation—Evidence of necessity—Survey.

Where the claim on a bottomry bond is by the material man against the owner, it will always be presumed that supplies and repairs ordered by the master were reasonably fit and proper, unless there is clear proof to the contrary, and also proof of collusion by the material man. But circumstances of actual necessity must be shown to exist to support a lien on ship in respect of a like claim. Proof of absolute and indispensable necessity, however, is not required in order to the establishment of such a lien, where supplies and materials are furnished on the credit of the ship and owners in a foreign port.

The cases of the Sultana, Pratt v. Reed, 19 How. 359, and *the Laura*, 19 How. 29, held not to lay down, as generally supposed, any more stringent rule in such cases:

There is only a faint line of demarcation between express and implied hypothecation, the more substantial distinction being found in the greater diligence required of the lender on bottomry than of the material man in inquiry concerning the necessity for repairs. The doctrine of maritime hypothecation stated in propositions thus:

1. *Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary, or believed, upon due inquiry and credible representation, to be necessary:*
2. *Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive, in the absence of evidence to the contrary, of necessity for credit:*
3. *Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship:*
4. *The ordering by the master of supplies or repairs upon the credit of the ship is sufficient proof of such necessity to support an implied hypothecation in favour of the material man, or of the ordinary lender of money, to meet the wants, of the ship who acts in good faith:*
5. *To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required, and, if the fact of necessity be left unproved, evidence is also required of due inquiry, and of reasonable grounds of belief that the necessity was real and exigent.*

A survey is not indispensable in proof of necessity; but where the repairs alleged to be made are extensive, and the necessity otherwise left in doubt, the absence of such an examination will go far to warrant the conclusion that no real necessity existed.

A bottomry bond may be good in part and bad in part; and the mere omission of the lender to make inquiry, will not vitiate it altogether.

CHASE, C. J. delivered the opinion of the court.—An important question of jurisdiction having been disposed of, the judgment proceeded:—The object of the original suit was the enforcement of a lien upon the bark *Grapeshot*, created by a bottomry bond, executed by her master, one Joseph S. Clark, in favour of Wallerstein, Massett, and Co., at Rio Janeiro, upon the 15th April 1858. The libel, filed by Wallerstein, Massett, and Co., on the 3rd July 1868, alleged that the bark *Grapeshot*, lying in the port of Rio, during the month of April 1858, was in great need of reparation, provisions, and other necessaries to render her fit and capable of proceeding thence on her intended voyage to the port of New Orleans; and, Joseph S. Clark, the master of the bark, not having any funds or credit there, and the owner of the said bark not residing in Rio, and having no funds or credit there, that the libellants, at the request of Clark, advanced and lent to him 9767dolls. 40 cents. on the bottomry and hypothecation of the bark at the rate of 19½ per cent. maritime interest; that Clark, as master, did really expend the sum borrowed for the repairing, victualling, and manning of the bark in order to enable her to proceed to New Orleans; that the bark could not possibly have proceeded with safety upon her voyage without such repairs, and other necessary expenses attending the

ADM.]

LAW v. WALLERSTEIN; THE GRAPESHOT.

[ADM.]

refitting of her; that she sailed, and arrived safe at New Orleans on or about the 7th June 1858; and, that the bond was, at the proper time, presented for payment to Clark, who refused to discharge it. Upon this libel, process was issued, and the vessel and her freight were seized. Subsequently the vessel was sold under an order of the court, and the proceeds, together with the freight money, amounting, in the whole, to 13,805 dolls., 85 cents., were deposited in the registry on the 2nd Sept. 1858. On the 1st Nov. 1858, George Law, the claimant of the vessel and freight, filed his answer, denying the necessity of the repairs and supplies, alleged to have been paid for by the money raised upon the bottomry bond, and alleging fraudulent collusion between the master and the lenders, to the prejudice of the claimant. The answer set out at large the history of the *Grapeshot*, from the time she left New York, on or about the 9th Feb. 1857, to the date of her arrival in New Orleans, on or about the 7th June 1858. It represented that the bark, when she left New York, was stout and staunch, well fitted, and supplied for her then intended voyage to Constantinople, and for the return voyage to New York; that, instead of returning from Constantinople to New York, the master, Clark, embezzled the freight earned in the voyage out, and engaged the vessel in voyages for his own benefit, until he caused her to be stripped at Rio of her copper, which was replaced by second-hand and indifferent metal, owned by Clark, and put on her in fraud of the claimant; that the dishonest practices of Clark were well known at Rio, and that the libellants were fully cognisant of them. The answer further denied the charge of the libel that the claimant had no funds or credit at Rio, and averred that he had credit to procure and obtain the necessary funds, and that the master was under no necessity to resort to the bottomry upon the vessel. The answer further alleged that there was no inspection or survey of the vessel with reference to the necessity for repairs; and that the alleged expenses for repairs and provisions far exceeded the sums actually expended, of all which the libellants had notice. Before proceeding to examine the evidence taken under these pleadings, it will be proper to consider the principles of maritime law applicable to the case. A bottomry bond is an obligation executed generally in a foreign port by the master of a vessel for repayment of advances to supply the necessities of the ship, together with such interest as may be agreed on; which bond creates a lien on the ship, which may be enforced in admiralty in case of her safe arrival at the port of destination; but becomes absolutely void and of no effect in case of her loss before arrival: (*Carrington v. Pratt*, 18 How. 67; *The Atlas*, 2 Hag. 57, 58.) Such a bond carries usually a very high rate of interest, to cover the risk of loss of the ship as well as a liberal indemnity for other risks and for the use of the money, and will bind the ship only where the necessity for supplies and repairs, in order to the performance of a contemplated voyage, is a real necessity, and neither master nor owners have funds or credit available to meet the wants of the vessel. Sometimes bonds, bearing only the ordinary rate of interest, or executed under circumstances more or less different from those just stated are called bottomry bonds, and are enforced as such (*The Trident*, 1 W. Rob. 29; brig *Draco*, 2 Sumn. 157; 1 Parsons on Shipping, 136, 138); but the general description just given embraces most instruments known under that name, and is sufficiently accurate for the case presented by the record. There is no question in this case as to the character of the bond, nor as to the safe arrival of the ship, nor as to the validity of the bond if the lien can be

held valid. The controversy turns on the question of necessity for repairs and supplies and for credit. We are to consider, therefore, what degree of necessity for supplies or repairs, and what degree of necessity for credit in that form, will warrant a master in borrowing upon bottomry. Where the claim of the material man is against the owner only, and no privilege is given upon the vessel, no necessity need be shown affirmatively. The master, in the absence of known fraud, is fully authorised to represent the owners in all matters relating to the ship; and it will always be presumed that supplies and repairs ordered by the master, were reasonably fit and proper, unless there is clear proof to the contrary, and also proof of collusion by the material man. But something more is required when the claim is against the ship itself. Such a claim can be asserted only as a lien of privilege upon the vessel. And the rule is that such a lien for supplies and materials, or for money advanced upon the ship, since it is created and exists without record, or other public notice, can only be established upon circumstances of actual necessity. Proof of absolute and indispensable necessity however, is not required in order to the establishment of such a lien, where supplies and materials are furnished on the credit of the ship, or of the ship and owners, in a foreign port. In such cases courts of admiralty do not scrutinise, narrowly, the account against the ship. They will reject, undoubtedly, all unwarranted charges (*Cognac*, 2 Hagg. 387), but upon the proof that the furnishing was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported (*The General Smith*, 4 Wheat. 443; *Peyroux v. Howard*, 7 Pet. 324; Brig *Nestor*, 1 Sumn. 73), unless it is made to appear affirmatively that the credit to the ship was unnecessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the material man knew, or could, by proper inquiry, have readily informed himself of the facts: (*The Fortitude*, 3 Sum. 246-7.) It has been supposed that a more stringent rule than that just stated was sanctioned by this court, at the December Term 1856, in the case of *The Sultana*, reported under the title of *Pratt v. Reed*, 19 How. 359. And it has been supposed also that the judgment of this court in the case of the bark *Laura*, 19 How. 29, reported as *Thomas v. Osborn*, required affirmative proof of the necessity of credit to the ship, in order to the creation of a lien on the vessel. [Reference was made to the facts and judgments in these cases.] We are satisfied that neither of the two cases when properly considered in connection with the proofs before the court, can be regarded as in conflict with the rule we have stated, which, prior to these decisions, had been undoubtedly received upon the general consent of authorities as the true rule on the subject of implied hypothecation for repairs and supplies, or for advances having the same relation to the ship. We have been induced to state this doctrine of implied hypothecation somewhat fully, not only because it seemed desirable to correct a common misunderstanding of these cases; but because of the close analogy in origin, effect, and incidents between implied hypothecation and express hypothecation by bottomry. It is, indeed, difficult to trace, either in reason or in the authorities, any marked line of discrimination between them. In the case of the *Aurora*, decided in 1816, this court said, "To make a bottomry bond, executed by the master, a valid hypothecation, it must be shown by the creditor that the master acted within the scope

ADM.]

LAW v. WALLERSTEIN ; THE GRAPESHOT.

[ADM.]

of his authority, or, in other words, that the advances were made for repairs or supplies necessary for effecting the objects of the voyage, or the safety and security of the ship. And no presumption should arise in the case that such repairs or supplies could be procured on reasonable terms with the credit of the owner, independent of such hypothecation." (1 Wheat 96.) And it was further said in the same case, that "it is incumbent on the creditor who claims an hypothecation, to prove the actual existence of those things which gave rise to his demand; and if it appear on his own showing, or otherwise, that he has funds of the owners in his possession which might have been applied to the demand, and he has neglected or refused to do so, he must fail in his claim:" (1 Wheat. 105.) And this, undoubtedly, is the general rule also in respect to implied hypothecation. The principles on which it rests were fully explained and illustrated by Story, J. in 1838, in the case of *The Fortitude*, 3 Sumn. 232. It has been thought that a distinction between the lien for repairs and supplies, or ordinary advances to pay for them, and the lien of bottomry, may be found in that "superadded necessity" of which the learned judge speaks, in the case last cited, as distinguishing the former from the latter. There must, he said, in substance, not only be a necessity for the repairs, but a necessity for resorting to a bottomry loan: (*Ibid*, 234.) But this ruling must be taken with the qualification previously established by this court in the case of *The Virgin*, 8 Pet. 554, where it was held that the "necessity of the supplies and repairs being once made out, it is incumbent on the owners, who assert that they could have been obtained upon their personal credit without bottomry, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case." It is only when such competent proofs have been adduced, or the practicability of raising funds on credit has been made to appear from circumstances, that the lender is held responsible for failing to make due inquiry. In the absence of such proofs or circumstances, an apparent necessity for credit by bottomry must be regarded as established when the necessity for repairs is proved. A more substantial distinction between the implied and the express hypothecation may, perhaps, be found in the greater diligence required of the lender on bottomry than of the material man in inquiry concerning the necessity for repairs. The authorities on this subject are not easily reconciled; but they may be best harmonised, perhaps, in the proposition that if no necessity for repairs is established a bottomry bond will not be supported in the absence of proof that the lender, after using reasonable diligence to ascertain the facts, had good reason to believe, and did believe, that the necessity really existed. And this is warranted by good reason. The maritime law seeks equally the general promotion of commercial intercourse and the most complete security in private transactions; and neither can be well reconciled with the support of hypothecations which partake largely of the nature of hazard, made where the owner cannot be consulted, at extraordinary rates of interest, agreed upon by the master and the lender, and under circumstances favourable to collusion and fraud, unless the lender be held to reasonable diligence in inquiring as to the existence of the facts of distress and necessity for repairs, which alone warrant such transactions. The doctrine on the subject of maritime hypothecation, so far as it seems useful to consider it in this case, may be summed up, I think, in these propositions: 1. Liens for repairs and supplies, whether implied or express, can be enforced in admiralty only upon proof made by the creditor that the repairs or supplies were necessary,

or believed, upon due inquiry and credible representation, to be necessary. 2. Where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise conclusive, in the absence of evidence to the contrary, of necessity for credit. 3. Necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them or to provide funds for the cost of them on the security of the ship. 4. The ordering by the master of supplies or repairs upon the credit of the ship is sufficient proof of such necessity to support an implied hypothecation in favour of the material man, or of the ordinary lender of money, to meet the wants of the ship, who acts in good faith. 5. To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required, and if the fact of necessity be left unproved, evidence is also required of due inquiry and of reasonable grounds of belief that the necessity is real and exigent. These principles are now to be applied to the case before us. The pleadings make distinct issues upon the necessity for credit, and exercise of due diligence in inquiry by the lender. [Having examined the evidence, the court came to the conclusion that the necessity for repairs had not been established.] This view is confirmed by the absence of any survey or examination by public authority, or by competent and disinterested persons for the purpose of ascertaining the necessity for repairs. In the case of the *Cognac* the bottomry bond was authorised by the French Tribunal of Commerce at the port of repair, and also by the British Vice-Consul there, and yet the British Court of Admiralty disallowed some of the items covered by the bond. 2 Hagg. 377, 387. And in the case of the *Fortitude* the bottomry bond was supported by evidence of a survey, called by the master and conducted by persons skilled in nautical affairs. This was, as the learned judge observed, "what every prudent master ought to do under the like circumstances." We do not say that such a survey is indispensable. No doubt proof of the necessity, and of the extent of the necessity, may be otherwise made. But where the repairs alleged to be made are extensive, and the necessity otherwise left in doubt, the absence of such an examination will go far to warrant the conclusion that the real necessity existed. The evidence in respect to the bills for supplies covered by the bottomry bond is not so strong as to the absence of necessity for them. But there are some items included in these bills, and particularly a very considerable item stated as a general balance found due on a former account of the consignee of the ship, which can generally be regarded as subjects of bottomry. Under these circumstances, if there were any proof affecting the lenders with actual knowledge of the facts, it would be our duty to pronounce the bottomry wholly invalid. For there is no evidence that they made any inquiry whatever, and the maritime law holds them to reasonable diligence in this respect. But mere omission to make inquiry will not invalidate the bond altogether. It may be good in part and void in part. And where, as in this case, part of the repairs and supplies have been shown to be necessary, and there is no reason to impute fraud or collusion to the lenders, the bond, though void as to the items of which the necessity is disproved or not shown, may properly be held valid as to those items the necessity of which is shown. On the whole the decree of the Circuit Court must be reversed, and the cause must be remanded to that court with directions to refer the accounts for repairs and supplies to one or more commissioners experienced in commerce and of known intelligence

Q. B.] THE UNION OF EXETER (apps.) v. THE UNION OF ST. THOMAS, DEVON (resps.). [Q. B.]

and probity, to ascertain, under the instructions of the court, what portion of the repairs and supplies actually supplied to the ship were really necessary, and for the amount thus ascertained and approved by the court to enter decree for the libellants.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Saturday, April 30.

THE UNION OF EXETER (apps.) v. THE UNION OF ST. THOMAS, DEVON (resps.).

*Settlement by payment of public taxes of a parish—
Local improvement and lighting rates.*

By a public local Act every occupier of the city of Exeter had to pay rates fixed by commissioners, and assessed and collected by persons appointed by the commissioners for the purposes of improving and lighting the city. The majority of the commissioners were elected by the parishes, and the commissioners had power, although they were not obliged, to appoint assessors and collectors for each parish separately. As a matter of fact, assessors were appointed for each parish separately:

Held, that paying his share to these rates by a man who rented a sufficient tenement created a settlement by the payment of public taxes or levies of the parish within 3 Will. & M. c. 11, s. 6.

This was an appeal against an order of two justices for the removal of Ann Tupman and her seven children from the St. Thomas's poor law union, in the county of Devon, to the poor law union of the city and county of the city of Exeter, the parish of St. Sidwell, in the last-named union, being adjudged to be the place of their last legal settlement. The appeal was tried at the Exeter Quarter Sessions 1869 for the county of Devon, when the court quashed the said order, subject to the opinion of the Court of Queen's Bench on the following

CASE.

The said paupers Ann Tupman and her children are respectively the widow and legitimate children of William Henry Tupman deceased, who died in a house occupied by himself and his family in the parish of St. Sidwell, in the city of Exeter (one of the parishes of the appellants' union), on the 1st Oct. 1868. Shortly after the death of the said William Henry Tupman, the said paupers removed themselves into the respondents' union. The order of removal appealed against was made the 29th Jan. 1869. The said William Henry Tupman *bonâ fide* rented a tenement, viz., the said house in which he died, which consisted of a separate and distinct dwelling-house in the said parish of St. Sidwell, at and for a larger sum than 10*l.* a year for the term of one whole year, namely, from Michaelmas 1867 to Michaelmas 1868, and the said house was occupied by the said William Henry Tupman and the said paupers during the whole of the said year under the said yearly hiring, and the rent for the same to the amount of 10*l.* was actually paid for the term of one whole year. The said William Henry Tupman was duly assessed to the poor-rate, but did not himself pay the same in respect of the said tenement for one year. In the month of July 1868 the said William Henry Tupman paid his share, which was demanded of him, and for which he was liable towards the improvement rate and the lamp rate levied as hereinafter stated for the said parish of St. Sidwell, in respect of his occupation of the said house. At the trial of this appeal at the quarter sessions, the court held that the said William Henry Tupman did not acquire a legal settlement in the said parish of St. Sidwell

on the following grounds, viz.: That the improvement rate and lamp rate were neither of them "public taxes or levies" of the town or parish in which the said William Henry Tupman inhabited within the meaning of the statute 3 Will. & M. c. 11, s. 6, nor "parochial rates" within the meaning of the stat. 6 Geo. 4, c. 57, s. 2; the said order of removal was therefore quashed, but the said court of quarter sessions granted a case that this point might be decided by the Court of Queen's Bench.

The said improvement and lamp rates are distinct rates, and are levied under the authority of a local Act, 2 & 3 Will. 4, c. 106, which was passed on the 5th July 1832, and is intituled, "An Act for better paving, lighting, watching, cleansing, and otherwise improving the City of Exeter and County of the same City." This Act is to form part of this case, and the following are the sections most material to this question:—

Sect. 2 provides for the appointment of commissioners to consist of six members of the common council, the dean and canons residentiary of the Cathedral, and also of persons to be elected by each parish and precinct within the city and county of the city as provided in the 4th section.

Sect. 4—

And be it enacted that the commissioners for executing this Act to be hereafter appointed shall be elected by the parishioners and inhabitants of the several parishes and precincts within the city of Exeter and county of the same, and every such parish or precinct respectively shall from time to time be entitled to appoint such person or persons to be commissioners of that Act as together with the commissioners for the time being acting for such parish or precinct respectively by virtue of the said recited Act, and this Act will make up the number of commissioners which such parish or precinct respectively shall be entitled to appoint according to the following scale (that is to say), where the amount to which the parishioners and inhabitants of such parish or precinct respectively shall be assessed to the rates hereinafter directed to be made after such assessments shall have been approved and confirmed in manner hereinafter mentioned shall not exceed 100*l.*, such parish or precinct respectively shall be entitled to appoint one commissioner; where such amount shall exceed 100*l.*, and not exceed 250*l.*, such parish or precinct respectively shall be entitled to appoint two commissioners; where such amount shall exceed 250*l.*, and not exceed 400*l.*, such parish or precinct respectively shall be entitled to appoint three commissioners; where such amount shall exceed 400*l.*, and not exceed 600*l.*, such parish or precinct respectively shall be entitled to appoint four commissioners; where such amount shall exceed 600*l.*, and not exceed 800*l.*, such parish or precinct respectively shall be entitled to appoint five commissioners; where such amount shall exceed 800*l.*, such parish or precinct respectively shall be entitled to appoint six commissioners.

Sect. 7—

And be it further enacted that when, and so often as the inhabitants and parishioners of any of the said parishes and precincts shall be entitled, as before mentioned, to appoint a commissioner or commissioners, the commissioners for the time being acting in the execution of this Act shall, and they are hereby required to, cause notice in writing to be given by their clerk to the churchwardens, or to any two inhabitants or parishioners of such parish or precinct qualified to vote at the election of commissioners, in manner hereinafter mentioned, that a person or two or more persons (as the case may be) is or are required to be elected to make up the full number of commissioners which such parish or precinct is entitled to appoint: and the inhabitants or parishioners of such parish or precinct shall, within fourteen days next after the delivery of such notice, meet at the church or chapel or in the usual place of public meeting of such parish or precinct, between the hours of ten and twelve in the forenoon, of which meeting seven days' notice shall be given by the churchwardens of such parish, or by any two inhabitants or parishioners of such parish or precinct qualified to vote as hereinafter mentioned, by affixing the same at the Guildhall of the said city, and also in case of a parish at the church door thereof: and at such meeting it shall be lawful for the major part of the inhabitants and parishioners to nominate and elect a person or such number of persons (as may be specified in such notice) to act as a commissioner or commissioners for such parish or precinct.

By sects. 40 to 135 the commissioners are empowered to pave and light the city of Exeter, and provide for watchmen and water pipes.

Q. B.] THE UNION OF EXETER (apps.) v. THE UNION OF ST. THOMAS, DEVON (resps.) [Q. B.]

Sect. 136 is as follows:—

And for raising, securing, and paying money to answer and defray the several purposes of this Act, and to defray the charges and expenses of soliciting, obtaining, and passing this Act, or a proportion thereof (other than and except for the purpose of lighting the said city and county of the same), Be it enacted, that the said commissioners shall, and they are hereby authorised and required, once in every year to rate and assess by a just and equitable pound rate or assessment under the name of the Exeter Improvement Rate, the several landowners and owners, and the several tenants and occupiers of all houses, buildings, gardens, tithes, and other hereditaments within the said city, in sums not exceeding certain sums therein mentioned.

Sect. 139—

And be it further enacted, that the charges and expenses of lighting, setting-up, fixing, providing, maintaining, and repairing the lamps by this Act directed to be set up for the purpose of lighting the said streets, ways, passages, and places, parishes, liberties, suburbs, and precincts, of the said city and county of the same city of Exeter; and for otherwise putting this Act into execution in any manner touching and concerning the lighting the said city and county of the same, shall be at all times borne and paid and defrayed by the tenants or occupiers of all houses, buildings, lands, tithes, and other hereditaments within the city of Exeter and county of the same; and for that purpose the said commissioners shall and they are hereby authorised and empowered and required from time to time, once in every year, to rate and assess by a just and equal pound rate or assessment under the name of the Exeter Lamp Rate, all the tenants or occupiers of all houses, buildings, lands, titles, and other hereditaments within the said city and county of the same in respect thereof at amounts therein limited.

Sect. 141—

It shall be lawful for the said commissioners as often as they shall see occasion to appoint two or more of the inhabitants of the city and county, or of each parish, precinct, or ward within the said city and county to be assessors of such rates and assessments, and such assessors are required to make such rates and assessments from time to time accordingly, and to deliver to the commissioners two copies of the rates and assessments made in the manner and according to the form directed by the said commissioners, and subscribed by such assessors; and the said commissioners shall as soon as may be after such rates and assessments are made and delivered to them by such assessors, settle and sign the same, and cause a duplicate thereof also signed by them to be delivered to the collectors to be appointed in that behalf. A penalty of 10*l.* is imposed on persons appointed assessors and refusing to take the office, such penalty when levied to be paid to the treasurer or treasurers of the said commissioners to be applied to purposes of the said Act.

Sect. 142—

No person who shall have served the office shall be compellable to serve again for three years, except with the consent of a vestry meeting of any parish, in respect of which any such assessor shall be appointed.

Sect. 150—

The commissioners are required yearly to appoint the churchwardens and overseers of the poor of the respective parishes, or such other persons as the commissioners shall appoint to be collectors of the said rates and assessments, and that all the said rates shall be paid to the said collectors by the respective tenants or occupiers of houses, &c.

Sect. 158 enacts that in all cases where any person or persons shall come into or occupy any house rated, or assessed, or liable to be rated or assessed out of or from which any other person or persons shall have removed or which at the time of making such rate or assessment was empty or unoccupied, the person or persons coming in or occupying the same shall be liable to pay such rate or assessment although his, her, or their name or names may not be inserted in such rate or assessment in proportion to the time that such person or persons shall occupy the same respectively, and in like manner as if such person or persons had been originally rated or assessed by name in such rate or rates, assessment or assessments, which said proportions in case of dispute shall be settled and ascertained by the said commissioners.

Improvement and lamp rates were from time to time made for the said parish of St. Sidwell by assessors appointed by the said commissioners, in pursuance of the powers given to them in that behalf by the said Act, and such rates were col-

lected by persons appointed as collectors by the said commissioners by virtue of the said Act. The improvement rate for the parish of St. Sidwell from Lady-day 1867 to Lady-day 1868, was produced in evidence, the heading of which is as follows:

Instructions to assessors: the assessors are required to insert the Christian and surname of the owner and occupier of every property assessed. The assessors will make the assessment by a strict list. Where there are two or more tenants of houses, and where houses are let for a less term than a year, or under the yearly rent of 5*l.*, the assessors will be very particular in assessing correctly the landlord of such property, who in all such cases will be liable to the occupier's as well as owner's proportion of the rate. The rate to be returned at the Guildhall, signed by the assessors at eleven o'clock in the forenoon on the day named in the warrant, under penalty of 10*l.*

The collectors of the rate have instructions to give the assessors their best assistance in making the rates.

The Exeter improvement rate is a rate on the several landlords and owners and the several tenants and occupiers of 1*s.* in the pound on the annual rent or value of all houses, buildings, gardens, tithes, lands, and hereditaments other than and except arable, meadow, or pasture ground, and of 8*d.* in the pound on the annual rent or value of all arable or pasture ground situate within the parish of St. Sidwell, in the city and county of the city of Exeter, made in pursuance of an Act passed in the second and third years of the reign of William IV., intituled "An Act for better paving, lighting, watching, cleansing, and otherwise improving the city of Exeter and county of the same city for one year commencing from Lady-day 1867."

In this rate one "Daniel A." was inserted as the occupier of a house of the annual value of 16*l.*, the amount of the rate being 16*s.* The rate was duly signed. The said Daniel A. was at the time the said rate was made tenant of the premises, but left during the year of rating, and was immediately succeeded in the occupation by the said W. H. Tupman as tenant.

The lamp rate is a rate on the several tenants or occupiers of 4*l.* in the pound on the annual rent or value of all houses, buildings, lands, tithes, and other hereditaments within the parish of St. Sidwell, within the city and county of the city of Exeter, made in pursuance of an Act passed in the second year of the reign of William IV., intituled "An Act for paving, lighting, watching, cleansing, and otherwise improving the city of Exeter and county of the same city."

In this rate "Aquila Daniel" was assessed as the occupier of a house assessed at the annual value of 16*l.*, at the amount of 5*s.* 4*d.*

The rate was duly signed.

The said Aquila Daniel was, at the time the said rate was made, the tenant of the premises, but left during the year of rating, and was immediately succeeded in the occupation by the said W. H. Tupman.

If the court shall be of opinion that the said improvement rate or the lamp rate was a public tax or levy, or a parochial rate within the intent and meaning of the stat. 3 Will. & M. c. 11, s. 6, and stat. 6 Geo. 4, c. 57, s. 2 respectively, then the said order of removal shall stand confirmed, and the said order of sessions shall be quashed; but if the court shall be of contrary opinion, then the said order of removal shall be quashed, and the said order of sessions shall stand confirmed.

By the 3 Will. & M. c. 11, s. 6, it is enacted—

That if any person who shall come to inhabit in any town or parish shall for himself and on his own account execute any public annual office or charge in the said town or parish during one whole year, or shall be charged with or pay, his share towards the public taxes or levies of the said town or parish, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereby before required.

Q. B.] THE UNION OF EXETER (apps.) v. THE UNION OF ST. THOMAS, DEVON (resps.) [Q. B.]

Anderson and *Mackay* argued for the appellants, and in support of the decision of the quarter sessions, they relied upon the power given to the commissioners by the 141st section to nominate any two inhabitants of the city of Exeter to be assessors for the whole city. It is not necessary under the Act that there should be any parish assessors, or that any authority of the parish should have any notice of inhabitancy. This is a similar case to that of *R. v. Christchurch*, 8 B. & C. 660, in which it was held that a watch rate made upon each ward of the City of London was not a parochial rate. There is a wide distinction, too, between rates of this kind and those imperial taxes of which everybody has notice, e.g., the land tax, *R. v. Bramley*, Burr S. C. 75; and *R. v. Exmouth*, 8 East, 383; the property tax, *St. George's, Hanover-square, v. Cambridge Union*, L. Rep. 3 Q. B. 1; or even the Liverpool borough watch rate, as in *Reg. v. Everton*, 2 E. & E. 701.

Sir *J. Karlake*, Q. C., and *McKellar*, for the respondents.—The case finds that these rates were assessed and collected by separate persons for each parish, according to the power vested in the commissioners by the 141st section. And by the early sections of the Act it became necessary to assess each parish separately in order to find out the number of commissioners each parish was to elect. [Stopped by the court.]

BLACKBURN, J.—I think we need not trouble the respondents to finish their argument. The case comes to this, that by the Local Act, sect. 136, the commissioners appointed by the Act are “authorised and required once in every year to rate and assess by a just and equitable pound rate or assessment, under the name of ‘The Exeter Improvement Rate,’ the several landlords and owners, and the several tenants and occupiers of all houses, buildings, gardens, tithes, and other hereditaments within the said city of Exeter, and county of the same,” in a certain limited sum. And sect. 141 shows that the commissioners have at least an option to appoint two or more of the inhabitants of each parish within the city to be assessors of such rates and assessments as are provided by the 136th section, and also as to lighting by the 139th. We suppose we may infer from the case that as a matter of fact they do so appoint assessors. The section goes on, “such assessor or assessors is and are hereby authorised and required to make such rates and assessments from time to time accordingly, and to appear at such time and place as the said commissioners shall by writing under their hands order and appoint, and then and there produce and deliver to them two copies or duplicates of the rates and assessments made, in the manner and according to the form directed by the said commissioners, and subscribed by such assessor or assessors” . . . “and the said commissioners shall from time to time, as soon as may be after any such rate or assessment shall be made and delivered to them by such assessor or assessors, settle and sign the same, and cause a duplicate thereof, also signed by them, to be delivered to the collector or collectors, to be appointed in that behalf, and shall also issue their orders to such collector or collectors, requiring him or them to collect and receive the respective sums of money made payable by such rate or assessment.” Sect. 150 shows that the commissioners may, and I suppose they have, authorised the churchwardens and overseers of the respective parishes or places rated or assessed by virtue of the Act to be collectors of the said rates and assessments. All this being taken together shows that the commissioners have at least the option to have the rates assessed and collected by persons belonging to each parish separately. Then the question is whether these are

taxes within the meaning of the Acts of Parliament, the payment of which creates a settlement. Lord Hardwicke said in *R. v. Bramley*, “It hath been a great doubt whether in this respect the Legislature did not mean parochial taxes. But this hath been long gotten over; and the land tax has been holden to be within the Act from the notice of inhabitancy that arises by the parties being assessed and paying it.” Mr. *Anderson* has argued that there is a distinction between an imperial tax like the land tax, and a city tax of the kind here imposed; and that the notice of inhabitancy in the former is much greater than in the latter. I cannot see it; indeed if anything, it seems to me, for the purpose of notice to the parochial authorities, the advantage is the other way. At all events, a city rate assessed by each parish is just as much within the Act as the land tax, and it is by no means necessary that officers of the parish should collect the money. The doubt in the case of *Reg. v. Everton* was whether the exception from liability of particular parts of each parish did not alter the nature of the rate; but that difficulty does not arise here, and that case is therefore an authority for the respondents. The case of *Reg. v. Christchurch* is clearly distinguishable from the present; each ward and precinct there had nothing to do with a parish, and the reason for the decision was that the parish had not notice that the party who paid the watch-rate was an inhabitant. I think there was a settlement obtained by the payment of these local taxes, and therefore the order of sessions should be quashed.

MELLOR, J.—I am of the same opinion. The question is whether the deceased paid his share towards rates which were “public taxes or levies of the town or parish” in which he inhabited. *Prima facie* he was liable to pay these rates because he lived in the parish. I think the nature of these rates makes them sufficient to create a settlement; the land tax is sufficient, and *a fortiori*, the rates here should be; that tax, although in early times it was made by the inhabitants, was rendered perpetual by 38 Geo. 3, c. 60, and its collection had from that time nothing to do with parish officers; yet in the case of *R. v. Axmouth* it was held that although a mere personal tax it still continued to be within the meaning of these Acts. It seems to me that the reasons given for the decisions referred to are abundantly sufficient to make these public taxes or levies of each parish of Exeter.

LUSH, J.—I am of the same opinion. That these are public taxes I never entertained the slightest doubt; the only question about which I was not certain was whether they were public taxes of each parish. If the rates had been made and collected by the commissioners for the whole city there would have been no notice of inhabitancy to the parish authorities. But by the 141st section the commissioners had power to appoint assessors for each parish separately, and they seem to have done so.

Order of sessions quashed.

Attorney for appellants, *J. E. Fox*, for *H. W. Hooper*, Exeter.

Attorney for respondents, *G. F. Coke*, for *T. E. Drake*.

Q. B.]

CLIFF v. THE MIDLAND RAILWAY COMPANY.

[Q. B.]

Wednesday, Feb. 2.

CLIFF v. THE MIDLAND RAILWAY COMPANY.

5 *Railway—Level crossing—Negligence—Obligation to provide a gatekeeper.*

In an action against a railway company by the plaintiff, who had been knocked down and injured by a train of the company whilst in the act of passing along a level crossing (an occupation road), where the gates were left unfastened and there was no gatekeeper, the learned judge who presided at the trial left, amongst other things, to the jury, as evidence of negligence on the part of the company, the fact that a gatekeeper was not kept at the place, though one had been kept there originally; and also the fact that the company had taken no steps till after this accident, notwithstanding the occurrence of previous accidents at the same place, to exercise the powers given them by an Act of Parliament of making a new road and discontinuing the use of the level crossing:

Held, that this was a misdirection.

Bilbee v. The London and Brighton Railway Company, 18 C. B., N. S., 584; 13 L. T. Rep. N. S. 146, commented upon.

In this case, which was tried before Byles, J., at Leicester, on the 12th July 1869, the declaration alleged that the defendants were possessed of a certain railway which crosses at a level a certain road or way leading from a certain highway called Mantel-lane to the Snibstone Colliery, in the county of Leicester; and the defendants did not take reasonable and proper care, nor use reasonable and proper means for the protection of persons using the said road or way where it was crossed by the said railway, and negligently omitted so to do; and erected and kept improper gates at the side of the said railway where it crosses the said road or way, and negligently kept the said gates and roadway open and unfastened, and negligently invited persons to pass the said road or way when it was dangerous so to do, and improperly and negligently drove and managed their trains on the said railway; and the plaintiff, whilst lawfully using and entitled to use the said road or way, and being permitted and invited by the defendants so to do, was, owing to the said negligent conduct of the defendants, knocked down by a train of the defendants and had one of her legs crushed, and was otherwise hurt and wounded, &c.

The defendants pleaded (1) not guilty, and (2) that the plaintiff was not permitted or invited to use the road or way as alleged. Issue was joined on these pleas.

There was also a demurrer to so much of the declaration as charged the defendants with not taking reasonable care or means to protect persons using the way or road, and erecting improper gates, and negligently keeping the gates and road or way opened and unfastened, on the ground that there was no duty on the defendants to do the said things. To this there was a joinder in demurrer.

It appeared from the evidence adduced at the trial that on the 17th Aug. 1868, the plaintiff, a girl between ten and eleven years of age, was, along with another girl of about the same age, taking dinner to her father, who was a workman at the Snibstone Colliery, which did not belong to the defendants, and had been in existence before the defendants' line of railway had been made. When the two girls arrived at the level crossing (an occupation road for carriages and foot passengers) leading from the highway, called Mantel-lane, to the colliery, the ordinary train having just passed, they attempted to cross, and were both knocked down by an engine

and tender which were employed in shunting trucks. The plaintiff was severely injured and her companion killed. The driver of the engine both whistled and shouted to them, and a pointsman, about ninety yards off, also shouted to them, but the girls, owing to their holding an umbrella between them and the quarter whence the men shouted, neither heard nor saw them. Owing to the number of collieries adjacent, there are many sidings near this spot, and trains and engines pass more frequently there than at ordinary parts of the line. The attention of the company had been called to the dangerous nature of the crossing by a letter written in 1861, and by one fatal and several other accidents which had previously occurred there. Originally the defendants had gates erected across the occupation road or level crossing, and had kept a gatekeeper there, but they had ceased to do so, and the gates were left unfastened.

By an Act of Parliament, the 28 & 29 Vict. c. 335 (1865), reciting that it was expedient that the defendants should be empowered to construct a road in the township of Snibstone, and that the use as a thoroughfare of so much of the above occupation road as crossed the railway should be prohibited, the defendants were empowered to make a new road and stop up and discontinue the use as a thoroughfare of so much of the said occupation road as lay between the fences and crossed the defendants' line. The works were to be completed within five years, when the powers given by the Act for the purpose were to cease. At the time the plaintiff sustained the injuries complained of, the company had not diverted the road or taken any steps to do so. Since the accident the level crossing has been stopped up, and a new road made.

Byles, J., in summing up the case to the jury, said that, in his opinion, there was little, if any, evidence of negligence on the part of the driver of the engine, and, after referring to the previous accidents, and the powers conferred on them by the Act 28 & 29 Vict. c. 335., on which they had not acted till after the accident, said, "If you think that the injury to this little girl, looking at the provisions of the statute as to diverting the way, certainly one fatal former accident, at the former complaints, and at the letter of 1861, and looking also at the fact that there was originally a gatekeeper, and that the gatekeeper was discontinued, if you think that was negligence on the part of the company which led to this accident, you must give your verdict for the plaintiff, if you think there was no contributory negligence on her part."

The jury returned a verdict for the plaintiff, damages 250*l.*, finding generally that the railway company were guilty of "negligence as to the crossing," but acquitting of negligence the driver of the engine.

Keane, Q. C., having on the part of the defendants obtained a rule nisi, calling on the plaintiff to show cause why there should not be a new trial, on the ground, amongst other things, of misdirection on the part of the learned judge in telling the jury that there was evidence of liability on the part of the defendants, and also on the ground that the verdict was against the weight of evidence,

Bulwer, Q. C., and Graham, now showed cause against the rule. The railway company were bound to take sufficient precautions in the case of level crossings where there is considerable danger, as there was here, a fact which the company must have well known from the number of accidents which had previously occurred there, one of them of a fatal character. Its dangerous character is in fact admitted by the company, seeing that they themselves had gone to Parliament to obtain an Act to enable

Q. B.]

CLIFF v. THE MIDLAND RAILWAY COMPANY.

[Q. B.]

them to discontinue the use of the level crossing and to make a new road. It is not contended that there was an absolute obligation on the part of the railway company to have a gatekeeper at the spot; but there is an obligation to take reasonable precautions under the circumstances of the case—to be guilty of no negligence. The question of what they should have done was one of which the jury could best judge, and the jury, though they have acquitted the driver of the engine of negligence, have found that the company were guilty of negligence as to the crossing. *Bilbee v. The London and Brighton Railway Company*, 18 C. B., N. S., 584; 13 L. T. Rep. N. S. 146, is a distinct authority in favour of the plaintiff. In that case a railway crossed on a level a public carriage and footway at a spot which from the fact of there being a considerable curve in the line and a bridge near preventing trains coming in one direction from being seen until very close, was peculiarly dangerous, there being gates across the carriage way, which were kept locked, but the footway was protected only by a swing gate on either side, no person being there to caution people passing. The plaintiff while using the footway having been knocked down by a passing train and injured, it was held that it was properly left to the jury to say whether or not the company had been guilty of negligence. [LUSH, J. In that case the railway company had obstructed the view of persons crossing by building a bridge close to a curve. They may thereby impose upon themselves an obligation. There is nothing of that kind in the present case.]

Stubble v. The London and North Western Railway Company, 13 L. T. Rep. N. S. 376;

Gardner v. Grace, 1 F. & F. 359, were also referred to.

Keane, Q.C. and Mereweather, in support of the rule.—The learned judge was wrong in leaving to the jury, as evidence of negligence, the omission to keep a gatekeeper, and to divert the road. The jury may have been induced by the direction of the learned judge to think that the defendants were bound to make the new road and discontinue the use of the level crossing before the time of the accident; but there was no obligation on the defendants to do so, as the Act of Parliament gave them five years for doing it. The jury may also have been led to think that there was a legal obligation on the part of the company to continue to keep a gatekeeper at the crossing because they had once kept one there; but there is no such obligation, and the direction was therefore wrong, and the rule for a new trial should be made absolute.

[Judgment on the demurrer was taken without argument for the plaintiff, at the conclusion of the argument on the rule.]

MELLOR, J.—We are of opinion that the rule must be made absolute for a new trial. I quite agree with the learned counsel for the plaintiff to this extent, that when Parliament authorises a company to construct a railway and to work it, it is implied in that that the company are to work it in a reasonably proper manner, in the usual way in which railways are worked; and in crossing a footway on a level the company are bound, as to the mode of working their railway, as to the rate of speed* and signalling, or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway. But, as I understand my brother Byles's summing up, he goes a great deal further than that. [His Lordship here read from the summing-up of Byles, J.] By leaving the question thus to the jury, he involved the consideration of the provisions of the statute which he had already

said are stronger evidence of negligence than the matters to which he had previously referred. He mixes up the statute with the previous accidents, with the complaints, and with the fact that a gatekeeper had been discontinued who had formerly been placed there. Now that being so, and coupling it with what passed between the learned judge and the jury when they were discussing the terms of the verdict, and the finding with reference to negligence, the learned judge telling them that they were not bound to specify any particular act of negligence, it is clear that the learned judge was under the impression, and so left it to the jury, that all these matters to which I have referred amounted to evidence of negligence; and if in truth one or more of them did not really amount to negligence there can be no doubt that the direction would be wrong, because the jury, for aught we know, may have founded their verdict on the fact that this company, having power from Parliament to stop up and divert the way, had not stopped it up and diverted it, although the Legislature itself had allowed five years for them to exercise their discretion. The jury may have supposed that the not doing that at an earlier time, and before the accident, was evidence of negligence, upon which they might give a verdict for the plaintiff; and this is the more probable when we see that the learned judge construed the expressions of the statute as an admission by the company of the dangerous character of the crossing. It is impossible to distinguish these various considerations; and without saying more upon that point, it seems to me that there was an erroneous direction to the jury, which was calculated to mislead them, and may have left it open to them to find a verdict for the plaintiff, upon a state of facts which were not negligence at all; because it appears to me that it is impossible to say that it was evidence of negligence that the company, having power at their discretion within five years to stop up this way, did not stop it up, and did not divert the road. With reference also to the gatekeeper I am inclined to think the direction was wrong. I have already said that the Legislature, when it authorises a railway company to construct a railway and to work it, does by implication require that the company shall work it in the ordinary way, and shall take all usual and reasonable precautions in the working of the traffic, in the management of the trains up and down the line, as experience shows to be proper and necessary; and if they failed in that they would be liable to an action for negligence. In this particular case the jury's attention was not confined to any negligence in the management of the trains, or in the mode in which they were sent backward and forward; but their attention was directed to the question of whether or not it was negligence in not having a gatekeeper, and in not stopping up and diverting the way before the end of the five years which Parliament had allowed for that purpose. Now, in this state of things, I am satisfied that there was or may have been a miscarriage in the verdict of the jury, and that the cause must go down for a new trial. I would also say with regard to the case of *Bilbee v. The London and Brighton Railway Company* (*ubi sup.*) which was much pressed upon us by the counsel for the plaintiff, it does appear very difficult to distinguish this case from that, so far as the duty to provide a gatekeeper is concerned; but my brother Lush has suggested a distinction in the course of the argument, and if it be not the distinction I really cannot suggest any other, viz., that where a railway company are empowered to make their railway and to use it, and to cross a road on the level, and they make a bridge so near as to obstruct the sight of the person who has to cross, and so to

Q. B.]

CLIFF v. THE MIDLAND RAILWAY COMPANY.

[Q. B.]

impose a difficulty or a danger which was not contemplated by the Legislature, they are bound to use extra precautions, and such a case may be distinguished from the present possibly on that ground. I am not very clear that that is a sound distinction, but it is a distinction upon which possibly we might have felt at liberty to act if we had found it necessary to do so. Without expressing any further opinion upon the case of *Bilbee v. The London and Brighton Railway Company*, I think that if the present case cannot be distinguished on the grounds I have mentioned, we should be bound by it in this court. But that is a very distinct question from that on which we are sending the case down for a new trial, namely, that a miscarriage may have arisen from the learned judge leaving as evidence of negligence what appears to us to be no evidence of negligence at all.

LUSH, J.—I am of the same opinion. I think that the direction of the learned judge is faulty, inasmuch as it leaves it open to the jury to find a verdict against the company, either upon the ground that they had omitted to divert the road which they had taken power to do by the Act of Parliament, as if the Act had imposed an obligation upon them to do it, or on the ground that they had taken away the gatekeeper whom they formerly employed at the crossing, or had omitted some other undefined precaution for the protection of persons going upon and crossing the railway. Now it seems to me that there was no obligation upon the company to do either the one thing or the other; no obligation to divert the road, because the Act authorising them to do so is merely permissive, and no obligation to fence off the road or to employ anyone there to warn persons coming on the road, because no such obligation is imposed by the Legislature; and I do not see in this case, supposing anything a railway company could do would create an obligation, that the company have done anything here to create that obligation. I think that where the Legislature authorises a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the Legislature intends that the persons who have to cross that line should take the risk incident to that state of things. But it may be, and I am inclined to think that it is, a sound principle that if the railway company, in the construction of the works so authorised, in the exercise of the discretion which the Legislature has vested in them, do anything which prevents persons passing over the line from taking care of themselves, and exposes them to greater peril than is ordinarily incident to a level crossing, the company thereby impose upon themselves an obligation to take other than the usual precautions for the protection of persons who have a right to pass there, and, as it were, to make up to the public for that which they have taken away from them. That I take to be the principle of *Bilbee v. The London and Brighton Railway Company*. As I read the case, it may well be sustained upon that principle. If it cannot, then I do not see any ground upon which it can be sustained. But it appears to me, although the principle is not enunciated in that specific form, that that is the ground upon which the learned judges in that case acted. It appeared at the trial that the number of trains which passed the crossing was very considerable; that the crossing was on a curve, and that at about 150 yards from it there was a bridge over the line which obstructed the view of the trains from that direction until they were partly under it. The plaintiff, who was deaf, had partly got on the line. His attention was attracted by an engine which ran by on the up line, and whilst his attention was thus diverted a down

train which passed by at the same time knocked him down. Now it was pressed, I observe, in the argument for the plaintiff that this was a peculiarly dangerous place; that trains were perpetually passing; that there was a curve, and a bridge obstructing the view; that some notice or some man might have been placed there, and that a swing gate was improper. Erle, C. J., who tried the cause, delivered judgment in these terms:—"I do not intend to lay down a rule as to footpaths elsewhere, or to interfere with the statute law; the ground of my decision is the great degree of risk in this place. There were many trains; it was on a curve and near a bridge. The noises of the different trains would interfere with each other, and the bridge would obstruct the sight; and I am therefore unable to say that the judge was bound to nonsuit." Now, as I have said, the principle I extract from that decision is this. The railway company had so constructed their line as to make a sharp curve at the spot where this train passed; they also built a bridge which prevented a passenger from seeing a coming train until it was very near; and on that account, the company having themselves created a peculiar difficulty, and exposed passengers to more peril than the Legislature contemplated, and more than was ordinarily incident to a level crossing, undertook the obligation of providing some additional protection. That appears to me the principle upon which that case may well stand; and I think it is a sound principle and one of easy application, distinguishing that case from this, and from many others that have been quoted. Whether the rule was properly applied in that or in any other case is not the question. Now there is nothing of the like kind in this case. There is nothing more here than the level crossing which the Legislature has authorised. There were no works of the company which impeded the view of the line and made it more perilous for persons to cross the level, than the Legislature must be taken to have been aware of when the Act was passed. Therefore, there being no obligation arising out of the acts of the company and no obligation imposed by their statute, I am unable to see any duty whatever, and if there was no duty, the omission to do what they were not bound to do cannot be a ground of complaint. Whether the jury acted upon the view that the company ought to have diverted the road, having obtained powers by an Act of Parliament to do so, or that they ought to have kept a person at the gate to warn people, or ought to have done something else which was not done, I do not know. But I cannot find in the case any facts which to my mind create an obligation on the part of the company to do either the one thing or the other. Upon that ground I think that the direction was wrong. I need hardly say that I agree with my brother Mellor that in the management of the trains upon a line which crosses a way, whether public or private, upon a level, the company are of course bound to use all reasonable care, vigilance, and skill; and the greater the thoroughfare over any part of the line the greater the care and vigilance that ought to be exercised by those who have the charge of the trains. Those persons ought to anticipate that people may be crossing where they know people have a right to cross. Whatever the degree of traffic may be, be it more or less, a corresponding degree of care is required on the part of the company. Here the jury have exonerated the driver from blame; and the only ground on which the verdict can be sustained is that there is some duty or other resting upon the company to take some undefined precaution, as to which I see no obligation created in point of law.

HANNEN, J.—I am of opinion that there ought to be a new trial for the reasons given by my brother

Q. B.]

LONGBOTTOM v. BERRY AND ANOTHER.

[Q. B.]

Mellor. Therefore, I abstain from expressing any opinion as to whether or not this case can be distinguished from that of *Bilbee v. The London and Brighton Railway Company*.

Rule absolute for a new trial.

Attorneys for plaintiff, *Paterson, Snow, and Burney*.
Attorneys for defendants, *Beale, Marigold, and Beale*.

April 27th and Dec. 13th 1869.

LONGBOTTOM v. BERRY AND ANOTHER.

Fixtures—Equitable mortgage—Bill of sale—Mode and object of annexation.

K. the occupier and owner in fee of certain land and buildings thereon, deposited in 1862 the title-deeds relating to the same, with the defendants, a banking company, to secure the balance of his account with them. K. subsequently built on this land a mill and fitted it with engines and machinery, and also with such articles and machinery as were necessary for the purposes of carrying on his trade as a woollen cloth manufacturer. In 1865, in consideration of a sum of money advanced to him by the plaintiff, K. assigned to the plaintiff by bill of sale "all the machinery, fixtures, implements, utensils, effects and things in or upon" the mill, and enumerated in a schedule, the plaintiff having at the time notice of the previous deposit by K. of the title-deeds with the defendants. In 1866, K. conveyed to the defendants by deed the land and buildings (including the mill), before mentioned, together with all the "steam-engines, shafting, going gear, tenders, pump, fixed machinery, and things fixed and fastened to the freehold of the said mill, &c.," the plaintiff not acquiescing in such conveyance to the defendants.

Of the articles enumerated in the schedule to the bill of sale, some were fixed to the building by screws and bolts or soldered with lead, in some cases being affixed to the floor, in some both to floor and roof, and in others to the side walls, the object of the fixing being to insure the steadiness of the machines whilst they were at work.

Other articles not so fixed were a washer or washing machine, standing by its own weight on the floor; press plates, press papers, clogs and fencings; a loom machine for sizing and drying the threads of cloth, and a beaming frame, each of which stood by its own weight on the floor; a large desk standing by its own weight in the counting house; condenser bobbins around which the wool was wound, and certain loose articles called fencings and clogs which are necessarily used with the hydraulic presses.

Held, that the former class of articles had as between the plaintiff and the defendants (equitable mortgagees), become part of the freehold, and passed to the defendants under their mortgage and subsequent conveyance but that the latter class of articles were movable chattels, and passed to the plaintiff under his bill of sale.

This was a special case stated for the opinion of the court, pursuant to an order of Mellor, J.

The action was brought to try the right to certain machines and other articles, and the judgment of the court was desired as to the ownership thereof, under the following circumstances.

1. The plaintiff is a wool merchant, carrying on business at Gomersal, in the county of York, and the defendants are the trustees of a certain banking company called the West Riding Union Banking Company, carrying on business at Huddersfield, Dewsbury, and Batley, in the West Riding of Yorkshire.

2. In the year 1855 one William Kershaw, of

Gomersal aforesaid, woollen cloth manufacturer, cloth finisher, and army clothier, was the owner in fee simple in possession of certain land situated at Gomersal, on part of which land there was then a building which had been used as a cloth drying house.

3. The said William Kershaw kept an account with the bank, and in the year 1862 he deposited with the bank the title-deeds relating to the said land and building, and certain other buildings which had been erected since 1855 on the said land, as an equitable mortgage to secure the balance of his account for the time being.

4. The bank continued to hold the said deeds as such security from the time of the said deposit until Aug. 1866, when the land and premises to which the deeds related were conveyed to the bank as hereafter mentioned.

5. After the said deposit of the title-deeds, and before the year 1865, the said William Kershaw built upon other part of the said land than that occupied by the buildings mentioned in paragraphs 2 and 3, a large mill and other buildings; and, having completed the said mill and the said other buildings, he fitted them with apparatus for generating and communicating steam power, and fitted up steam and gas pipes for heating and lighting the whole of the said mill and the said other buildings, and furnished such part of them as he required with machinery for the purposes of his said trade of a woollen cloth manufacturer, and thenceforward used and occupied all the said premises as a factory for the manufacture of woollen cloth.

6. By a bill of sale, dated 18th Jan. 1865, the said William Kershaw, in consideration of a certain sum of money advanced to him by the plaintiff, assigned to the plaintiff all the machinery, fixtures, implements, utensils, effects, and things in or upon the said factory and enumerated in the schedule thereunder written. The said schedule comprises all the machines and articles the ownership of which is in question in this case. The said bill of sale was duly registered under the Bills of Sales Act.

7. For some time previously, and up to the 25th Aug. 1866, a sum of money considerably exceeding 8000*l.* was due to the bank from the said William Kershaw on the balance of his account, and secured by the deposit of title-deeds mentioned in paragraph 3, and it was, some months previous to that day, agreed between the said William Kershaw and the bank, that the bank should become the absolute purchaser of the premises comprised in the deeds so deposited for the sum of 8000*l.* That agreement was carried out by a deed bearing date the day and year last above mentioned, by which the said William Kershaw, in consideration of the sum of 8000*l.* with which he was then credited by the bank on account of their claim against him, conveyed to the defendants and their heirs as trustees of the bank, all that close piece or parcel of land or ground situate at Upper Spen, within Gomersal aforesaid, containing by measurement 0a. 3r. 29p., and then in the possession of the said William Kershaw. And also all that cloth dry-house, and the cottages, warehouse, and mill called Perseverance Mill, and other buildings erected and built upon the said close piece or parcel of land or ground, and then in the tenure or occupation of the said William Kershaw and his tenants. And "all those three several steam-engines, shafting, going-gear, tenters, pump, fixed machinery, and things fixed and fastened to the freehold of the said mill, buildings, and premises, and then being in and about the same, and part and parcel thereof, together with all houses, fixed machinery, and fixtures, rights, liberties, easements, privileges, and appurtenances whatsoever to the said hereditaments and premises thereof conveyed, and every or any part

Q. B.]

LONGBOTTOM v. BERRY AND ANOTHER.

[Q. B.]

thereof respectively belonging or appertaining." The said deed was not registered under the Bills of Sales Act.

8. At the time of the making of the bill of sale, dated the 18th Jan. 1865, to the plaintiff, the plaintiff was aware of the previous deposit of the title-deeds with the bank, and at the time of the agreement for the absolute purchase and premises being made by the bank as in the 7th paragraph mentioned, the plaintiff was made aware of that agreement, but he was never asked to acquiesce therein, nor did he do so in any way. Before the making of the said agreement for the absolute purchase of the said mill and premises as aforesaid, the trustees of the bank knew of the plaintiff's said bill of sale.

9. The said William Kershaw became bankrupt on the 21st Jan. 1867. Before that date the plaintiff, to whom a much larger sum of money was then and still is due from the said William Kershaw under the said bill of sale than the value of the machinery and articles comprised in such bill of sale, entered the factory, and without removing anything, took possession of the machinery and articles therein under the said bill of sale.

10. The defendants claimed part of the said machinery and effects under the deposit of title-deeds mentioned in paragraph 3, and the conveyance of the 25th Aug. 1866, or one of them; but by agreement between the plaintiff and defendants all the machinery and articles in question in this cause have been sold by public auction on the joint account of the plaintiff and defendants, and as arranged between them the bank has received and now holds the produce of the sale, subject to the determination of the court on this special case.

11. It is conceded between the parties to this suit, that on the one hand the defendants as representing the bank had become entitled to the fee simple in the mill premises formerly belonging to Kershaw, and to such of the machinery and fixtures therein as are necessarily incident thereto, or as became part of the freehold thereof when placed in or connected as hereinafter mentioned with the premises by the owner of the premises, he being also occupier thereof and owner of all the machinery worked therein; and, on the other hand, it is conceded that the plaintiff has become entitled to all the property in or upon the mill and premises which would not pass to the mortgagee by deposit of the deeds relating to the freehold. Both parties were large creditors of Kershaw under his bankruptcy, and both will be losers by his failure.

12. The mills used for the purposes of the various trades carried on in the manufacturing district of the West Riding of Yorkshire generally resemble each other in construction and in the manner in which the steam power is supplied, but differ in minor arrangements and in the machines with which they are furnished according to the particular trade which is being carried on in them for the time being. In the majority of cases where mills are held by tenants, the land, buildings, steam engines, boilers, main shafting and gas and steam piping are the property of the landlord, and the tenant supplies and furnishes the mill with the species of machinery suited for the particular trade to be carried on by him, which last-mentioned machinery is in such case the property of the tenant. Occasionally however, and particularly when the owner of the mill and machinery relinquishes business, mills are let furnished by the owner with machinery, and in such cases the owner in order to rebut the presumption of ownership in the tenant, sometimes advertises in the newspapers circulating in the district that such machinery and things as are in question in this cause belong to him, and not to the tenant for the time being in possession of the premises.

13. Machinery such as is in question in this cause is never rated to the relief of the poor, although the steam engine, boilers, and shafting always are.

14. The usual mode of rating mills of all kinds, including the steam engine, boilers, and shafting in the West Riding of Yorkshire is, according to the actual or estimated horse power of the engine or other first power. The requirements of the various manufacturing trades of the West Riding district are not so diverse, but that the same building may be applied to any or all of them, and cases are by no means unfrequent of one floor of a building being used for one kind of manufacture, and another floor of the same building being used for an entirely different one, both being supplied with motive power from the same steam engine, but the machinery used in such floors if not belonging to the owner of the mill, or his tenant invariably, is found by the sub-tenants. The mill and premises of the said William Kershaw are well adapted for the silk cotton or worsted manufacture, as well as for the woollen manufacture. Within the town of Gomersal are eight mills of which four are at present used for the manufacture of woollen cloth, and for the manufacture of worsted, yarn, and stuffs—one for the manufacture of shoddy, and another for the manufacture of cotton. One of the mills now used for the worsted manufacture was formerly used for the woollen manufacture by the owners of it, and it was recently sold under their bankruptcy to the present owner, who is a worsted manufacturer, and the one now used for the cotton manufacture was about two years ago used for the woollen manufacture.

14. The machines adapted to all the various kinds of manufacture are dealt in by machine brokers and others, and may usually be bought ready made ready to be placed in a mill, and to have the steam power belonging to such mill applied to them in the manner hereinafter described. The frequent improvements in the several processes of manufacture render occasional changes of machinery desirable, and the large manufacturer finds it his interest to replace portions of his machinery by others of improved construction or more novel arrangement.

15. The machines and articles, the ownership of which is in question in this cause formed part of the machinery used by the said William Kershaw in his said business of a woollen cloth manufacturer and cloth finisher, but they did not comprise all the machinery in the said mill and premises, nor even the more valuable part of it. Certain very valuable machines comprised in the said bill of sale to the plaintiff are of a very massive character, and unlike other machines hereinafter specially described, are kept steady by their own weight, and therefore do not require to be attached, and were not in this case attached in any way to the building. The plaintiff's right to the machines of the character just described the defendants do not dispute.

16. There is no custom of the trade in the said West Riding District that machines, such as those in question in this case, and attached to the building in the manner hereinafter described, should go with the freehold, but on the contrary they are, save in exceptional cases, the property of the tenant, and removed by him at the expiration of his term.

17. Steam power is supplied to the mill in which the machines and articles in question in this cause are placed by shafting in the usual way. Shafting is of three kinds or classes, namely: Main shafting, cross shafting, and counter shafting. The mode of fixing main and cross shafting, usually, is by having iron bearers cast on the pillars of the mill, or otherwise fixed or annexed by some other permanent way to the building; an iron socket is annexed to the bearer; upon this socket the shaft is fixed, a metal cap is put over the shaft and screwed or bolted to

Q. B.]

LONGBOTTOM v. BERRY AND ANOTHER.

[Q. B.]

the bearer. The cap keeps the shaft in its place, and the shaft cannot be removed without taking off the cap. Counter shafting is fixed in a similar way, namely, by caps screwed on, or bolted to bearers or hangers, which are screwed or bolted to the floor of the room above. The main shafting consists of substantial rods or bars of iron running along each room or floor of the mills, to which rods or bars a rotatory motion is communicated direct from the steam engines. Cross shafting consists of similar rods or bars, but often of a lighter description and is fixed at right angles to the line of main shafting.

Par. 18.—Enumerated the various machines and articles in question, which are afterwards described.

19. The said machines and articles are all, with the exception of the gig rods, press plates, press papers, loom machines, beaming frame, condenser bobbins, fencings, clogs, and straps or belts, attached to or connected with the fabric of the said mills and premises, in the various ways hereinafter described.

20. A shake willey is a machine for detaching the various fibres of wool from each other, and then mixing or blending the same together before the wool is carried to a machine hereinafter described called "the tenter hook willey." The shake willey stands about 6ft. high, is about 5ft. broad, and 6ft. long, and weighs 15cwt. or thereabouts. Of the two shake willeys in question in this cause one was attached to the fabric of the mill in the following way. A hole having been drilled in the flags forming the floor of the mill, a bolt with a screw at the top thereof was inserted and fastened in the hole by means of melted lead, so as to leave the top of the bolt standing from 1in. to 3in. above the flags. In the feet or frame work of the machine are holes large enough to admit of the bolt passing through it. When the machine was to be fixed in its place it was lifted up and placed on the floor of the mill in such a way that the bolt should pass through the holes in the feet or framework thereof, and a nut was then screwed on to the top of the bolt, and the machine was thereby made firm, and prevented from oscillating or being moved from its place when in use.

21. The other shake willey was attached to the floor of the mill as follows, that is to say, holes were drilled in the flap forming the floor of the mill, and the machine was placed on the floor so that certain holes in the framework thereof, which are made for that purpose, were placed over the holes drilled in the flags. Wooden pegs or wedges were then driven through the holes in the framework of the machine into the holes in the floor, until the pegs or wedges were firmly fixed; and still further to fix the said machine, a nail or iron spike was driven into each such peg or wedge to cause it to expand and hold the more firmly. The said machine could not be moved without pulling out, or breaking, or damaging the said peg or wedges; nor could the said first-mentioned shake willey be moved without unscrewing the nuts; but when the nuts were unscrewed in the one case, and the peg or wedges pulled out or broken in the other case, the said machines could be removed. This removal of the nuts could be effected in a few minutes by an unskilled workman. In consequence of the great speed at which the said shake willeys run, and the uneven manner in which they are fed, it is necessary to fasten them in some way to the fabric of the building to keep them steady, and prevent them jerking or moving from their place, and the object of the fixings, as above described, was simply to insure steadiness and keep the machine in its place when working; for if these machines were not kept in their places, the belt or strap from the shaft would get slack, and then not turn the machine at the great speed required.

22. A winding-on machine is a simple apparatus for

winding cloth on to rollers. It consists of an iron framework supporting a wooden roller or brush, it is about 8ft. broad, 4ft. high, and 4ft. long, and weighs 5 cwt. or thereabouts. It was attached to the floor of the mill by bolts and nuts in the same manner as the shake willey first above described, and the object of its being so attached was simply to keep it steady and in its place whilst the roller revolved.

23. A gig or raising gig is a machine for raising the nap or surface of cloth. It is about 7ft. high 7ft. broad, and 4ft. long, and weighs 10cwt. or thereabouts. It was attached to the floor of the mill by bolts and nuts in the manner hereinbefore described in regard to the shake willey first described, and for the same purpose. There were four gigs in all; to each pair of gigs there was driving gear which was bolted to an iron pedestal, the pedestal being bolted in a like manner as the first described shake willey to the Ashlar foundation let into the floor for that purpose.

24. A wringing machine is a machine for wringing the water out of cloth after it has been washed. It is about 4ft. high, 2½ft. broad, and 2ft. long, and weighs 6cwt. or thereabouts. It was attached to the stone work which forms part of the floor of the mill by means of bolts and nuts as above mentioned in regard to the shake willey hereinbefore first described, and the sole object of fixing was to keep it steady and in its place when at work.

25. A tenter-hook willey is a machine for drawing out the fibres of the wool so as to make them straight and regular. It stands about 6ft. high and is 3½ft. broad, 12ft. long, and weighs 1½ tons or thereabouts. It was attached to the floor of the mill in the same manner as the shake willey described in the 21st paragraph of this case, save that there were no nails or iron spikes driven into the wooden pegs or wedges. In consequence of the great speed at which this machine revolves it is necessary to fasten it to the floor, or otherwise, to prevent a jerk when it is fed with the material, and to keep it steady and in its place, otherwise the strap would get slack.

26. The double balloon drying machine, which revolves over a coil of steam pipes, which is attached to the main steam pipes of the mill in order to dry the material on it, is a machine for drying webs or threads that have been warped and sized before they are woven. It is a slender apparatus, the framework of which is of wood and one end an iron plate or holdfast, about 12in. long and 3in. broad, and ½th of an inch thick, was fastened by screws to the top of the framework of the machine, and the other end of the said iron plate or holdfast was fastened by screws to the under side of the floor of the room above. A similar iron plate or holdfast was attached in the same manner to the framework at the bottom of the said machine, the other end of which was fastened by screws to a third iron plate, which said last-mentioned iron plate or holdfast was let into and fastened by lead to the flags forming the ground floor of the mill. By taking out the screws attaching the iron plates of the framework of the said machine it could be completely detached. This machine as made must be attached to something before it can be worked, as it has not sufficient framework to stand by itself, whether in motion or not.

27. A drying machine is a machine or apparatus for drying wool; it consists of two parts, that is to say, a fan and a drying cage. The fan is an iron box or chest which was attached to the Ashlar floor of the mill by bolts and nuts, as hereinbefore described with regard to the raising gig and driving gear in paragraph 23. The cage is a kind of wooden trough supported on a light iron framework, and in or on the wirework placed on the top of this trough,

Q. B.]

LONGBOTTOM v. BERRY AND ANOTHER.

[Q. B.]

the material to be dried is placed. The trough is fastened by bolts, nuts, and screws to the framework of the fan, which was fastened to the stone forming the floor of the mill as just mentioned. The fan is driven at a great speed by a belt from the shafting, and must be firmly fixed to keep it steady and from moving, neither part of this drying machine is of use without the other.

28. A scouring machine is a machine for scouring or washing wool. It consists of two parts—the rollers and the cistern. The framework of the rollers was fastened by bolts and nuts like the shake willey described in paragraph 20, the object of the fastening being, as in other cases, for the purpose of keeping it steady, and to prevent it moving when at work. An iron rod or stay was at one end, bolted with a screw and a nut to the beam of the roof, and at the other end with another screw and nut to the framework of the machine, so that the machine could not be moved without unscrewing the nuts of the bolts let into the stone floor, and one of the nuts of the iron rod or stay bolted to the roof and framework, as aforesaid; but when such nuts were unscrewed, the machine was completely detached. The cistern rested on the floor by its own weight. It has a valve, the framework in which the valve works is riveted to the under side of the cistern, an iron pipe was fastened by nuts and bolts to the bottom of the framework of the valve, in order to empty the cistern. This pipe was buried in the soil of the floor, and taken into a drain, and the framework of the valve so riveted as aforesaid could be detached from the outlet pipe by taking out the nuts and bolts, and the cistern was then no longer connected in any way with or to the fabric of the building; but in order to get to the framework of the valve and pipe it was necessary to remove a flag and take out soil. The cistern was supplied with water by another pipe, but such supply pipe was not in any way attached to the cistern.

29. A spinning mule is a machine for spinning the wool, which is brought to it in the half-manufactured state called stubbing—that is, material drawn into a thick yarn or thread. The mule is about 4ft. high, 6ft. broad, and 66ft. long. It consists of two parts: one part was fixed by screws to the floor, and to this part is permanently attached the head gear, which was driven by a strap from the shaft above, and thereby gave motion to the fixed part of the machine, and the other part was unfixed and quite movable. To the unfixed parts there are wheels, which run upon pieces of metal called “carriage slips,” firmly screwed to the floor so as to form slight tramways. By these wheels running upon the said tramways the movable part of the machine is drawn backwards and forwards, to and from the other part of the machine which was screwed to the floor and on which the stubbing had to be placed. The two parts with the metal tramways constitute a mule, and the motive power was communicated in this, as in all other cases, by means of a belt or band, one end of which passed over the drum fixed to the shafting of the mill, and the other passed over a wheel forming part of the head gear of the machine, which head gear was secured to the floor, and also connected by bolts with that part of the machine mentioned above as also screwed to the floor. Neither part of the mule can be worked nor is of any use without the other. The object of fastening part of the mule as above described is to insure steadiness and to prevent it from moving, as it would do if not fastened, every time the movable part was sent against it.

30. A washer or washing machine is an apparatus for washing cloth after it is woven. It is about 5½ft. high, 4½ft. broad, 6ft. long, and weighs 1½ tons or thereabout. The principal portion of it is an iron

frame lined with wood, standing on the floor entirely by its own weight. There was, however, attached to it a lead pipe to let water into it. This pipe is two inches in diameter, and was carried by two branches through two holes in the woodwork of the machine, and the end or opening of this branch of the lead pipe was hammered out flat to the wood inside the cistern, so as to expand and form a flange, which surrounded the hole in the wood for the space of about an inch, so that the pipe could not be drawn out without forcing up or cutting off the flange, and restoring the mouth of the pipe to its original size. The pipe was connected with the water pipes which supply the building, and the water pipes are connected with the water pipes laid under the yard and the public turnpike road, and thus communicate water from the town's mains. The pipe could also be supplied with water from a well belonging to and situated on the said premises by means of another lead pipe one inch in diameter and several feet in length, which last-mentioned pipe was, for the sake of convenience, held in its place at one point by a small iron stay or band which was fastened to the machine by means of screws, and these screws would have to be taken out before the last-mentioned pipe could be moved.

31. Fulling stocks are machines or apparatus for rendering cloth thicker, closer, more compact and solid in substance. A pair of stocks consists of two large wooden hammers which are made to fall upon the cloth, which is placed in a cistern below saturated with water. The hammers are worked, that is made to rise and fall at intervals, by a cast-iron cogged or tappet wheel. This wheel is about 4½ft. in diameter, there being one of such wheels to every pair of stocks. The framework of the stocks was on the side thereof steadily held to the Ashlar work forming the floor of the mill by means of bolts and screws, after the manner hereinbefore described in regard to the first-mentioned shake willey, and on the other side was firmly fixed in its place by means of two wooden wedges driven in between it and the Ashlar. In consequence of the great weight of the hammers the machines require to be held very firmly to keep them in position, but, with proper appliances, they can be detached in a few minutes, all that is required being to take out the wedges and unscrew the nuts.

32. A milling or fulling machine is a machine for effecting the same purpose as is attained by the fulling stocks, but by a somewhat different mode. It is about 6ft. high, 2½ft. broad, 8ft. long, and weighs 15cwt. or thereabouts. It was held fast by the framework being screwed to beams about 6in. square, laid just below the surface of the floor of the mill, the space between the machines and over the beams being filled up to the level of the floor with bricks laid in mortar. Neither the machine nor the beams to which it was screwed could be removed without displacing some of the bricks, but the beams form no part of the machine. The floor of the mill does not consist of bricks in any other part than between these particular machines, but on taking these machines away it is necessary to remove several of the bricks.

33. A dry brushing machine is a machine for brushing cloth in a dry state. It is about 7ft. high, 8ft. broad, and 6ft. long, weighs 15cwt. or thereabouts, and was fastened to the floor in like manner as the shake willey described in paragraph 21. There is a long and slender cast-iron framework attached by bolts to the body of and projecting over and beyond this machine; and this framework is sustained and prevented from snapping off by being held up with three iron rods or stays, one end of each rod being nailed to the joists of the floor above, and the other end being bolted to the projecting

Q. B.]

LONGBOTTOM v. BERRY AND ANOTHER.

[Q. B.]

framework by means of a threaded bolt passed through the end of the rod or stay, with a nut screwed thereon to hold it in its place. This machine had also one end of a steam pipe screwed thereto, the other end of the steam pipe being connected with and fastened by an ordinary screw or threaded joint to a main steam pipe laid along the floor of the mill. A condensed water pipe of quarter-inch diameter was also screwed at one end to the machine, and the other end was taken under the floor and through the wall of the building, to carry the water arising from condensed steam.

34. A dry beating gig is a machine for brushing cloth, and thereby loosening the nap, and is a machine of a somewhat similar nature to the dry brushing machine described in the last preceding paragraph. The machine has also an iron framework over it, as described in the last machine, and bolted to and forming part thereof, and was held in its place by being attached with two iron rods to the roof of the building and to the machine by nuts and bolts in the manner described in the preceding paragraph, and the other of the parts rested by its own weight on the floor. There was also attached, by screw or union joints, to the machine, an iron steam pipe, half an inch in diameter, which was connected with the main steam pipe, and also a condensed water pipe, which was fastened to the machine by screws or union joints, and went under the floor through the wall of the building, in the same manner as before described in the case of the dry brushing machine.

35. A hydraulic pump and hydraulic presses constitute the machinery used for pressing the cloth after it has been manufactured, so as to form an even and smooth surface upon it. The pump, which is worked by hand, is about 3ft. high and 4ft. broad and 4ft. long and the presses are each about 8ft. high, 4ft. broad and 4ft. long, and the whole of the machinery of which it is constituted weighs two tons or thereabouts. The pump was screwed to bolts set into an Ashlar stone bed on a level with the floor of the building by means of nuts. A pipe was connected with the pump by a screw or union joint, which pipe was also connected with the cylinder of each of the presses by a screw or union joint. The presses stood entirely by their own weight in holes sunk into the ground, and when the pipe from the pump which is screwed to the cylinder of each press was unscrewed, each press could be completely removed in detached pieces without disturbing any part of the fabric of the building. Until such pipe was unscrewed the press of course could not be so removed. These presses could also be worked by the steam-engine. To do so it was necessary to turn a valve connected with the above pump, so that the water from the steam pump might be driven by the same pipes to the cylinder of the press.

36. In using hydraulic presses in the finishing of woollen cloth, it is necessary to have and use therewith press plates, press papers, clogs, and fencings. Press plates are loose sheets of iron 32in. long, 12in. wide, and about $\frac{1}{4}$ in. thick. They are heated in the press oven hereafter mentioned, and then placed between the different folds of cloth so as to keep the cloth warm during the time that it is being pressed in the hydraulic presses just described. There were from 100 to 200 of them used in the mill of William Kershaw, and at the said sale they were sold at a price per cwt. Press papers are loose sheets of strong glazed cardboard about 36in. long and 31in. wide, they are placed between the different folds of cloth before it is put in the press, and their use is to protect the cloth from the heated press plates, and to give a smoothness and gloss to the cloth with the different folds of which they are compressed in the hydraulic press. There were a

great number of such papers used in the mill of William Kershaw, and they were of considerable value. At the sale the press plates and press papers were sold separately from the hydraulic presses, the papers being disposed of at a price per lb. weight.

37. Press oven. This is an iron box heated by steam, and its use is to put in the iron press plates to be heated before being used as before mentioned. It weighs about a ton, and stood on the floor by its own weight. It was connected by means of screws or union joints, with an iron pipe 1in. in diameter, for the purpose of supplying it with steam from the boilers, and with an iron pipe $\frac{3}{4}$ in. in diameter, by which the condensed water was carried away from the oven into the condensed steam pipe of the small steam engine in the press shop hereafter mentioned.

38. The screw press is a machine used for a similar purpose to that which the said hydraulic packing press hereafter described is used, but is worked by hand, and consists of two wooden boards 2in. or 3in. in thickness, and about 4ft. square, between which the cloth is placed, and by means of an iron screw brought to bear on the upper of the said two boards. The boards are faced towards each other, and the cloth is compressed into a smaller and more compact bulk. The iron screw works in a hole made in the wooden plank or board upheld at the height of about 7ft. from the floor by two other boards, one on either side thereof. This machine rested on the floor by its own weight, but in order to support the said framework two small iron rods, or holdfasts, were inserted at one end and bolted by a nut to the outside, through the wall of the building, and at the other end were attached to the machine by means of a nut and screw. By unscrewing the nuts the whole machine could be at once removed.

39. Small steam engine. In the same room where the said four hydraulic presses and press oven were placed; namely, the press shop there was a small high pressure or non-condensing steam engine of four horse power, the ownership of which is also in question in this case. It was used for the sole purpose of working the said hydraulic presses when the hand pump was not used, and was fastened by nuts secured by four bolts let down into the Ashlar bed or floor built up for the purpose, on which it stood; the steam to set it in motion being conveyed by pipes from one of the main boilers used to generate steam for the condensing steam engines used for communicating power to the mill; which pipes were attached to the steam engine now being described by means of a flange pipe bolted thereto by nuts and bolts. When the nuts and bolts to this steam flange pipe, and the nuts to the bolts in the Ashlar work were unscrewed and withdrawn, the small steam engine could be lifted off the bolts and completely detached.

40. A hydraulic packing press and hand pump form the machinery for packing the cloth previous to its being sent away to the merchant or customer. This class of machine is not by any means invariably a part of a woollen manufacturer's machinery; but the peculiar business carried on by William Kershaw, viz., that of a cloth finisher and army clothier, as well as a manufacturer, necessitated his sending away his cloth in a finished state to great distances, and made it desirable that he should have the means of packing it easily and effectually, and with a greater saving of time than when a common hand screw press is only used. The pump is a hydraulic hand pump for working the packing press, and resembles the hand pump described in the 35th paragraph, except that the pump now being described is smaller in size. The packing press is about 8ft. high, 6ft. long, 3ft. wide, and weighs, with the pump, one ton, or

Q. B.]

LONGBOTTOM v. BERRY AND ANOTHER.

[Q. B.]

thereabouts. The packing case rested on the floor of the first story of a building forming part of the mill premises, and was fixed or stayed by two iron rods, one of which was fastened to and through the wall of the room by a rod or stay through the wall with a nut screwed at the end outside the building, and the other to the joists of the floor above by means of bolts and nuts. The pump was bolted by bolts and nuts to the floor on which it stood, and a pipe from the pump to the press was fastened by screw or union joints. The aforesaid iron rods or stays form no part of the machine, and were used only for the purpose of keeping the machine steady while working. It is necessary that the hydraulic pumps should in all cases be securely fixed in their places, otherwise the pipes conveying the water to the cylinder of the press would get displaced or broken. The hydraulic presses are of no use without a pump.

41. A blowing machine is a small machine or apparatus for giving a gloss to the cloth by causing steam to pass through it. This machine stands by its own weight. One end of a pipe was fastened to it by screws, or union joints, the other end being screwed into the steam pipe used for supplying steam from the boilers to the room in which the machine is placed. There was also an outlet waste pipe, one end of which was attached to the machine by screws, or union joints, and the other end ran through the wall of the building into the underground drain.

42. A Donisthorpe sizing machine and the drying, warping and loom machines connected therewith, form an apparatus for sizing (*i.e.*, immersing in a glutinous liquid), and afterwards drying, warps, or threads before they are woven into cloth. This machine stood by its own weight on the floor of the mill. A three-quarter inch iron pipe, which was screwed into one of the main steam pipes of the mill, was placed at a convenient point above the machine and fastened to the wall of the mill by holdfasts. The other end of the iron pipe was screwed to the machine by a screw or union joint. Another pipe, quarter inch in diameter, was screwed in the same manner to the machine, and also to a condensed water-pipe which was connected with a larger pipe fixed near the floor of the room, and used for carrying away condensed waste-water from the main steam engine. When the two screws or union joints—by means of which the said two pipes were attached to the machine—were unscrewed, the machine was completely detached. The warping machine consists of a tin cylinder, in no way attached to the fabric of the building, but standing upon cushion wheels, which run upon two ridges or slight tramways of metal, about half an inch in diameter and 5yds. long, laid upon the floor of the mill, and held in position by means of small iron holdfasts, part of them driven into the stone floor between the flags, and others let into the flags and fastened by lead. The ridges or tramways stood about half an inch above the surface of the floor. Their only purpose was to guide the machine when in motion, and to enable it to run more smoothly. The motion given to this machine was from the shaft above by a strap. The loom machine was in no way affixed to the freehold, but is claimed by the defendants as being appurtenant to the Donisthorpe sizing and drying machine in connection with which it was used. As a matter of convenience, the material was usually carried from one of these machines direct to the other, but there is no necessary connection between the two machines, and either of them would be available for the purpose of a wheel; it is used without the other. The above sizing, and drying, warping, and loom machines were put in one lot by the auctioneer and sold together.

43. The beaming frame stood upon the floor by its own weight. It was not connected in any way with the fabric of the building, and could be at once lifted up and carried away, but for a leather band or belt which communicated motion to it from the shafting above. This belt was passed over a drum on the shafting, and also over a wheel of the machine, but the wheel being surrounded by the framework of the machine the belt could not be slipped off, as in the case of the generality of machines, but must be cut or have some stitches taken out before the machine could be removed.

44. In the yard of the said premises there was a double iron cistern, used for steaming cloth, in order to give it a lustre or gloss. This cistern was about 7ft. deep, and sunk into a hole in the ground, made on purpose, about 3ft. deep. An iron steam pipe from the main steam pipe from the boilers was directed into it, and reached from the top to the bottom, about the middle, but was not in any way fastened to the cistern, and the pipe would have to be bent, or one length of the pipe would have to be unscrewed and detached in order to move the cistern. Without bending or detaching this pipe, and removing the soil around it, it would be impossible to remove the cistern. There is also an aperture in the bottom of the cistern, through which, when a valve attached to the cistern was opened, condensed water could pass into a pipe drain laid in the ground beneath the cistern.

45. In the counting-house of the mill and premises was a large desk, the ownership of which is also in question in this case. It is about 5ft. long, 4ft. high, and 4ft. broad. This desk stood by its own weight. An iron gas pipe, connected by screw or union joints, with the main pipe laid underneath the soil in the yard, was brought into the counting-house through a hole in the wall. To this gas pipe a small lead pipe was soldered, and passed through a hole cut in the side of the desk, and was screwed to the under part of a socket, above which socket was an upright standard carrying the burner, and which socket was fixed by screws to the desk. When the gas pipe was unscrewed from the socket, and the lead pipe cut at its junction with the iron pipe, which was the only means of severing it, the desk was completely detached, and could be removed, but without severing the gas pipe it could not be removed.

46. There was also in the counting-house an iron safe. It was let into the brick wall, and surrounded with bricks and mortar. In the front was a wood moulding fastened by nails to pieces of wood driven into the wall. The safe could not be removed without pulling off the wood moulding and disturbing the brickwork.

47. Condenser bobbins are used for winding the wool upon when in the partly manufactured state called slubbing. It is wound upon the bobbins when used in connection with machines called condensers, which it is admitted are not fixtures. The bobbins are then taken to the mules before described, and the wool is wound off them by the mule, and spun into a coppin or bobbin, after which they (the condenser bobbins) are taken back empty to the condensers. These bobbins the defendants claim as appendages to the mules.

48. There are also certain loose articles, consisting of fencings and clogs which are necessarily used with the hydraulic presses, and are only of use in connection with such presses. They are, however, bought and sold separately from the presses.

49. The counter shafting, the ownership of which is in question in this case, is placed in various positions in the several rooms of the mill and premises, and consists of separate iron bars or shafts, which are fixed at each end, as before described in paragraph 17, to sockets in iron hangers or bearers sus-

Q. B.]

LONGBOTTOM v. BERRY AND ANOTHER.

[Q. B.]

pended from the ceilings of the rooms, but so loosely that the shafts easily revolve in the socket on their own axes, but these shafts cannot be removed from their hangers or bearers without unscrewing and taking off the caps. Motion is communicated to the counter shafting from the main shafts, which run along the several chambers of the mill and premises, as before described, by means of hollow wheels or drums on such main shafting or counter shafting respectively, over which leather belts or bands pass, and when made tight, these bands communicate to the counter shafts the motion given to the main shafts.

50. Lastly, the straps or belts, the ownership whereof is in question, are the leather bands before referred to as used to impart the motion of the main shafting to the counter shafting, and of both kinds of shafting to the machinery in the mill and premises. They are generally about six inches in breadth, and are commonly brought from the curriers, in undivided lengths, which are afterwards cut up by the owners of the machinery into the required lengths, the several pieces being generally riveted together by metal rivets. The strap, before being put together, is passed over the drum on the shafting, and over a wheel of the machine to be set in motion, and, being drawn quite tight, the two ends are stitched, riveted, or laced together with leather, thread or tags, or metal rivets. The straps, when so joined, can be slipped off the drum of the shaft, from which they cannot be removed until they are cut or unloosened at the point of junction. They can be slipped off the wheel of all the machines in question in this case (except the beaming frame) at pleasure, when the machine and shafts are not in motion.

The question for the opinion of the court was, whether, upon the facts above stated, the plaintiff became entitled to the said machine or articles, or any and which of them under or by virtue of the bill of sale dated the 18th Jan. 1865, in the sixth paragraph mentioned, or whether the defendants are entitled to the possession of the said machines or articles, or any and which of them under or by virtue of the said deposit of title-deeds, and of the conveyance of the 25th Aug. 1866, or either of them. If the court should be of opinion that the plaintiff is entitled to all the said articles or machines, then judgment is to be entered up for the plaintiff for the sum of 944*l.* 1*s.* 4*d.* with costs of suit. If the court should be of opinion that the plaintiff is entitled only to part of the said articles or machines, then judgment is to be entered up for the plaintiff for a sum to be fixed by an arbitrator already agreed upon by the plaintiff and defendant as the value of the said articles and machines in respect of which judgment shall have been given for the plaintiff without costs. If the court should be of opinion that the plaintiff is not entitled to any of the said articles or machines, then judgment of *non pros.* is to be entered with costs.

Mellish, Q. C. (with him M^r Leod) for the plaintiff. It is admitted on the part of the plaintiff that decided cases have established that there is no difference with reference to fixtures between a legal and an equitable mortgage, and, further that the mortgagee is entitled to all fixtures although they are tenant's fixtures which, as between landlord and tenant the tenant would be entitled to remove. But it is contended that the articles in question in the present case, or most of them, come within the rule laid down in *Hellawell v. Eastwood*, 6 Ex. 295, and are not fixtures but movable chattels. In that case it was held that machinery used for the purposes of manufacture, such as mules used for spinning cotton, though fixed by means of screws, some into the wooden floors of a cotton mill, and some

by being sunk into the stone flooring and secured by molten lead, were nevertheless distrainable for rent. "Before the machines were so attached," said Parke, B., "they were mere chattels and undoubtedly were distrainable chattels; and the question is whether they lost that character by being attached to the floor in the manner described. . . . This is a question of fact depending on the circumstances of each case, and principally on two considerations: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed, *intégrè, salvè et commodè*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling—in the language of the civil law, *perpetui usus causa*, or in that of the Year Book, *pour un profit del inheritance* (20 Hen. 7, c. 13)—or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel. Now, in considering this case, we cannot doubt that the machines never became a part of the freehold. They were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. They were never a part of the freehold any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking glasses, pictures, and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason why they and similar articles have been held in different cases to be reasonable. The machines would have passed to the executor: (Per Lord Lyndhurst, C. B., *Trappes v. Harter*, 2 C. & M. 177.) They would not have passed by a conveyance or demise of the mill. They never ceased to have the character of movable chattels, and were, therefore, liable to the defendants' distress." These observations and this reasoning apply to most, if not all, the machines in the present case. Both the mode of annexation and the object and purpose of annexation are in favour of these machines being regarded merely as movable chattels and not as fixtures. In *Parsons v. Hind*, 14 W. R. 860, it was held that a hydraulic press fixed by means of bricks and mortar to the floor of a factory remained a chattel, and did not become part of the freehold. Blackburn, J. said, "whether or no a thing remains a chattel or becomes a part of the freehold is often difficult to decide, turning as it does on a question of more or less. . . . There are generally three classes—first, those cases where a chattel still remains a chattel, being merely fixed for convenience, like the clock in court, which though firmly fixed, and though probably it could not be moved without disturbing the plaster, yet no one could doubt that it remains a chattel, and does not become a part of the freehold. Then there is another class, where chattels are fixed for the better enjoyment of the freehold, but subject to a right to remove them. These are what are generally called fixtures. Then there is a third class, where chattels are fixed to the freehold and cannot be removed.

. . . *Hellawell v. Eastwood* gives the two guiding points to determine whether or no the article remains a mere chattel. Nevertheless the question must always be one of more or less," and the learned judge cites the remarks of Williams, J. in *Lancaster v. Eve*, 3 C. B., N. S., 717, "No doubt the maxim, '*Quicquid plantatur solo solo cedit*,' is well established; the only question is what is meant by it? It is clear the mere putting a chattel into the soil by another cannot alter the ownership of the

Q. B.]

LONGBOTTOM v. BERRY AND ANOTHER.

[Q. B.]

chattel. To apply the maxim there must be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil." *Climie v. Wood*, L. Rep. 3 Ex. 257; 20 L. T. Rep. N. S. 1012, no doubt conflicts with *Hellawell v. Eastwood*, but it cannot be said to overrule the principles laid down in the latter case, nor does it profess to do so; and those principles are recognised in *Waterfall v. Penistone*, 6 El. & Bl. 876, where a person who had mortgaged the freehold of a mill with machinery thereon afterwards assigned to the defendant the equity of redemption, and certain machinery which had been fixed in the mill since the first mortgage, and afterwards by indenture bargained and sold to the defendant machinery erected since the conveyance of the equity of redemption, subject to redemption on payment of a certain sum which was charged on the mill and machinery, the machinery in the last-mentioned indenture being erected for the purpose of carrying on the manufactory in the mill, and for the more conveniently doing so, part of it was screwed, nailed, and otherwise fixed to the mill. On the bankruptcy of the mortgagor it was held that his assignees were entitled to the machinery, the machinery under the interpretation clause being personal chattels, as the intention of the parties appeared to be that the machinery should pass, separately from the realty, and so it had not become parcel of the freehold by annexation subsequent to the conveyance of the equity of redemption. "In *Hellawell v. Eastwood*," said Erle, J., in delivering the judgment of the court, "the question whether the trade machinery there described, which was annexed to the soil, was liable to be distrained, was answered in the affirmative, on the ground that, if the purpose of the annexation was not the permanent improvement of the dwelling, but the more complete use temporarily of the machinery, it was a chattel, and that the intention of the party in the annexation was material to be considered for deciding whether it became parcel of the realty. According to that decision, we hold this machinery to have been a personal chattel within the statute, notwithstanding the annexation to the soil." It is submitted that the doctrine of *Hellawell v. Eastwood* remains unimpeached, and that it applies in favour of the plaintiff to almost all, if not all, of the machines here in question.

Manisty, Q. C. (with him *Macrory*), for the defendants.—It has been long settled that articles of machinery fastened to a floor or wall merely for the purpose of steadying them, would, as between landlord and tenant, pass to the tenant; but as between heir-at-law and executor, or as between mortgagor and mortgagee, they go with the realty. All the machines in the present case are but accessory to the mill; they, along with the building, constitute the mill, and as between mortgagor and mortgagee, they go with the mill. *Hellawell v. Eastwood* (*ubi sup.*) has been treated in subsequent cases as deciding merely that as between landlord and tenant such articles are chattels; but not that they are so as between mortgagor and mortgagee. In *Fisher v. Dixon*, 12 Cl. & Fin. 312, it was held that where the absolute owner of land for the better purpose of using that land, created upon and affixed to the freehold certain machinery, in the absence of any disposition by him of the machinery, it would go to the heir as part of the real estate; and that if the corpus of such machinery belongs to the heir, all that belongs to that machinery, though more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir. "The principle," said Lord Cottenham, p. 328, "upon which a departure has been made from the

old rule of law in favour of trade, appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land and of the personal property which he erected and employed in carrying on the works; he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was, therefore, not at all necessary, in order to encourage him to erect those new works, which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favour of trade as applicable here, the whole being under the control of the person who erected this machinery." In *Mather v. Fraser*, 2 K. & J. 536, it was held that all articles affixed to the freehold whether by screws, solder, or any other permanent means, or by being let into the soil, partook of the nature of the soil, and would have descended to the heir along with and as part of the soil itself. "According to the old rule of law," said Wood, V.C., "if that which would otherwise have been a chattel had been affixed to the soil, whether by nail, screw, or otherwise, it passed along with the soil to which it had been so fixed. In the relation of landlord and tenant, but in that relation alone, the rule of law was relaxed for the encouragement of trade, it being very early perceived that it would be injurious to trade if a tenant were told he must contrive to conduct his trade with piping which need not be fixed in any way to the soil, or he would at once be held to have made a present of it to his landlord; and accordingly, as between landlord and tenant, questions of some difficulty have arisen, whether in particular instances chattels pass with the freehold of the land. But here—and it was the case also, as Lord Cottenham observed, in *Fisher v. Dixon*—no such question can arise. Here the same parties were owners both of the fee and of the chattels in question. There was no landlord between whom and themselves the question could arise. Here, therefore, and in all other cases where the owner of the chattel is also the owner of the fee, the court can at once dismiss from its consideration the entire class of cases in which the rule of law has been relaxed in favour of trade, all such cases presuming the existence of the relation of landlord and tenant." And the Vice-Chancellor thus refers to the case of *Hellawell v. Eastwood* (*ubi sup.*), which is chiefly relied on by the plaintiff in the present case. Immediately after the words last cited he says, "This consideration disposes of the decision—I do not say of the dictum—in *Hellawell v. Eastwood*. For the decision in that case there was abundant ground irrespective of the dictum. . . . That case, in common with the numerous other cases upon the question of distress, has no application to the present. And, in fact, the only point for which it was cited was the dictum of a learned judge, whose opinion is entitled to great weight, Mr. Baron Parke. . . . That remark, however, is a mere dictum, not necessary to account for the decision, for which there was abundant ground in the circumstances I have mentioned; and I cannot but think that the numerous class of cases ending with that of *Fisher v. Dixon*, which does not appear to have been cited in *Hellawell v. Eastwood*, could not have been present to the mind of the learned judge to whom that dictum is attributed." In *Walmsley v. Milne*, 7 C. B., N. S., 115, it was held as between a mortgagee and the assignees in bankruptcy of the mortgagor that a steam-engine and boiler, a haycutter, a malt mill or corn crusher, and a pair of grinding stones erected for the more convenient use of the premises in the business of the mortgagor

Q. B.]

LONGBOTTOM v. BERRY AND ANOTHER.

[Q. B.]

as an innkeeper, brewer, and bath proprietor, and all capable of being removed without injury either to themselves or to the premises, did not pass to the assignees but remained attached to the freehold. Crowder, J., in delivering the judgment of the court, referred to *Hellawell v. Eastwood*, and said, "Now, without expressing any opinion upon that case, it is sufficient on the present occasion to observe that, assuming it to be well decided, it is no authority for holding that the disputed articles in the case at bar are not fixtures forming part of the freehold; for we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose." And he quotes the language of Lord Tenterden in *Doe d. Robey v. Maisey*, 8 B. & C. 767: "The mortgagor is not in the situation of tenant at all, or, at all events, he is not more than tenant at sufferance; but in a peculiar character and liable to be treated as tenant or as trespasser, at the option of the mortgagee;" and Crowder, J. adds: "All the cases, therefore, which show that, where a tenant for years has put up trade fixtures, he may remove them before his tenancy expires, have no application to the case at bar." In *Boyd v. Shorrocks*, L. Rep. 5 Eq. 72; 17 L. T. Rep. N. S. 197, it was held that looms put up by the lessee of a cotton mill for his convenience during the existence of his term, and fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the floor, are, though easily movable, without injury to the freehold, fixtures, which will pass under an assignment of "the mill, fixed machinery, and hereditaments, with all looms and other machinery, fixed or movable," without the necessity of registering the assignment as an assignment of chattels under the Bills of Sales Act (17 & 18 Vict. c. 36). "On the best consideration I can give to this case," said Wood, V.C., "having looked into the various authorities referred to, I can come to no other conclusion than that the principle enunciated in *Ex parte Barclay*, 5 De G. M. & G. 403, is the right one. That principle seems to be that if the tenant has affixed to the freehold, during his tenancy, articles in such a manner as to make it appear that during the term they are not to be removed, and that he regards them as attached to the property, according to his interest in the property, then on any dealing by him with the property to which these articles are affixed, the court would presume that he meant to deal with the property as it stood, with all these things so attached, and to pass the property in its then condition." He adds, "The looms, no doubt, might be transported to another part of the building, and in that respect the case may be compared to a man dealing with a grate or cupboard. He thinks the cupboard would be in a more convenient situation if removed to another part of the building. Of course he can take down his cupboard and screw it up in another part. Having done so, it is to be supposed that the cupboard continues where it is placed during the remainder of the term as a fixture." The looms in that case were exactly like the willeys in the present case. In *Place v. Fagg*, 4 Man. & Ry. 277, it was held that by a mortgage of a mill, the stones, tackling, and implements necessary for the working of the mill passed to the mortgagee. (The notes to *Elwes v. Mawe*, 2 Sm. L. C. were also referred to.) Of fixtures those most favoured are tenants' as against the landlord, those least favoured are as between executors and the heir, and on a similar footing the courts treat fixtures as between vendor and vendee, mortgagor, and mortgagee.

Waterfall v. Penistone, 6 El. & Bl. 874;
Walmsley v. Milne, 7 C. B., N. S., 115;

Reg. The Inhabitants of Lee, 13 L. T. Rep. N. S. 704.

were referred to. In *Haley v. Hammersley*, 30 L. J. 771, Ch.; 4 L. T. Rep. N. S. 269, where the mortgage of the mill was stated to include "all those the steam engine or steam engines, boilers, steam pipes, main shafting, mill gearing, millwrights' work, and other machinery and fixtures whatsoever then erected or set up, or standing or being, or which should at any time thereafter be erected or set up, or stand or be in or upon the said lands, mill, and premises, or any part thereof," it was held (reversing the decision of the Master of the Rolls, who confined these words to the machinery necessary to give motive power to the mill), that all the machinery and fixtures used in the manufacturing of silk within the mill were included.

Parsons v. Hind, 14 W. R. 860;

Ackroyd v. Mitchell, 3 L. T. Rep. N. S. 236.
 were also referred to.

McLeod in reply.—If all the machinery claimed on the part of the plaintiff were removed, the mill would not lose its character of a mill, though it would no longer be a mill for the specific purpose of making cloth. It would be in a position to be fitted up as a mill for any other purpose. In *Walmsley v. Milne* (*ubi sup.*) the lower grinding stone was boxed on to the floor of part of the premises by means of a frame screwed thereto, and the steam engines and other articles (except the boiler) were fastened by means of bolts and nuts to the walls or the floors. In *Reg. v. The Inhabitants of Lee* (*ubi sup.*), Blackburn, J. (p. 708) states the rule to be "that where the things are attached to the premises so as to be part of the premises, although they are removable afterwards, still they are part of the premises, although there may be a right to remove them. But if things or chattels be merely fixed to the premises, and so fastened to the premises as to be still chattels, but fixed and steadied for the purposes of use there, they remain chattels altogether, so that they would not be part of the premises at all; they would never cease—to use the phrase in the case of *Hellawell v. Eastwood*—to have the character of movable chattels, although fixed for the purpose of the enjoyment of them, still they remain movable chattels"—a rule which covers those things claimed by the plaintiff.

Cur. adv. vult.

Dec. 13, 1869.—The judgment of the Court (Lush, Hannen, and Hayes, JJ., prepared by the late Hayes, J.), was now delivered as follows by HANNEN, J.—The question in this case is, whether the plaintiff became entitled to the machines and articles enumerated in the list contained in sect. 18 of the special case under his bill of sale of the 18th Jan. 1865, or whether they passed to the defendants as fixtures annexed to the freehold, under the equitable mortgage (which was prior to the plaintiff's bill of sale), and the subsequent conveyance of the 25th Aug. 1866; and our opinion is in favour of the defendants as to all the articles that were really affixed to the premises comprising nearly the whole of the enumerated articles, except a few that appear to be merely movable goods. Kershaw, under whom both parties claim, was owner as well as occupier of the mill and premises. He built the principal mill and fitted it with engines and machinery as well as shafting and pipes for the purpose of supplying and communicating steam power and gas throughout the building, and he also supplied and affixed all the machinery and articles necessary for adapting the mill for the business of a woollen manufacturer, which he carried on there. The title

Q. B.] THE LAND CREDIT COMPANY OF IRELAND v. LORD FERMOY; *Ex parte* MUNSTER. [CHAN.]

to the former machinery is admitted to be in the defendants, and it is only in regard to the latter to which the enumerated articles belong, that any question is raised. It is stated in the case that in the district where mills are occupied by tenants, the landlord owns the former class of machinery as well as the mills and premises, but that it is common for the tenant to supply the latter class, which in that case remains his property. But we consider the statement as altogether immaterial and irrelevant to the present case, which is not that of a tenant annexing fixtures on the property of another, but of an owner annexing them on his own property. The entire inapplicability of the peculiar law of fixtures between landlord and tenant to such a case was long since very clearly pointed out by Lord Cottenham, in the well known case of *Fisher v. Dixon*, 12 Cl. and Fin. 328. The precise question here is what are the rights of a mortgagee in the case of fixtures annexed to the freehold by the mortgagor. In the present case the mortgage was an equitable one, but no point or distinction was made on this ground; and it was admitted that the plaintiff, at the time of his bill of sale, had notice of the defendant's mortgage, and the case was argued on the same footing as if a mortgage had been executed before the bill of sale. Now, it appeared to us to be well settled by a series of decisions both at law and in equity, that in the case of such an annexation by the freeholder of machinery or other fixtures, the things so annexed will pass to a mortgagee with the freehold, and that this applies equally to articles which, as between landlord and tenant, would be considered as trade fixtures. As to any other articles which are really in the nature of fixtures, see *Mather v. Fraser*, 2 K. & J. 536; 25 L. J. 97, Ch.; *Walmsley v. Milne*, 7 Q. B. 115; 29 L. J. 97, C. P.; and the earlier cases in bankruptcy and Chancery cited in the judgment of the late case of *Cullwick v. Swindell*, L. Rep. 3 Eq. 249, and especially the case of *Climie v. Wood* (*ubi sup.*), affirmed in error L. Rep. 4 Ex. 328. But on the part of the plaintiff it was strongly contended on the authority of *Hellawell v. Eastwood*, 6 Ex. 296, that the machines and articles now in dispute, that looking to the nature of the articles, the mode of annexation, and the object and purpose of annexation, they were not in truth fixtures at all, but remained mere movable goods and chattels which would be liable to distress, as the machines called cotton mills were held to be in that case. The grounds of decision given by the court in that case being that the annexation there was so slight as to admit of removal of the machines without injury to the building or themselves, and the object and purpose of annexation being not to improve the inheritance but to render the machines steady and more capable of convenient use as chattels. In that case the mules were affixed in the same manner, as many of the machines in the present case. But it is observable that this case was decided before any of the cases to which we have referred and was cited in all or most of them, but not followed in any. On the contrary, it was distinguished in *Mather v. Fraser*, by the present Lord Chancellor (then Vice-Chancellor), who observed that it was a case between landlord and tenant, and was altogether inapplicable to the question whether machines fixed by an owner of the soil passed to a mortgagee of the freehold. In that case, machinery fixed in the same manner as the machine in *Hellawell v. Eastwood* was considered to pass to a mortgagee as fixtures and so also in *Walmsley v. Milne* the fact that the machinery there was so fastened as to admit of severance without injury to the building or the things fixed was disregarded by the court, as was also, in *Climie v. Wood*, the special additional fact

found by the jury that the object of annexation was for the more convenient use of the things fixed, and not to improve the inheritance. In the present case the machines in question was nearly all firmly fixed to the building, in what the Vice-Chancellor in *Mather v. Fraser* calls a quasi-permanent manner, viz., by screws and bolts, or soldered with lead; in some cases they were affixed to the floor, in some both to floor and roof, and in others to the side walls. This fixing was clearly necessary, for they could not otherwise be effectually used, and for the same reason the fixing obviously was not occasional, but permanent. It is no doubt said in this case that the object of fixing was to insure steadiness, and keep the machines in their places when worked; but the same thing could probably be said of most trade fixtures, from a steam-engine downwards; and if the effect of this fixing is to cause the whole set of machines to be effectually used in the manufacture of wool and cloth, it seems very difficult to avoid coming to the conclusion that a necessary consequence is to cause the mill to be put to a more profitable use as a wool mill than it otherwise would be. It is also equally difficult to conceive that a machine which at all times requires to be firmly fixed to the freehold for the purpose of being worked, could truly be said to lose its character as a movable chattel. We therefore think that the case of *Hellawell v. Eastwood* was well distinguished from cases like the present in *Mather v. Fraser*, and that all the fixed articles in this case were such articles in the nature of trade fixtures as were considered by the court of error in *Climie v. Wood* in regard to the machinery there in dispute, and that they passed here to the defendants under their mortgage and subsequent conveyance. The articles which we consider to be merely movables are the washer or washing machine described in paragraph 30, the press plates and papers mentioned in paragraph 36, the loom machine mentioned in paragraph 42, the beaming frame mentioned in paragraph 43, the desk in the counting-house paragraph 45, the condenser bobbins paragraph 47, and the fencings and clogs paragraph 48.

Judgment for the defendants.

Attorneys for plaintiffs, *Johnson and Weatheralls*, agents for *Rawson, George, and Wade*, Bradford.

Attorney for defendants, *Brooke*, agent for *Tenant and Rayner*, Dewsbury.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by T. BROOKSBANK and F. STEWART ROCHE, Esqrs.,
Barristers-at-Law

Saturday Feb. 19.

(Before Lord Justice GIFFARD.)

THE LAND CREDIT COMPANY OF IRELAND
v. LORD FERMOY.

Ex parte MUNSTER.

Practice—Service of decree—Writ of fi. fa.—Motion to discharge on ground of non-service of decree—Consolidated General Orders, 23, rule 10; 29, rule 6.

By the decree in a suit, the defendants were declared to be jointly and severally liable to repay to the plaintiffs a sum of money, and they were ordered to pay the same accordingly, with interest from the date of the decree, and the taxed costs of the suit, on or before a day named.

More than a month after the decree had been passed and

CHAN.] *Re THE INTERNATIONAL CONTRACT COMPANY (LIMITED); G. H. LEVITA'S CASE.* [CHAN.]

*entered, the plaintiffs issued a writ of *fi. fa.* against one of the defendants, upon whom the decree had not been served:*

*Held (affirming a decision of the Master of the Rolls), that the writ of *fi. fa.* was regularly issued, though there had been no service of the decree on the defendant.*

*But even though the month from the time when the decree was duly passed and entered has elapsed, a *fi. fa.* could not be issued, if the time fixed by the decree for payment had not arrived.*

This was an appeal by Mr. Munster, one of the defendants to this suit, from an order made by the Master of the Rolls, refusing an application on the part of Mr. Munster to set aside, as irregularly obtained, a writ of *fi. fa.* which the plaintiffs had issued against him to enforce payment of a sum of 3739*l.*, which, by the decree in the cause, he and the other defendants were ordered to pay on or before the 30th June 1869, with interest from the date of the decree, and the costs of the suit when taxed. The decree was made on the 24th March 1869, and passed and entered on the 10th May 1869, but it was never served on Mr. Munster. On the 24th Nov. 1869, the plaintiffs issued a writ of *fi. fa.* against Mr. Munster, for the sum of 3739*l.*, with interest from the date of the decree, and also for the sum of 580*l.*, the amount at which the costs of the suit had been taxed.

The hearing of the application before the Master of the Rolls is reported 21 L. T. Rep. N. S. 574.

*Jessel, Q. C., and Hemming, for the appellant, argued that, according to the old practice of the court, in order to compel the payment of money which by the decree a defendant was ordered to pay, it was necessary not only to serve the decree on the defendant, but to make a demand for payment. The 17th order of the 30th March 1859, which had now become the 1st rule of the 29th Consolidated General Order, was simply intended to do away with the necessity of making a demand for payment, but was not intended to alter the practice in any other way. The 1st rule of Order 29 provides that any person directed by any decree or order to pay any money to another shall be bound to obey such decree or order upon being duly served with the same, without demand, and that rule governs all the other rules of Order 29, among which is rule 6, relating to the writ of *fi. fa.* Rule 6 provides that every person to whom any sum of money shall have been directed to be paid, shall, after the lapse of one month from the time when the decree or order for payment was duly passed and entered, be entitled to sue out one or more writs of *fi. fa.*, &c. All the other provisions of Order 29, as to the enforcing obedience to a decree, proceeded on the assumption that there had been default made in obeying it, and there could be no default till the decree had been served. Moreover rule 6 could not be read literally, for, if so, the writ of *fi. fa.* might be issued a month after the passing and entering of the decree, even in a case where the term fixed by the decree for payment had not arrived. That construction of rule 6, though absurd, was at one time adopted in the Record and Writ Clerks' Office. The practice of the court requires service of a decree or order as a preliminary to enforcing process of contempt in all cases except that of an order for an injunction, in which case it is sufficient that the party enjoined has knowledge in any way of the order. If, however, the practice at law is to be followed, then it should be followed altogether, and at law it would be necessary that the writ of *fi. fa.* should be issued against all the defendants, even though it was executed against one only. On this ground also, there-*

fore, the writ was irregular in the present case, and ought to be discharged. They cited

*Adkins v. Bliss, 2 De G. & J. 286;
Order 23, rule 10;
Order 29, rules 1 and 6;
Order 30, rule 4.*

Sir R. Baggallay, Q. C. and Shebbeare, who appeared for the plaintiffs, were not called upon.

Lord Justice GIFFARD thought that there was no difficulty in the case. The meaning of the General Orders was quite plain, and it was the constant practice of the court to enforce orders against one of several defendants. Rule 10 of Order 23 had no reference to the issuing a writ of *fi. fa.* Then, by Order 29, express provision was made by rules 4 and 5 that in certain specified cases, viz., the enforcing obedience to a decree by means of a sequestration, or by the serjeant-at-arms, or a writ of assistance, the decree must be served before process could issue to enforce obedience to it. All these proceedings were founded upon the old process of contempt, and in all those cases the order required service of the decree as a necessary preliminary step. But the 6th rule of Order 29, which related to the issuing of the writ of *fi. fa.*, said not a word about service of the decree. If it had been intended to require service of the decree as a preliminary, one would have expected to have found it mentioned in the rule. But the terms of the rule were unqualified. There was no difficulty in construing the 29th order. It was not intended that the 1st rule should override all the subsequent ones. No provision was made in the 6th rule for service of the decree before a writ of *fi. fa.* could be issued, because it was not intended that in that case service should be required as a necessary preliminary. But of course it was not supposed that the 6th rule would be construed otherwise than in accordance with common sense, or that the limit of one month was to apply when it would be inconsistent with the time fixed by the particular decree for payment. The appeal must be accordingly dismissed.

Solicitors for the appellant, Ward, Mills, and Witham.

Solicitor for the plaintiffs, Henry Gover.

Friday, March 4.

Re THE INTERNATIONAL CONTRACT COMPANY (LIMITED);

G. H. LEVITA'S CASE.

Company — Winding-up — Contributory — Application for shares—Allotment notice—Agent—Authority to accept notice of allotment.

L. applied for shares in a company in the ordinary way. The shares were allotted to him, and his name was entered upon the company's register of shareholders as the holder of them. No notice of allotment was, however, given to him by the company, and they never treated him as a shareholder. The notice of allotment was given to M., at whose request L. had signed the letter of application for the shares, and dividends which became due upon the shares were carried by the company to the credit of M. By the evidence of L. it appeared that he was not aware till after the commencement of the winding-up of the company that his name had been entered on the company's register, and also that he was told by M., when he signed the letter of application, that his doing so was a mere matter of form, and that he would not be troubled any more in the matter:

Held (affirming the decision of Stuart, V.C.), that L. must be placed on the list of contributories of the

CHAN.]

ALEXANDER v. MILLS.

[ROLLS.]

company, he having constituted L. his agent in every respect with regard to the shares.

This was an appeal by Mr. G. H. Levita, of Antwerp, from a decision of Stuart, V. C., fixing him on the list of contributories of this company in respect of 350 shares.

On the 4th June 1864 Mr. Levita signed a letter of application for the shares, as follows:

To the Directors of the International Contract Company (Limited).

Gentlemen,—Having paid to your bankers the sum of 350*l.*, being a deposit of 1*l.* per share on 350 shares in the above company, I hereby request that you will allot me that number, and I agree to accept such shares, or any less number that you may allot me; and I agree to pay the deposit on allotment, and to sign the articles of association of the company when required, and I authorise you to insert my name on the register of members for the number of shares allotted to me.

These 350 shares were afterwards registered in the name of Mr. Levita, but no notice of allotment was given to him. It appeared, however, that Mr. Levita had applied for the shares at the instance of a Mr. McHenry, and that the certificates of the shares were handed by the company to a person who signed the initials "C. C.," in the books of the company. Certificates of other shares belonging to McHenry, appeared to have been handed by the company to a person who signed the same initials, and he was believed to have been a clerk in the employ of McHenry. The books of the company showed that the dividends which accrued due on the 350 shares in question had been carried by the company to the credit of McHenry. The circumstances under which Levita applied originally for the shares were detailed by him in an affidavit which he made as follows:

In the month of June 1864, I received a letter from Mr. James McHenry, inclosing three printed forms of letters of application for shares in the above company, and requesting that I would sign one of them for 350 shares, and get my friends A. Van Bombeyer and H. Schopeler to sign the two others for 250 shares each, and I was informed by the said Mr. McHenry that it was a mere matter of form, and that neither I nor my said friends would be troubled any more in the said matter. I had known the said Mr. McHenry for some time previous thereto, and believed him to be a person of great respectability, and having confidence in his representations, I acceded to his request by signing the said first-mentioned letter, and getting my said friends also to sign the other two letters, and on the 4th June 1864, I transmitted them to the said Mr. McHenry. I never received any letter or notice of allotment of shares in the said company either before or after my returning the said letters, or any reply whatever from the said company to the said letter of the 4th June 1864, nor did I ever receive any scrip or other certificates for shares in the said company; nor did I ever pay anything as a deposit in applying for the shares mentioned in the said letter of the 4th June 1864, or any shares whatever in the said company. I never authorised any person or persons to accept any shares of the said company on my behalf, or to apply for or accept any scrip or share certificate for any shares whatever in the said company or on my behalf, or to give a receipt or receipts for the same. I never received any notice of a call, or paid any call on the said shares, or any shares whatever in the said company, or received any notice of a dividend or dividends in respect thereof, nor have I received any dividend or dividends, nor did I ever authorise any person or persons to pay any deposit or call, or receive any dividend or dividends on my behalf in respect of the said shares, or any shares whatever in the said company, save that I signed and sent to Mr. McHenry the said letter of the 4th June 1864. I have never done, said, or written anything with reference to becoming a shareholder in the said company, nor have I authorised or ratified or recognised anything which may have been done by the said Mr. McHenry, or any other person, in my name or on my behalf with reference to the said company or the affairs thereof, nor have I ever received any notice whatever from the said company until I received a notice in the month of June 1867 from the official liquidator after the commencement of the winding-up of the said company. Until I received the aforesaid notice from the said official liquidator after the commencement of the winding-up I did not know and had no reason to believe that any shares in the said company whatever had been allotted to me, either in pursuance of the aforesaid letter of the 4th June 1864; or otherwise, and I do not now know when the shares alleged to have been allotted to me were so allotted, if, in fact, they ever were allotted to me, which I have no reason to believe, except from the

notices which I have received from the official liquidator in the course of the winding-up of the said company.

Notwithstanding this the Vice-Chancellor held that Mr. Levita was liable as a contributory in respect of the 350 shares, and from the decision he appealed.

Greene, Q.C., and Rigby, on behalf of the appellant, contended that he never became a shareholder in the company, because no notice of allotment of the shares was given to him. McHenry was not made his agent to receive notice of the allotment, but only to make the application. They cited

Re the Universal Banking Corporation, Green's case, 17 L. T. Rep. N. S. 365; L. Rep. 3 Ch. App. 40;

Re The Peruvian Railway Company, Crowley's case, and *A. Robinson's case*, 20 L. T. Rep. N. S. 96; L. Rep. 4 Ch. App. 322;

Wallis' case, L. Rep. 4 Ch. App. 325.

Hardy, Q. C., and J. Napier Higgins appeared on behalf of the official liquidator, but were not called upon.

Lord Justice GIFFARD said that this case was entirely different from *Robinson's case*. Mr. Levita could not be taken to have signed the letter of application for the shares with any other intention than that it should be made use of, and his own evidence showed that when he had done so he sent the letter of application to Mr. McHenry to make what use he pleased of it, trusting to him for an indemnity against any consequences which might result from the application. To his Lordship's mind it was clear that Mr. Levita constituted McHenry his agent in every respect with regard to the shares, and left him to do as he pleased in the matter. Mr. Levita must, therefore, be taken to have been the owner of the shares, and must be placed on the list of contributories in respect of them. The appeal must be dismissed with costs.

Solicitors for Mr. Levita, J. C. Cole.

Solicitors for the official liquidator, Lewis, Munns, Nunn, and Longden.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Feb. 8 and March 9.

ALEXANDER v. MILLS.

Power for trustees to sell at request of tenant for life—Alienation by tenant for life—Subsequent exercise of power—Fraud on power—Specific performance.

By a marriage settlement made in 1850, certain real estate was conveyed to trustees to the use of H. for life, with remainder to certain uses in favour of his children, and with an ultimate limitation in default of issue to H. in fee. The settlement contained a power for the trustees, during his life at and by his request in writing to sell the property.

In 1862 H. conveyed the property to A. to hold the same for the life of H., and for and during every other estate and interest which H. then had or could dispose of.

In 1868 the trustees of the settlement, purporting to exercise the power of sale contained in the settlement, at the request and by the direction of H., conveyed the property to A. in fee.

A. afterwards sold the property by auction to M. who declined to complete on the ground that the conveyance by the trustees was not a valid exercise of the power.

On a bill by A. to enforce specific performance of the contract:

ROLLS.]

ALEXANDER v. MILLS.

[ROLLS.]

Held, that, H. having conveyed away all his interest in the property, the trustees could not at his request and by his direction exercise the power of sale, and consequently that M. could not be compelled to accept the title.

Bill accordingly dismissed with costs.

This was a vendor's suit for specific performance.

By an indenture dated the 19th June 1850, and made between the Reverend William Henry Hicks of the first part, Charles Bailey and Charlotte Louisa Bailey spinster, his eldest daughter, of the second part, and Isaac Moreton Wood, Henry Albert Goodwin and Charles Edward Rowcliffe of the third part (being a settlement made in consideration of the marriage then intended and shortly afterwards solemnised between the said William Henry Hicks and Charlotte Louisa Bailey), the manor or lordship of Watton Hall, in Watton, in the county of Norfolk, and certain other real estate therein particularly described were conveyed to the said Wood, Goodwin, and Rowcliffe, their heirs and assigns: to the use (after the solemnisation of the said then intended marriage) of the said William Henry Hicks, and his assignees during his life, without impeachment of waste, with remainder (subject to certain powers for raising money and jointuring, appointment, &c., and to all terms of years, and estates to be created by the exercise of the said powers) to certain uses in favour of the child or children and other issue of the said William Henry Hicks whether by his then intended or by any future wife with an ultimate limitation, in default of such issue to the use of the said William Henry Hicks, his heirs and assigns. And by the indenture of settlement it was agreed and declared that it should be lawful for the trustees and the survivors and survivor of them their and his heirs and assigns at any time after the said intended marriage during the life of the said William Henry Hicks, at and by his request and direction in writing, to dispose of either by way of absolute sale or in exchange, all or any part or parts of the manor, &c., and other hereditaments thereby conveyed and the inheritance thereof, in fee simple to any person or persons whomsoever for such price, &c., as to them should seem reasonable, and for the purpose of effecting any such sale, &c., absolutely to revoke all and singular the uses, trusts, and powers thereinbefore contained of the hereditaments so to be sold, &c.

By an indenture dated the 29th Oct. 1862, and made between Hicks of the one part, and the plaintiff of the other part, for the consideration therein mentioned, Hicks granted, conveyed, and in order to extinguish the powers of jointuring and appointment reserved or given to him by the settlement, released and quitted claim unto the plaintiff, his heirs and assigns, the said manor and other hereditaments comprised in the settlement, to hold the same freed and discharged from the said powers of jointuring and appointment, but subject to certain sums amounting together to 5000*l.* charged by Hicks on the premises and the interest thereon, and subject to certain terms of 5000 years and 3000 years and to certain sums thereby secured unto and to the use of the plaintiff, his heirs and assigns, for the life of Hicks, and further for and during every other estate and interest which Hicks then had or could dispose of by this indenture both at law and in equity, and whether present or future, vested, executory, contingent, or otherwise howsoever.

By an indenture dated the 27th March 1868, and made between G. Goldney, G. P. Goldney, and C. W. Roberts (the then trustees of the settlement) of the first part, Hicks of the second part, G. Goldney and T. A. Fellowes (in whom the terms of 5000 years and 3000 years, and the sums thereby secured were vested) of the third part, and the

plaintiff of the fourth part, for the considerations thereafter expressed, the parties thereto of the first part in exercise and execution of the power or authority in that behalf, vested in them as trustees of the said indenture of settlement of the 19th June 1850, and at the request and by the direction of the said William Henry Hicks absolutely revoked the uses, trusts, and powers in the said indenture of settlement declared and contained of the hereditaments and premises thereafter described and thereby appointed and conveyed or intended so to be so far as such powers were not necessary to effectuate and complete the assurance intended to be thereby made. And in consideration of the sum of 5000*l.* to the said G. Goldney and T. A. Fellowes, paid by the plaintiff at the request and by the direction of the trustees, and in consideration of the sum of 14,000*l.* to the trustees, at the same time paid by the plaintiff, the trustees, by force and virtue, and in exercise and execution of the aforesaid power or authority in that behalf, given to or vested in them as such trustees as aforesaid, and at the like request and by the like direction of the said William Henry Hicks, thereby absolutely and irrevocably declared and appointed that all and singular the premises thereafter mentioned, &c., with their appurtenances, should thenceforth go, continue, and be to the use thereafter expressed and declared of and concerning. And for the considerations aforesaid the trustees at the like request, and by the like direction of the said William Henry Hicks, and according to their estate and interest, if any, in the premises thereby granted and conveyed, and the said G. Goldney and T. A. Fellowes, for the purpose of merging and extinguishing the said several terms of 5000 years and 3000 years surrendered and released, and the said William Henry Hicks granted and conveyed unto and to the plaintiff, his heirs, and assigns, all and singular the said manor, &c., and other hereditaments comprised in the said indenture of settlement of the 19th June 1850, with the appurtenances to hold the same unto and to the use of the plaintiff, his heirs, and assigns, for ever freed and absolutely discharged from the said mortgage securities so vested in the said G. Goldney and T. A. Fellowes as aforesaid, &c.

In May 1869 the plaintiff put up the property for sale by auction, and it was purchased by the defendant at the price of 21,000*l.*, of which 2100*l.* was paid by way of deposit, and the defendant's agent signed an agreement to complete the purchase in accordance with the conditions of sale.

On examining the title the defendant refused to complete on the ground that as Hicks, the tenant for life, had conveyed away absolutely all his estate and interest in the property by the indenture of the 29th Oct. 1862, his power of directing or consenting to a sale had determined, and the indenture of the 27th March 1868 was not a valid exercise of the power.

Thereupon the plaintiff filed the present bill praying that the defendant might be decreed specifically to perform his contract of the 13th May 1869.

Jessel, Q.C. and Wickens, for the plaintiff, submitted that the defendant's objection to the title could not be sustained. They cited

Long v. Rankin, Sug. on Powers, app. No. 2;
Walmesley v. Butterworth, Coote on Mortgage, 698;
Tyrell v. Marsh, 3 Bing. 31; 10 Moo. 305;
Davies v. Bush, M'Clell. & Yo. 58;
Warburton v. Farn, 16 Sim. 625;
Holdsworth v. Goose, 4 L. T. Rep. N. S. 196; 29 Beav. 111;
Eisdell v. Hammersley, 6 L. T. Rep. N. S. 706; 31 Beav. 255;

ROLLS.]

ALEXANDER v. MILLS.

[ROLLS.]

Howard v. Ducane, Turn. & Russ. 81 ;
Simpson v. Bathurst, W. Notes, 31 Dec. 1869.

Joshua Williams, Q.C., and Rodwell for the defendant, contended that there was no case in which it had been held that, after the tenant for life had completely alienated his interest in the property, the power for the trustees to sell at the request of the tenant for life could be exercised, while there was a clear opinion of Lord St. Leonards' to the contrary; in his work on Powers (8th edit.) p. 70, he says "an absolute conveyance upon a sale would, it is apprehended, prevent the power from being exercised, from the very nature of the power independently of any technical question, for powers of sale and exchange are manifestly given to the tenant for life in consequence of the character which he fills." The cases cited on behalf of the plaintiff were quite different from the present case; in *Long v. Rankin* there was a conveyance of the life estate to secure an annuity; that did not defeat the life estate, but merely created a charge upon it. *Holdsworth v. Goose*, *Eisdell v. Hammersley*, and *Simpson v. Bathurst* were cases in which the life estate was alienated by bankruptcy; that was an alienation by operation of law, and was quite different from a voluntary alienation such as had taken place in the present case. The conveyance by the trustees was a clear fraud on the power; true it was that the trustees might sell to the tenant for life, for in that event they could exercise their discretion, but here their hands were bound, and they could exercise no discretion. They referred to

Reeves v. Creswick, 3 Y. & Coll. Ex. 715;
Hill v. Pritchard, Kay 394.

Wickens, in reply, contended that there was no foundation for the distinction insisted upon between bankruptcy and voluntary alienation.

March 9.—Lord ROMILLY.—The question in this case is whether a tenant for life who has sold his estate, and the ultimate reversion to a purchaser for value, can, at the request of the purchaser, exercise his power of sale; it is clear that he cannot exercise the power of sale without the assent of the purchaser, because no man can derogate from his own grant. The facts which raise the question are the simplest possible. On the 19th June 1850, a settlement is made on the marriage of Mr. Hicks; by it he takes a life interest in the property and a power of jointuring a wife with remainder to the issue of the marriage, with an ultimate limitation to himself in fee; and the settlement contained a power given to the trustees to sell at the request and by the directions in writing of Mr. Hicks. In Oct. 1862, Hicks sold the whole of his interest under the settlement to the plaintiff. Afterwards in March 1868, the trustees at the request and by the direction in writing of Hicks, sell the property to the plaintiff under the power; and about a year after in 1869, he sells the estate by auction to the defendant. The defendant objects that there is a blot on the title, and that the sale by Hicks to the plaintiff was a fraud on the power. The plaintiff files a bill for specific performance; this is the only objection to the title, and the question is whether this is such a title as the court can compel the defendant to accept. I think that it is impossible to compel the defendant to accept the title. In saying this I do not adopt the expression frequently cited to me, that the court will abstain from compelling a defendant to accept a title where, though the point is doubtful, the court is of opinion that the objection is bad; but, upon fully considering this case, I have found myself compelled to come to the conclusion that if it was absolutely necessary to decide the point between adverse claimants, I should hold the objec-

tion to be valid. I do not think that this case is affected by such decisions as that of the House of Lords in *Long v. Rankin* (*sup.*) where the tenant for life had sold his estate for the purpose of raising an annuity for his life, and had expressly reserved his power of leasing, and the question there tried was whether the exercise of that power was derogatory to his grant, and it was held not to be so, but to be for the benefit of all persons interested in the enjoyment of the estate. But here the opposite principle appears to me to arise; on the principle of that case all that is clear as applied to this case is that the tenant for life could not require the trustees to exercise the power of sale without the consent of the plaintiff. But the question in reality here is whether the plaintiff can require the tenant for life to call on the trustees to exercise the power for the benefit of himself, and in fact at the suggestion of the plaintiff. As long as the tenant for life is the owner of the property for the period of his life, it is obvious that it must be for his interest that the property should be sold in such a manner, and at such a time as to secure the highest price, but when he has sold his life interest and his reversion to a stranger, it is to him a mere matter of indifference at what time and in what manner the sale is carried out, and if it can be so managed that it can be bought by the purchaser of the life interest, he acquires an advantage, as indeed is shown in the present case, where the sale to the defendant is at a considerably advanced price on the price that was given for it by the plaintiff. The time and mode of sale is, in fact, intrusted to the tenant for life because it is inferred that he will do what he can to protect his own interest, and in so doing to protect the interests of the persons in remainder, but the moment his interest ceases then he may collude with the alliance to the injury and detriment of the persons in remainder. I do not observe or suspect anything of that sort in this case, but I state it in order to show the reason of the rule and why such an exercise of the power may reasonably be considered as a fraud on the power. It seems to be quite settled by authority that an absolute alienation of the life estate by sale takes away from the tenant for life the power of leasing. How does the power of sale in substance differ from this? It is no doubt difficult to see how, in a court of law, any distinction can exist between the conveyance of the life estate by way of security or by way of mortgage, and a conveyance by way of sale, and yet it seems to me to be obvious that a power of sale is given to a tenant for life by reason of his being tenant for life as I have already stated, and I have in vain searched for any case where the court has held such a power capable of being exercised where there has been an absolute sale of the life estate. In this case, not only is the life estate sold, but the reversion also is sold, and all interest of Mr. Hicks in the estate is absolutely gone. The cases of *Tyrell v. Marsh* (*sup.*), *Davies v. Bush* (*sup.*), and *Walmesley v. Butterworth* (*sup.*), are all cases of mortgage. It does not appear to me to be a matter of technicality, but one of substance. Here the settlor settles an estate on A. for life with remainder to his issue, and in default of such issue to A. in fee; and he gives a power of sale. I call it a power of sale to him; but it is, in fact, a power of sale to the trustees to be exercised at his request, and by his direction in writing; in my opinion this does not differ from a power of sale given to him alone. A. sells all his interest; surely the intention of the settlor was that the power of sale should then become incapable of being exercised, and he never meant that the tenant for life when he is become a mere stranger without any interest in the property should be able so to sell it as to deprive his issue of the full value of the estate. It is true

V.C. S.]

ROBINSON v. O'KELL.

[V.C. S.]

that if there be an ingredient of fraud a collusive sale might be set aside on other grounds, but the difficulty of detecting and proving this is a sufficient reason to induce a settlor not to give such a power to a mere stranger, but to restrict the exercise unless as inseparable from the estate of the tenant for life, and that when he parts with this, the power is gone. It appears to me that if I were to decide in favour of the plaintiff, I should be going a step further than any case has hitherto gone, and a step which the facts of this case show would be likely to lead to much evil and inconvenience. I must therefore dismiss the bill with costs.

Solicitors for the plaintiff, *Wood, Street, and Hayter*, for *Keary, Stokes, and Goldney*, Chippenham.

Solicitors for the defendant, *Thomas and Hollams*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

April 25 and 26.

ROBINSON v. O'KELL.

County Court—Mortgage—Wife's chose in action—Parties—Decree of County Court reversed.

A married woman advanced 250*l.* upon the security of a deposit of title-deeds of real estate. Her husband died, and she married a second time. Shortly after her second marriage her husband borrowed some money upon a deposit of the same deeds. Subsequently she separated from her husband, and a deed was then executed, whereby the husband released to his wife all his interest in her real and personal estate. The husband became bankrupt, and his assignee, having paid off the second mortgage, obtained possession of the deeds. Upon the death of the first mortgagee the bankrupt's assignee filed a plaint in the County Court, making the mortgagee's executors the only defendants, and claiming to be paid the 250*l.*, or in default that the property might be sold. The County Court judge, overruling an objection taken that the bankrupt's wife was a necessary party, made the order prayed.

Held (reversing the decree of the court below), that the wife was a necessary party, and that the case must stand over in the County Court, with liberty to the plaintiff to amend his plaint by adding parties.

This was an appeal from a decision of the judge of the County Court of Cheshire, pronounced under the following circumstances:

On the 25th March 1859, Mrs. Pater, a married woman, lent to Mrs. Jardine, also a married woman, a sum of 250*l.*, at 4½ per cent., on the security of a deposit of the title-deeds of certain freehold property. Mr. Pater died in 1862, and in 1867 Mrs. Pater married a Mr. Lloyd, who shortly afterwards obtained possession of the title-deeds and deposited them with a Mr. Houghton, to secure a sum of money then due to him. In Jan. 1868, Mr. Lloyd was adjudicated a bankrupt. The plaintiff was appointed his assignee, and as such assignee, paid off Houghton and obtained possession of the title-deeds.

In May 1868, Mr. Lloyd and his wife agreed to separate, and live apart, and had ever since continued to do so. At the time of the separation a deed was executed, whereby Mr. Lloyd gave up and released all claim to the real and personal estate of his wife. Mrs. Jardine died a widow in Sept. 1868, having, by her will, devised and bequeathed all her estate to the defendants, whom she appointed her executors.

She had never paid off the money advanced to her on the security of the title-deeds by Mrs. Lloyd, and after her death the plaintiff, as Lloyd's

assignee, filed a plaint against her executors, praying that they might be ordered to pay to him the principal sum and interest due on the mortgage, or, in default, that a decree might be made for the sale of the real estate comprised in the deeds, and satisfaction of the debt thereon, together with the costs of the suit.

When the cause came on to be heard in the County Court, it was objected, on behalf of the plaintiff, that Mrs. Lloyd ought to have been made a party to the plaint, the judge, however, overruled the objection, and, without any evidence being adduced by either of the parties to the suit, but upon admissions, made an order, according to the form No. 24 in the schedule to the County Court Rules 1867, to the effect prayed by the plaint.

Hence this appeal on behalf of the defendants.

The question on the appeal turned principally upon the necessity of making Mrs. Lloyd a party.

Cozens Hardy for the appellants, contended that the mortgage debt was a *chose in action* which had never been reduced into possession by Mr. Lloyd, and that it was now the property of Mrs. Lloyd under the separation-deed. But even assuming that the suit itself was an attempt by Mr. Lloyd to reduce the debt into possession, Mrs. Lloyd ought to be a party to it. The plaint was clearly demurrable on that ground, and in fact the defendants by their statement in answer to the plaint, had in effect demurred to it.

W. Pearson for the respondent, argued that where there was a question for want of parties, there must be a claim averred, and neither in the plaint nor elsewhere in the pleadings was there an averment of any claim on the part of Mrs. Lloyd. Further, if Mrs. Lloyd were a necessary party, she could be brought before the court by a supplemental plaint, and then she would be bound by these proceedings; but even if she were brought before the court, she could not assert any right, and therefore the appeal ought to be dismissed.

The VICE-CHANCELLOR.—The admission in this case shows that Mr. Pater, the first husband of Mrs. Lloyd, allowed her to deal with the 250*l.* by lending it, as if it had been her own, to Mrs. Jardine. On Mr. Pater's death, the money, therefore, became his widow's property, and on her marriage with Mr. Lloyd, a *chose in action*, liable to be reduced into possession by him. Mr. Lloyd, however, has become bankrupt, and his assignee now claims the property, but if it has not been reduced into possession by Mr. Lloyd, or if Mrs. Lloyd asserts any right to it, under the separation-deed, her presence before the court is clearly requisite. The proper order, therefore, to be made, is this, the court being of opinion that Mrs. Lloyd is a necessary party to the suit, the decree of the court below must be reversed, and the case must stand over in the County Court, with liberty to the plaintiff to amend his plaint by adding parties as he may be advised. There will be no costs of the appeal, but the deposit must be returned.

Solicitors for the appellants, *Sharpe, Parkers and Pritchard*, for *Charles Green*, Norwich, Cheshire.

Solicitors for the respondent, *James Crowdy* for *Ryland and Martineau*, Birmingham.

V.C. M.]

LINES v. LINES—*Re* THE UNION HILL SILVER COMPANY (LIMITED).

[V.C. M.]

V.C. MALINS' COURT.Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.

Tuesday, July 6, 1869.

LINES v. LINES.

*Will—Construction—“All my personal estate and effects” comprehending real estate—Intention.**A testator gave his “personal estate” to his executors, with a direction to collect the rents of his real estate, and gave all the residue of his personal estate and effects of every kind and description to T. L. :**Held, that the testator, by directing the executors to receive his rents, with a mere gift of personal estate, showed what he meant by those words; and that, therefore, the residuary legatee took all the residuary real estate.*

The question in this case was whether a gift of all the testator's “personal estate and effects,” having regard to the whole of his will, passed his real estate to the legatee. The bill was filed by the plaintiff as heir-at-law of the testator, claiming all his residuary real estate, and a common administration decree had been made; the present point being reserved to be argued on the cause coming on, as it now did, on further consideration. The testator by his will gave to his executors (therein named) all his personal estate, and he directed them, his said executors, from time to time, to collect, get, and receive the rents of his freehold, copyhold, and leasehold hereditaments; and thereout to pay annuities to certain persons named, and the will concluded as follows:—“And I appoint Samuel Lines my sole residuary legatee; and I bequeath to him all the rest, residue, and remainder of my personal estate and effects of every kind and description.” Under this will the defendant claimed all the testator's real estate, not otherwise given by the will, the plaintiffs claiming it as undisposed of.

Glasse, Q. C. and *Shebbare* appeared for the plaintiff, and contended that there being no words used in the will sufficient to describe or pass real estate, it was impossible to hold that the residuary gift passed such real estate; and therefore, that the plaintiff was entitled to it as undisposed of as the testator's heir-at-law.

Cotton, Q. C. and *Speed*, for the defendants, insisted that the testator had in the whole context of the will put his own interpretation on the residuary clause. It was impossible to look at the gift to the executors, coupled with the direction with respect to the real estate, without seeing that he intended to give them the real estate, without which they could not collect the rents; and therefore, having used the expressions “personal estate” in the gift to them, it was evident what sense he attributed to those words; and they must have the same meaning applied to them when used in the residuary clause. Moreover the word “effects,” connected with the word “estate,” was sufficient to pass real estate.

Glasse, Q. C. in reply.**Authorities cited:—**

Doe v. Tofield, 11 East. 246;
Wildes v. Davies, 1 Sm. & Giff. 475;
Den v. Trout, 15 East. 394;
Hogan v. Jackson, 1 Cowp. 299;
Titchfield v. Horncastle, 2 Jur. 610;
Doe v. Earles, 15 M. & W. 450; see also *Stein v. Ritherdon*, 37 L. J., N. S., 369, Ch.; 19 L. T. Rep. N. S. 184;
Dobson v. Bowness, L. Rep. 5 Eq. 404.

The VICE-CHANCELLOR.—The question in this case is, whether a gift of “all my personal estate

and effects,” included certain real estate. Now, it cannot be disputed that a general gift of residuary personal estate cannot pass real estate, but you must look at every part of a will, and if you find that the testator has described that which is personal estate as real estate, or that which is real estate by terms only importing personalty, that is conclusive upon the court, which is bound to carry out as far as it can, that which he intended. No doubt if this gift stood alone it passed no more than personal estate, because the testator says, “And I appoint Samuel Lines sole residuary legatee of all my personal estate and effects.” What does he call personal estate? To discover that we must look at the whole will. He begins by a disposition which shows an intention not to leave anything undisposed of. He directs his trustees and executors to stand possessed of his personal estate of every kind and description, and he goes on to enumerate what he means, excepting household furniture, plate, linen, and china, and he directs his trustees to collect the rents of his leasehold, freehold, and copyhold property. Therefore when he says “personal estate,” he clearly includes these leaseholds, freeholds, and copyholds, although, of course, leaseholds would be personalty. Unfortunately, he uses language importing personal estate only; but still, if he distinctly shows an intention to pass his leasehold, freehold, and copyhold property, although in one part of the will he may call it personal estate, who shall say that he does not mean it because he uses the same expression, only including personal estate, in another? I think he distinctly shows that he was perfectly acquainted with the nature of his property, and intended the whole of it to pass, both real and personal; for it is clear to my mind that he has interpreted his own words, showing that by the description, “personal estate and effects,” he meant to include real estate. Therefore I am of opinion that the residuary legatee is entitled to the residuary real estate. *Doe v. Tofield* (*sup.*) is a leading authority, and there it turned upon the question whether, where there was a gift of all the personal estate, and then of a freehold house, that house passed under the general description. All the court did there was to ascertain that which was not strictly personalty, and laid it down that you must look at every part of the will for the purpose of interpreting it; and if you find in one part that which is personal described by words importing real estate or *vice versa*, you must give effect to the intention. In this case it appears to me that the testator has distinctly shown that he means by the words “personal estate and effects,” leasehold, freehold, and copyhold property. There must, therefore, be a declaration that the residuary real estate passed.

Solicitors for the plaintiff, *Tucker and New*.

Friday, April 22.

Re THE UNION HILL SILVER COMPANY (LIMITED).*Company—Winding-up—Notice of meeting—Shareholders out of jurisdiction—Dissentient shareholder—Companies Act 1862, s. 52.*

Notice was issued to the shareholders of a company of a general meeting for the purpose of passing a resolution to wind-up voluntarily; the resolution was passed, and confirmed at a subsequent general meeting. Some of the shareholders were resident in America, and consequently could not, in the ordinary course of the post, have received seven days' notice of either of the meetings as required by sect. 52 of the Companies Act 1862:

Held, that this section only applies to shareholders within

V.C. M.]

Re THE UNION HILL SILVER COMPANY (LIMITED).

[V.C. M.]

the jurisdiction, and that therefore the proceedings were valid.

Where resolutions for winding-up a company voluntarily were passed by the shareholders, there being only one dissentient shareholder, the court refused to entertain a petition presented by such shareholder for a compulsory winding-up order, on the ground that the meetings at which the resolutions were passed were not in all respects regular.

Re Beaujolais Wine Company, L. Rep. 3 Ch. App. 15, followed.

This was a petition by the Rev. Francis Henry Brett, a shareholder in the Union Hill Silver Company (Limited), praying for a compulsory winding-up order. They company was registered on the 15th Nov. 1866, for the purpose, as stated in the memorandum of association, of purchasing and working certain silver mines known as "The Blazing Star," "The Northerner," and "The Morning Glory," near Austin, Nevada, in the United States of America, and also of purchasing and working any other mines in North America; the capital was to be 60,000*l.*, divided into 6000 shares of 10*l.* each. On the same day articles of association were duly registered, which provided that the regulations contained in Table A of the Companies Act 1862, should be adopted as regulations of the company, and that the directors of the company might issue fully paid-up shares in payment for any property purchased by the company, which shares were to be marked B shares, and were not to be entitled to any dividend until 20*l.* per cent. should have been first paid to the holders of ordinary, or A shares, and also that the directors should purchase the mines mentioned in the memorandum of association. Shortly afterwards a prospectus was issued by the directors, stating that previous owners had already opened the mines to an extent sufficient to prove that their value at the depth reached was equal to the average of the celebrated mines in the best part of the very richest district of the state of Nevada, but that such owners had surrendered them to the company in order that they might be more actively worked, and that it had been estimated that by an outlay of 1200*l.* on each mine for machinery, a profit of 240*l.* per day, or at least 200*l.* per day, would be realised from each mine, being at the rate of 250*l.* per cent. per annum upon the total capital of the company; also that the original owners had taken the whole purchase price of the property in paid-up deferred B shares, and that only a limited number of the ordinary, or A shares, remained unallotted. The petitioner was, as he alleged, induced by this prospectus to apply for, and he accordingly became the holder of five A shares.

The petitioner stated that it was arranged between Frederick William Howes and Edmund Edwards, two of the promoters of the company, on the one hand, and Henry Joachimsen on the other, that Joachimsen should sell his interest in the mines to the company for 30,000*l.* by an allotment to him of 3000 B shares, which arrangement was carried into effect by an agreement dated the 31st Dec. 1866. That on the 10th Feb. 1868 only 473 of the A shares had been allotted, and upon these 4*l.* had been called up, and of that amount the sum of 1099*l.* was in arrear, and its recovery almost hopeless; and that out of the sums actually paid-up, 500*l.* had been paid for promotion money, so that the whole available capital for working the mines was less than 300*l.* On the 8th April 1868, the company issued a circular to the shareholders asking them to subscribe for new shares, and with this circular a new prospectus was issued repeating, in substance the statements in the first prospectus. Another prospectus had also been issued to the same effect. The petitioner then applied for and became the

registered holder of seven shares of this new issue, and paid-up 5*l.* upon them; and also became the purchaser for 40*l.* of eight of the B shares. On the 7th Feb. last, when he presented this petition, he was the holder of twelve A shares, with 7*l.* paid-up, and seven out of the eight B shares which he had purchased. On the 22nd Dec. 1868, Joachimsen, who had been appointed manager of the mines, wrote to the directors that the "Blazing Star" mine, the only mine then in operation, had turned out to be unprofitable, and proposed to find other mines in the State of Nevada, which could be advantageously worked by the company.

On the 1st Oct. 1869 the directors issued a report to the shareholders, stating the position and prospects of the company, and with the report issued a notice that the second annual general meeting of the shareholders would be held on the 12th Nov. 1869. About the same time a notice was sent to the shareholders by one of the directors of his intention to propose at the meeting that the company should be wound-up voluntarily. The meeting was accordingly held and the resolution was submitted to the shareholders, but was not passed, being opposed on the ground that time should be given for obtaining further advices from Joachimsen; it was, however, distinctly understood at the meeting that the opposition to the resolution should be withdrawn if satisfactory advices were not received within a certain time. No further advices having been received, the directors, on the 15th March 1870, issued a notice to the shareholders that an extraordinary general meeting would be held on the 24th March 1870, at which a resolution would be proposed that the company should be wound-up voluntarily. The meeting accordingly took place; there were present, either in person or by proxy, twenty-one shareholders, holding 258, out of a total of 335 A shares, and the resolution to wind-up the company voluntarily was carried unanimously, and liquidators were appointed. On the 31st March 1870 notices were issued convening a second extraordinary general meeting, to be held on the 11th April following, for the purpose of confirming this resolution. At this meeting there were present, in person or by proxy, eighteen shareholders, holding 248 A shares. The petitioner did not himself attend this meeting, but his solicitor, Mr. Pulbrook, who had qualified himself by taking one share, was present on his behalf. The resolution for a voluntary winding-up was confirmed by all the shareholders present except Mr. Pulbrook, who voted against the resolution.

The petitioner alleged that the company was a bubble company; that it had long ceased to carry on business, and was unable to pay its debts; but on the other hand, it was stated in evidence that the business of the company had not actually ceased, but was only suspended, and that its debts did not amount to 50*l.* It also appeared that some of the shareholders were resident in New York, and, consequently, could not have received seven days' notice of the meetings of the 24th March and the 11th April, as required by the 52nd section of the Companies Act 1862. On this ground the petitioner contended that the meetings were irregular, and the resolutions therefore invalid.

Glasse, Q. C. and Brooksbank for the petitioner.—This company has ceased to carry on business for more than a twelvemonth; it is altogether a bubble company, and the petitioner therefore asks, under clause 5 of the 79th section of the Companies Act 1862, that it should be wound-up by the court: (*Re London and County Coal Company, L. Rep. 3 Eq. 355; 16 L. T. Rep. N. S. 475.*) The resolutions for winding-up the company voluntarily are invalid. Under the 51st section of the Act, the

V.C. M.]

Re THE UNION HILL SILVER COMPANY (LIMITED).

[V.C. M.]

resolutions must be passed by a majority of not less than three-fourths of the members of the company for the time being entitled to vote at meetings of which due notice has been given; and according to the 52nd section no meeting can be held to be duly summoned, unless seven days' notice of such meeting has been served on every member as required by Schedule 1, Table A; here the shareholders resident in America could not in the ordinary course of the post have received the seven days' notice.

Cotton, Q. C. and Graham Hastings, for the company, opposed the petition. The order asked for would cause unnecessary expense. The company has not come within the 79th section of the Companies Act 1862; it is still able to meet its liabilities, and therefore the court cannot make the order: (*Re Joint-Stock Coal Company*, L. Rep. 8 Eq. 146; 20 L. T. Rep. N. S. 966.) There was no necessity for serving the shareholders in America with notices of the meetings. The 52nd section can only apply to shareholders within the jurisdiction, and who can be reached by the English post. It cannot mean that a company must suspend the transaction of business until its shareholders in every quarter of the globe have been served. All the shareholders, except the petitioner, are in favour of a voluntary winding-up, and therefore the court ought not to make an order for compulsory winding-up:

Re Beaujolais Wine Company, L. Rep. 3 Ch. App. 15.

Glasse, in reply.—It is clear the company cannot continue to carry on its business, and we have therefore a right to a winding-up order, even though the company may not be insolvent: (*Re Suburban Hotel Company*, L. Rep. 2 Ch. App. 737; 17 L. T. Rep. N. S. 22.) All the shareholders ought to have been served with the notices of the meetings. How could the resolutions be regular, if a substantial number of the shareholders were unrepresented at the meetings? It is of great importance that a resolution for winding-up a company should be regular in all respects: (*Re Old Bridport Brewery Company*, L. Rep. 2 Ch. App., 191.) *Re Beaujolais Wine Company* (*ubi sup.*) differs from the present case.

The VICE-CHANCELLOR—This is a petition for a compulsory order for winding-up this company. The company, it appears, was formed in Nov. 1866 for the purpose of purchasing and working certain mines in Nevada, in the United States. Three prospectuses were issued by the directors at different times, which were in the usual form, holding out great promises and the most brilliant prospects, and by them the petitioner was, as he alleged, led to believe that the profits would amount to about 240% a day, or 250% per cent. per annum. As might well have been expected, he experienced complete disappointment; no profits whatever were made. Looking at these prospectuses, I am inclined to think the statements they contain are not altogether consistent with good faith, and that they are such as honest men ought not to have made; but I am astonished to find that any persons could have been found to embark their money upon such an undertaking. There can be no doubt that these statements are altogether delusive and unfounded, and therefore I think that if the petitioner has been misled by them, his proper remedy was to have filed a bill for the return of his money against the parties who made the misrepresentations, and according to the well known principles of this court as laid down in *Chester v. Spargo*, 18 L. T. Rep. N.S. 314, there would have been no difficulty in coming to the conclusion that the di-

rectors were bound to return all moneys received by them on the faith of these misrepresentations. That would have been the proper course for the petitioner to take. But instead of adopting this course, he presents a petition for a compulsory winding-up stating he is a shareholder, and by so doing he admits his position. It appears he has paid up 124% and is liable to pay 36% more, but the company offered to exonerate him from this sum and to pay him his costs out of pocket, if he would consent to have his petition dismissed; that offer, however, was not acceded to, and I have therefore now to decide whether this is a case for a compulsory order. Now in all these cases the court must consider what the result of a compulsory order will be. If the result of such an order in this case would be that great expense would be incurred, I ought to refrain from making such an order. Now this company has substantially no property whatever; the whole of their debts do not amount to 50%, it seems perfectly clear that they cannot continue to carry on their business, and therefore they ought to be wound-up. The question is whether they ought to be wound-up under a compulsory order. The facts of the case are these:—A general meeting of the shareholders was held in November 1869, at which a report was read showing the prospects of the concern; a resolution was then proposed that the company should be wound-up voluntarily, but the resolution was not passed, though it was understood by those present that a voluntary winding-up should take place, if more favourable accounts of the company's prospects were not received from Joachimsen, the company's manager. Nothing further having been heard from Joachimsen, an extraordinary general meeting of the shareholders was held on the 24th March last, at which a resolution was unanimously passed that the company should be wound-up voluntarily. On the 11th of this month a second meeting was held at which this resolution was confirmed. The petitioner did not himself attend this meeting, but his solicitor Mr. Pulbrook, who had bought one share to entitle him to be present as a shareholder, attended in order to protect the interests of his client; and therefore I must consider Mr. Brett to have been present by his agent. Mr. Pulbrook was the only shareholder who voted against the resolution, which was then passed. It appears, therefore, that all parties are desirous of a voluntary winding-up except the petitioner. Then this petition is presented. Now, looking at the character of the speculation, the petitioner must have been aware that the concern he was embarking in was a mere lottery, and therefore, open to the greatest peril. No reasonable person could have expected that an investment in such a concern would yield a profit of 250 per cent.; it ought, therefore, to have been brought to an end in the most expeditious and inexpensive manner. The petitioner was well aware that the general feeling of the shareholders was in favour of a voluntary winding-up, but, notwithstanding this, he presents a petition for a compulsory winding-up which can be of no benefit to any of the parties concerned; and he contends that the resolutions for the voluntary winding-up were invalid because some of the shareholders, who were in America, did not receive due notice of the meetings at which those resolutions were passed. This objection is founded on the 52nd section of the Companies Act 1862, which provides that seven days' notice of any general meeting must be served upon every shareholder in the manner specified in Table A of the first schedule to the Act. Now, if the petitioner's construction of this section is right, namely, that every shareholder must have notice of a general meeting, no matter in what part of the world he may happen to be, it is a most inconvenient con-

V.C. J.]

Re MARTINEZ' TRUSTS—PADDON v. WINCH.

[V.C. J.]

struction; because a company cannot, without serious injury to itself, delay the transaction of important business until every shareholder in every part of the world has had notice of the meeting at which the business is to be discussed. I think that such a construction would be entirely opposed to the spirit and intention of the Act. It seems to me that the Act has reference only to shareholders who can be reached by the ordinary English post, and that, in fact, it was not necessary to serve these absent shareholders. I am therefore of opinion that this objection to winding-up the company voluntarily is unfounded. The petitioner, at all events, had due notice of these meetings; and the proceedings, therefore, are binding upon him. If the absent shareholders think they are not bound, they may come here at some future time and raise the question. Mr. Glasse says this case is different from that of the *Beaujolais Wine Company*, L. Rep., 3 Ch. App., 15; but that case seems to me to be exactly similar to the present. There the meetings which took place, though they were irregular, showed the general feeling of the shareholders, and that all parties were desirous of winding-up voluntarily; and, accordingly, the proceedings at those meetings were upheld. In the present case no one appears in support of the petition, and the interest of the petitioner is insignificant. Under all the circumstances of this case, and as no reasonable good would arise from the order to the petitioner or anyone else, I think the petition must be dismissed; but, taking into consideration the misrepresentations in the prospectus, without costs.

Solicitor for the petitioner, *Pulbrook*.Solicitors for the company, *Deane and Chubb*.

V. C. JAMES'S COURT.

Reported by the Hon. ROBERT BUTLER, Barrister-at-Law.

Monday, Feb. 28.

Re MARTINEZ' TRUSTS.

Trustee Act 1850—Appointment of new trustees—Alien—Cestui que trust—13 & 14 Vict. c. 60, s. 32.

Where three executors and trustees of the will of a naturalised British subject renounced probate, and declined to act, the court, on the petition of the administrator, and of the persons who would, but for the fact of their being aliens, be coheirs at law, made an order, the Crown not opposing, for the appointment of new trustees, and vesting the real estate in such new trustees.

This was a petition for the appointment of new trustees of the will of Andres Ysidro Breton Martinez, a naturalised Spaniard, who, by his will dated the 29th of March 1856, devised real estate to three trustees upon trusts for sale; the beneficiaries being the testator's two sisters, who were aliens, and would, if British subjects, have been his coheirs at law.

The trustees, who were also appointed executors, renounced probate, and declined to act, but had not disclaimed by deed.

The petition was presented by the administrator cum testamento annexo, and the two sisters.

Eddis, Q.C., and *W. W. Karlake* for the petitioner.—The question is whether the disclaimer is sufficient to divest the real estate; if so, the estate is in the Crown, which, however, cannot hold beneficially. They cited—

Re Ellison, 2 Jur. N. S. 62.*Marten and Haynes* for the disclaiming trustees.

The VICE-CHANCELLOR said he could not allow

the respondents to disclaim the trusteeship without also disclaiming the estate.

Wickens for the Crown, did not oppose the prayer of the petition.

The VICE-CHANCELLOR said that under the circumstances he decidedly thought it "fit and expedient" that new trustees should be appointed. If the Crown took at all, it would not take for its own benefit; and as the Crown did not, in this instance, appear, he thought he might make an order vesting the estate in the new trustees.

Solicitors: *Hume and Bird*; *Hill and Son*; *Raven and Bradley*; *Waltons, Bubb, and Walton*.

Monday, March 14.

PADDON v. WINCH.

Practice—Production of documents.

Pending a contract between mortgagees, selling under a power of sale, and the purchaser, letters passed in which reference was made to an anticipated claim by a third party to a legacy, as being a charge on the mortgaged property.

The claim was afterwards made by bill:

Held, that the correspondence could not be treated in the suit as privileged.

This was an adjourned summons for production by the defendant of certain letters in his possession written before the institution of the suit.

The bill was filed in Oct. 1869 by a legatee whose testator died in 1848, for the purpose of obtaining a declaration that her legacy was charged upon certain freehold property which, in Jan. 1868, had been sold to the defendant Winch by the West of England and South Wales District Bank, as mortgagees with power of sale from the testator's son to whom the property was devised (charged, as the bill alleged, with payment of legacies and interest). The defendant, by his answer, insisted that he was purchaser of the property for valuable consideration without notice; that he was led to believe that the plaintiff's legacy had been long since paid, though out of abundant caution the bank had given him an indemnity against any claim in respect of such legacy.

A summons having been taken out for production of documents by the defendant, the defendant claimed privilege for (amongst other documents) certain letters which had passed between the solicitors and agents for the bank and his solicitors between Aug. 1867 and Feb. 1868, during the negotiations for his purchase.

The defendant's affidavit stated that these letters were "letters referring to the plaintiff's claim for her legacy, which is the subject-matter of dispute in this suit. My solicitor, Mr. Downing, having, as my solicitor, corresponded with Messrs. Chanter and Finch and other the agents of the said bank, concerning the same, such letters were written in anticipation of proceedings being taken in reference to the said legacy."

Graham Hastings, for the plaintiff, in support of the summons, contended that the privilege could not be extended to communications between the defendant's solicitor and third parties before the suit arose, and not for the purposes of the suit; and cited

Ford v. Tennant, 32 Beav. 162; 7 L. T. Rep. N. S. 733.

Ince, for the defendant, contended that the letters in question were privileged communications, having

V.C. J.] THE WANDSWORTH AND PUTNEY GAS-LIGHT, &C., CO. v. WRIGHT AND OTHERS. [V.C. J.]

been written in anticipation of the claim raised by the plaintiff, which was then contemplated, though it had not actually ripened into a suit. He cited

Simpson v. Brown, 33 Beav. 482; 11 L. T. Rep. N. S. 593;

Curling v. Perring, 2 M. & K. 380;

Pearse v. Pearse, 1 De G. & Sm. 12;

Manser v. Dix, 1 K. & J. 451;

Boyd v. Petrie, 17 W. R. 903; 20 L. T. N. S. Rep. 934.

Hastings, in reply, referred to

Gore v. Bowser, 5 De G. & Sm. 30

The VICE-CHANCELLOR.—I am of opinion that these documents must be produced. It is quite clear, looking at the dates, that they were not written with a view to the defence of this suit. They were letters that passed between the solicitor of the purchaser and the solicitor of the vendor, in reference to a contract for the purchase by the defendant, in which the legacy claimed by the plaintiff was incidentally mentioned. They could not be said to be letters written in anticipation of the claim raised by this suit, and must, therefore, be produced.

Solicitors: *G. Dillon Webb*; *W. A. Downing*.

Thursday, April 21

THE WANDSWORTH AND PUTNEY GAS-LIGHT AND COKE COMPANY v. WRIGHT AND OTHERS.

Company—Election of directors—Validity of, impeached—Authority of parties claiming to be duly elected—Retainer on behalf of company by—Costs.

At a board meeting of a company, under the regulations of which three directors made a quorum, two directors and two other gentlemen who claimed to be directors on the ground that at the election of directors the poll which went against them had been unfairly taken, passed resolutions under the advice of a solicitor that he should take legal proceedings to restrain one of the gentlemen in whose favour the poll had been declared (the other being dead) from acting, and they affixed the seal of the company to a retainer for that purpose. The solicitor accordingly filed the bill in Chancery in the name of the company, against the three directors who supported the validity of the poll to restrain the gentleman who had been declared elected from acting. A meeting of shareholders was subsequently held, at which resolutions were passed repudiating the Chancery proceedings.

Held, that the return of the poll was to be considered good until it was brought into question before a proper tribunal, in a proper manner; and that therefore the solicitor having accepted a retainer from persons not authorised to pledge the credit of the company, the bill must be taken off the file, and the costs paid by the solicitor.

This was a motion on the part of the defendants that the bill in the above suit might be taken off the file, having been filed without the authority of the nominal plaintiffs, the Wandsworth and Putney Gaslight and Coke Company; and that Edmund Kell Blyth, the solicitor by whom the bill was filed, might be ordered to pay to the defendants their costs of this suit and of the present application.

The bill in this suit stated that an annual general meeting was held on the 23rd February, 1870, for the purpose (among other things) of electing two directors in the room of Benjamin Wright and Charles Price, who retired by rotation from the direction, and who offered themselves, and were proposed for re-election. John Langton and Henry Palfrey Stephenson were also proposed to fill the office. A show of hands being called for, it was declared in favour of Langton and Stephenson. A poll was then demanded on the part of Wright and

Price; Henry Kimber and Joseph Holland were appointed by the chairman, Mr. Symonds Howell, to be scrutineers of the votes. The poll having been taken, the scrutineers reported the number of votes to be as follows: Wright, 3021; Price, 2945; Langton, 2936; Stephenson, 2860. The chairman thereupon declared Messrs. Wright and Price to be duly elected, and the secretary entered the above result in the minutes.

At the first board meeting after the above meeting (Mr. Howell being absent), there were present Messrs. Wilkins, Clarke, Blake, and Wright and Mr. Blyth, the solicitor. Mr. Stephenson and Mr. Langton were also present. Soon after the meeting commenced business, Messrs. Blake and Wright withdrew from the meeting; whereupon those present passed resolutions ordering the minutes of the general meeting to be altered, by making it appear that the scrutineers had reported the numbers of votes in favour of Messrs. Langton and Stephenson, instead of Messrs. Price and Wright. They also passed resolutions authorising Mr. Blyth to take legal proceedings to restrain Mr. Wright from acting, (Mr. Price having meanwhile died); and they affixed the seal of the company to a retainer for that purpose.

At the next board meeting, Messrs. Wilkins and Clarke refused to attend, unless Messrs. Langton and Stephenson were allowed to sit in lieu of Messrs. Wright and Price; Mr. Wilkins refused to bring or send the key he had taken away; and Mr. Lass, the secretary, refused to give the chairman the office keys, so that the business of the company could not be carried on.

On the 8th March, 1870, Mr. Blyth filed the bill in Chancery in the name of the company against Messrs. Wright, Howell, and Blake, to contest Mr. Wright's election, and moved for an injunction to restrain him from acting. The defendants at once gave notice of motion to take the bill off the file, on the ground that it was filed without any authority on the part of the company. Both motions were argued on the 17th of March, 1870, when the Vice-Chancellor stated that there was sufficient ground for the counter motion to justify him in not refusing it, until the opinion of a general meeting of shareholders was ascertained, and he therefore did not grant the injunction.

A meeting of the shareholders was accordingly held on the 11th April 1870, when resolutions were passed by the shareholders disavowing the bill in Chancery, and requesting that it be taken off the file, confirming Mr. Wright's election, and the election by the directors of Mr. Robert Jones, C.E., in the place of Mr. Price, deceased, and removing Messrs. Wilkins and Clarke from the office of directors, and appointing Messrs. Ransome and Newsome in their stead. The result of the meeting was brought before the court by the directors, who gave the necessary notice to bring on again their motion to take the bill off the file.

Amphlett, Q. C. and *E. Macnaghten* appeared in support of the motion, and cited *Moxley v. Alston*, 1 Ph. 790.

Kay, Q. C., *Eddis*, Q. C. and *Speed* appeared for the nominal plaintiffs, and contended that, although Messrs. Langton and Stephenson were not nominally returned to act as directors at the general meeting held on the 23rd of February they were *de jure* and *de facto* elected. For if the votes which were improperly received for Messrs. Wright and Price were deducted from the return, and those that were improperly rejected on behalf of Messrs. Langton and Stephenson were added to it, it would be found that Messrs. Langton and Stephenson were elected. This being so, they were *de jure* and *de facto* direc-

V.C. J.] THE WANDSWORTH AND PUTNEY GAS-LIGHT, &C., CO. v. WRIGHT AND OTHERS. [V.C. J.

tors, and therefore the bill was properly filed, and the company are liable for the costs.

Foss v. Harbottle, 2 Hare, 461.

Mr. Blyth was not personally represented.

The VICE-CHANCELLOR (without hearing a reply): I am of opinion that this motion must be granted as asked; the bill must be taken off the file, with costs to be paid by the solicitor. In one respect this bill is entirely new, because I do not recollect ever hearing of a bill in which this court was called upon to try a question of *quo warranto* upon a scrutiny of votes. In truth, the bill was framed with full notice of that difficulty, because it alleges a direct case of fraud against the scrutineers and the chairman. It is impossible to deny that is the substance of it; that the chairman appointed two partisans as scrutineers, and that the two scrutineers, by a conspiracy between themselves, wilfully falsified the return of the votes by inserting in the list bad votes on the one side, and by excluding good votes on the other. That is what it comes to, they well knowing that to be untrue. Then what appears is this: there was a meeting held, and at present, as far as I have heard the case, if I were sitting merely as scrutineer upon that election, I assume I should come to the conclusion that Langton and Stephenson had a majority of legal votes; that is to say, that I should come to the conclusion that the revocations were sufficient, and, beyond all question, proxies which had not been delivered within forty-eight hours were not admissible. However, what takes place? There was a meeting called, and I think I recollect sufficient of the affidavit brought before me on the former occasion to say this: that at that meeting Mr. Kimber, who seems to have been a legal friend of the chairman, was appointed chairman's scrutineer, the chairman being at the head of one of the parties, and the other person appointed scrutineer was appointed after an appeal to the meeting to name a scrutineer; and his affidavit of what took place at that meeting satisfies me that he went to that meeting without any bias either one way or the other, and had nothing whatever to induce him to act otherwise than impartially. There were those two scrutineers appointed by the meeting. Now, it is said that the Act of Parliament does not provide for scrutineers. The Act of Parliament does not provide for the minutiae of the election,—it simply says that the election is to be at a general meeting. It is like everything else at general meetings of shareholders, the details of the proceedings must be regulated by the persons present, and by the chairman; and if his decision is quarrelled with, it must be regulated by the majority of those present. Of course it must be presumed that they do it all honestly and fairly. The meeting being held—without any dissentient voice—as far as I can make out, the meeting agreed that there should be two scrutineers appointed; that was reasonable and proper. Accordingly, those two gentlemen I have mentioned were appointed for the purpose of taking the votes. The votes were taken by them. There is no entry on the minutes of the proceedings to show that particular persons voted, or what were the number of good votes, or what were the number of bad votes. That has been made out before me upon evidence on the motion. Well, then, that can only be made out on a proper scrutiny. All that appeared upon that which is the legal record of what took place at the meeting was, that the show of hands was in favour of Stephenson and Langton; that thereupon a poll was demanded; and that the chairman declared the poll open, and nominated as scrutineers Messrs. Kimber and Holland. A poll was thereupon taken, when the number of voters present, personally or by

proxy, as ascertained by the scrutineers, was as follows—then the number is given. Then “the chairman declared Messrs. Wright and Price duly elected directors of the company.” That is all that took place; there is no dispute whatever in point of fact, that is to say, of the fact that the scrutineers made that return. Then, that being so, it appears to me that *de facto*, at all events, I must presume that was done at the meeting, and that the meeting did declare—that the chairman, in the name of the meeting, did declare—Wright and Price to be duly elected as directors; and that declaration, being entered on the minutes, appears to me to have exactly the same effect as the declaration of any other poll; that is to say, there is a return made; that return is good until it is brought into question before a proper tribunal in the proper manner,—and thereupon *prima facie* by that declaration Messrs. Wright and Price were elected at that meeting, subject, of course, to their election being brought in question afterwards. If that had really been done by way of fraud and conspiracy, which is alleged by the bill against the chairman and scrutineers, in all probability this court would have found its arm long enough, notwithstanding the decision of *Mosley v. Alston* and other cases, to have dealt with such fraud as that; but, in the absence of anything of that sort—and I am bound to say I am quite satisfied there was no fraud of any kind—in the absence of any mistake as to the admission of votes, or the mode in which the votes were taken, the matter would simply come to this: there is the return of the men who had the majority of votes. Well, then, that return is good until it is set aside. Then, how is it set aside? It is set aside by gentlemen who question the return. It appears to me the proceedings of the meeting of the directors on that point were the most extraordinary proceedings that I almost ever heard of. They were gentlemen who knew that they had not been returned as elected, who knew that the minutes of the meeting represented two other persons as being elected; they thereupon take their seats as directors, and, having done so, they proceed to determine that, as directors, they were duly elected. I am rather surprised that the other directors present allowed them to do that. It is quite clear that they ought to have waited until there was a meeting, or to have called a general meeting. I cannot admit a thing of this kind; that in this company a man may say that “although by a mistake on the part of the chairman or the scrutineers I was not elected as director, yet I will go and take my seat, and authorise a bill to be filed by the solicitor of the company, in the name of the company, for the purpose of asserting my right.” That cannot be right. The truth is, there is always a mode of setting things in order in these companies. You can always call a general meeting if there is anything wrong; and, after all, it is the general body alone that this court has to regard. This court does not regard the office of director as a thing with respect to which a man has a vested right to say, “I was elected to the office, and I have a right to hold it.” The office of director is nothing more than that of manager of a company. The company has full power to deal with its directors, to appoint them, to dismiss them, or to re-elect them; and if any dispute arises as to the propriety of the election of a director, the simple course is to call another general meeting, and to get the whole thing set right. I am of opinion that the way in which those two gentlemen (Langton and Stephenson) have acted is certainly without any colour of right in taking their seats at the board before there was any declaration or return of their election; and the solicitor is the person who seems to have advised the proceedings, and accepted a retainer of those gentle-

C. P.]

Re HANNAH PACKER.

[C. P.]

men who were not directors, and were not authorised in any way to pledge the credit of the company. In accepting that originally, he accepted it at the peril of its being avowed or disavowed by a general meeting of the shareholders. A general meeting of the shareholders has disavowed the proceedings, and desired that the bill should be taken off the file, as being not in accordance with the general views of the company. I therefore accede to that application, and order the bill to be taken off the file, and the costs to be paid by the solicitor.

Solicitor for the plaintiffs, *Edmund Kell Blyth*.
Solicitors for the defendants, *Kimber and Ellis*.

Common Law Courts.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING,
Esqrs., Barristers-at-Law.

Wednesday, April 27.

Re HANNAH PACKER.

Acknowledgment by a married woman — Affidavit verifying certificate—3 & 4 Will. 4, c. 74 — Regule Generales, Hilary Term, 4 Will. 4.

A married woman, since deceased, duly acknowledged an indenture according to the provisions of the 85th section of the Fines and Recoveries Act, and a certificate was duly signed by two commissioners, since deceased, who received the acknowledgment, but it was discovered twelve years afterwards that no affidavit of verification had been made at the time, and that the certificate had not been filed.

Upon the production of affidavits by the husband and a practising attorney, the latter of which contained all that was required by the Act itself, but the further matters required by the rules of Hilary Term, 4 Will. 4, were certified by the husband only, all other parties who had knowledge of them being dead, the court allowed the certificate to be filed.

This was an application for leave to file the certificate of acknowledgment of Mrs. Packer, a married woman, now deceased, to an indenture, made the 19th Oct. 1857. The acknowledgment and certificate were duly made, but, by accident, were not filed. No affidavit, as required by the rules of court, had been made at the time, and literal compliance with the rules could not now be performed in consequence of the deaths of the necessary deponents.

It appeared from the affidavit of Elijah Packer, gentleman, the husband of the said married woman, that the parties to the said indenture of the 19th Oct. 1857, were one William Tier (since deceased), himself Elijah Packer, and Hannah his wife (since deceased), of the first part; Elizabeth Tier, widow (since deceased), of the second part; and Mary Padwick, spinster, of the third part. On the day of the date of the indenture it was executed by the said Elijah Packer and William Tier in the presence of each other and one Daniel Smart, solicitor (since deceased), the attesting witness.

This affidavit proceeded as follows:

On the 20th of the same month (Oct. 1857) my said wife Hannah and I attended by appointment at the dwelling-house of William Foster, of Emsworth, and there and then the said indenture was acknowledged by my said wife Hannah before the said Daniel Smart and Charles Beare Longcroft, then of Havant in the said county of Southampton, gentleman (since deceased), two of the perpetual commissioners appointed for the county of Hants for taking the acknowledgments of deeds by married women, pursuant to 3 & 4 Will. 4, c. 74, I being present all the time except during the interval when at the request of the said commissioners I left the room in order to allow of my said wife Hannah being separately examined by the said commissioners apart from me: and that after the said examination had been made I was readmitted to the said room, and

was informed by the said commissioners that my said wife had been examined whilst apart from me touching her knowledge of the contents of the said deed, and that she had fully and voluntarily consented unto the same. And I further say that before again leaving the presence of the said commissioners I saw their respective signatures to the said memorandum of acknowledgment and certificate respectively written at the foot of the said memorandum of acknowledgment and at the foot of the said certificate respectively.

That at the time of making such acknowledgment my said wife Hannah was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made for the purpose of securing by way of mortgage to the said Mary Padwick the sum of 700*l.* and interest, and subject thereto, for enabling her to dispose of her estate and interest in the said premises to such uses and in such manner as she, notwithstanding her then present or any future coverture, should at any time, or from time to time, by any deed or deeds, or by will or codicil appoint, and that the said indenture contained an express declaration that the direction for the reconveyance of her moiety or interest in the same premises, in the proviso for redemption therein contained, to such uses as aforesaid, was intended to enable her to dispose of the same moiety as if she was sole and unmarried, but without prejudice to the security thereby made; and that the premises comprised in the said indenture were certain freehold hereditaments situate at Emsworth aforesaid, and fully described in the first part of the schedule to the said indenture, and as being then in the occupation of the said William Foster, and certain copyhold hereditaments also situate at Emsworth aforesaid, fully described in the second part of the said schedule, and as being then in the occupation of the said William Foster.

That the said Daniel Smart prepared the said indenture, and was solely concerned for all parties thereto, and after the acknowledgment thereof by my said wife Hannah, the said indenture and the certificate of the acknowledgment thereof, were taken charge of by the said Daniel Smart for the purpose of completing the said acknowledgment.

That the said Charles Beare Longcroft, one of the said commissioners, was not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned.

That I know and was well acquainted with the said Charles Beare Longcroft for many years prior to his death, and am well acquainted with his handwriting, and I say that the signature "C. B. Longcroft," subscribed at the foot of the memorandum of the acknowledgment of the said indenture, is of the proper handwriting of the said Charles Beare Longcroft; and that the signature "C. B. Longcroft" subscribed at the foot of the certificate of acknowledgment of the said indenture by my said wife Hannah is of the proper handwriting of the said Charles Beare Longcroft.

That I knew and was well acquainted with the said Daniel Smart for many years prior to his death, and am well acquainted with his handwriting, and I say that the signature "Daniel Smart," subscribed at the foot of the memorandum of acknowledgment of the said indenture, is of the proper handwriting of the said Daniel Smart, and that the signature "Daniel Smart" subscribed at the foot of the certificate of acknowledgment of the said indenture by my said wife Hannah, is of the proper handwriting of the said Daniel Smart. And I further say that the signature "Daniel Smart," indorsed on the said indenture as the witness attesting the execution of the same indenture by the said William Tier, me, the said Elijah Packer, and my said wife Hannah, and the said Elizabeth Tier respectively, is of the proper handwriting of the said Daniel Smart.

That my said wife Hannah afterwards by her will, bearing date the 1st Oct. 1858, in exercise and execution of the authority given to her by the said indenture, appointed that from and after her decease all that her undivided moiety of all that and those the piece or parcel of land and hereditaments situate at Emsworth aforesaid, specified in the first schedule to the said indenture, and subject to the same indenture, and also all other her real estate whatsoever and wheresoever, should be and remain to the use of me her said husband, my heirs and assigns for ever. And by the said will she also gave, devised, and bequeathed all that the estate and interest in a certain copyhold estate situate at Emsworth aforesaid, specified in the second schedule to the said indenture, subject as therein mentioned unto me her said husband, my heirs, executors, administrators, and assigns absolutely.

That my said wife Hannah died on or about the 16th Oct. 1858.

That the said William Tier, one of the parties to the said indenture died on or about the 25th March, 1860.

That the said Elizabeth Tier, another of the parties to the said indenture died on or about the 13th Nov. 1860.

That the said Charles Beare Longcroft died on or about the 6th May 1859.

That the said Daniel Smart died on or about the 5th July 1859.

That the sum of 700*l.* intended to be secured to the said

C. P.]

Re HANNAH PACKER.

[C. P.]

Mary Padwick by the said indenture together with an arrear of interest is still due and owing on the said security.

That I have contracted for the conveyance of the equity of redemption of and in the moiety of the said freehold and copyhold hereditaments comprised in the said indenture and by the said will of my said wife, devised to me my heirs and assigns as aforesaid to the said William Foster, and that I was not aware until informed of the fact on or about the 17th March last by Mr. James Stening of Portsea, and Emsworth, my present solicitor, that the said certificate had not been filed in this honourable court, and that no affidavit in verification of the certificate by either of the said commissioners could be found.

That I am now required by the parties interested in the said sum of 700*l.* secured by the said indenture to perfect the said acknowledgment, and the perfecting thereof is also necessary in order to enable me to complete my contract for the conveyance of the said moiety of the said freehold and copyhold hereditaments to the said William Foster.

There was also produced an affidavit of James Stening, an attorney and solicitor practising at Portsea and Emsworth, who had succeeded to the practice of the said Daniel Smart. In this affidavit he deposed that he knew and was well acquainted with the said Daniel Smart, Charles Beare Longcroft, Wm. Tier, and Elijah Packer, and with the handwriting of all of them; that every signature of each of them on all the documents alluded to was in the proper handwriting of each respectively. The affidavit also contained the following:

That I knew and was well acquainted with Hannah, the wife of the said Elijah Packer for thirty years prior to her death in the year 1858, and that at the date of the execution of the said indenture the said Hannah Packer was of full age, that is to say, of the age of fifty years or thereabouts, and of competent understanding.

That at the request of the said Elijah Packer I have caused diligent search to be made amongst the documents and papers of the late Daniel Smart which came into my custody after his decease, and the said certificate of acknowledgment was found on or about the 5th March last in one of the deed boxes formerly of the said Daniel Smart, and that diligent search has since been made for an affidavit in verification of the said certificate, but none has been found nor any draft thereof, and I verily believe that no such affidavit is to be found.

Certificates of death of all the deceased persons mentioned in these affidavits were also produced; the certificate and memorandum of acknowledgment were both duly drawn up.

Sect. 85 of the Fines and Recoveries Act 1833 (3 & 4 Will. 4, c. 74) provides:

That every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in Chancery, or by two commissioners appointed pursuant to this Act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and if all the requisites in this Act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate, and the affidavit to be filed of record in the said Court of Common Pleas.

Sect. 89 requires the Court of Common Pleas from time to time to make such order and regulations as the court shall think fit, touching the various matters dealt with by the Act.

By No. 4 of *Regule Generales*, Hilary Term, 4 Will 4, it is ordered that:

The affidavit verifying the certificate to be made pursuant to the said Act, and which certificate shall be in the form contained in the said Act, shall be made by some practising attorney or solicitor of one of the courts at Westminster, or of one of the counties palatine of Lancaster or Durham, and that in all cases it shall be deposed in addition to the verification of the said certificate, that the deponent knew the person or persons making such acknowledgment. And that at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgments, to the best of his (deponent's) knowledge or belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein as attorney,

solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit. And that previously to such acknowledgment being taken, the deponent had inquired of such married woman whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and where any such married woman in answer to such inquiry shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said judge [master, or commissioners.]

By a subsequent rule of Trinity Term in the same year, it was ordered that

Where such parts of the affidavit verifying the certificate of acknowledgment, taken in pursuance of the late Act of Parliament respecting fines and recoveries, as state the deponent's knowledge of the party making the acknowledgment, and her being of full age cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

F. M. White submitted that upon the affidavits produced all the requirements of the statute were carried out, and it appeared also from these affidavits that no other evidence but that of the husband was procurable of the matters of which the rules required verification. In the case of *Ex parte Stevens*, 3 Hodges 13, the court allowed a certificate and affidavit to be filed two years after the acknowledgment.

BOVILL, C. J.—The affidavits, I think, show a sufficient compliance with the terms of the Act of Parliament, and the order asked for should be granted. The certificate is in proper form, and the signatures of both the commissioners are verified by the affidavit of a practising attorney; it appears also by that affidavit that the attorney knew the person making the acknowledgment, and he deposes that she was at the time of full age and competent understanding. But as to the other matters required by the rule, the husband is the only person who is able to state that one of the commissioners was disinterested, or that his wife intended to give up her interest; he, however, does this satisfactorily, and describes a conversation with the commissioners on the subject immediately after the acknowledgment was made. This was a substantial compliance so far as the Act is concerned with what is required to render an acknowledgment valid. It is certainly not a literal compliance with what is required by the general rules, nor is it in accordance with the usual practice. The practice, however, has not been unbroken, and the case referred to shows that the rules have not been always strictly complied with; and in this case I do not doubt the propriety of transgressing them again.

BYLES, J.—I am of the same opinion, although I have formed it with some hesitation. It is clear from the affidavits that we have the best evidence procurable of what was said at the time, and I think it is not likely that such a conversation would have been stated unless it really took place. It may be said that the application was out of the usual time, but the answer to that is, before this such an objection has been held to be not insuperable. In granting the order asked for, we shall, I think, be acting in accordance with the manifest truth and justice of the case.

BRETT, J.—I also have some difficulty in agreeing to grant this application, because it is clear that the

C. P.]

EVERARD v. KENDALL.

[C. P.]

rule of court has not been complied with; unless the circumstances of a case are most exceptional, we ought certainly to insist upon compliance with the rules; but the statute does not say that the rules are to be treated as part of the enactments; and they are therefore mere rules of practice for the convenience of the officers of the court; and although the court should insist upon their being carried out when it is possible to do so, and except under peculiar circumstances, yet I think that no affidavits can be produced which would show facts creating a better justification for our making the order.

Application granted.

Attorneys for applicant, *Dyne and Harvey.*

Saturday, April 30.

EVERARD v. KENDALL.

County Courts—Admiralty jurisdiction—Ship—Vessel—Dumb-barge—The County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), s. 3—The County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), s. 4.

A dumb-barge, being a vessel propelled by oars only, is not a "vessel" within the meaning of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), or a "ship" within the meaning of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), s. 4; so that where there is a collision between two dumb-barges no County Court has Admiralty jurisdiction in the matter.

The County Courts do not take a new and original Admiralty jurisdiction under the Acts 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, but merely a portion of that jurisdiction which was formerly enjoyed exclusively by the High Court of Admiralty.

This was an application for a prohibition against the judge of the City of London Court exercising the Admiralty jurisdiction of the court in a case where the defendant's dumb-barge had "sat on the head" of the plaintiff's dumb barge.

Lanyon, for the defendant.—This question turns on the construction to be put upon the 4th section of the County Courts Admiralty Jurisdiction Act 1869 (32 & 33 Vict. c. 51). The County Courts Admiralty Jurisdiction Amendment Act 1868 (31 & 32 Vict. c. 71), s. 3, gives to certain County Courts, to be appointed by Her Majesty for the purpose, a limited Admiralty jurisdiction in certain cases. The City of London Court is one of the courts so appointed. One of these cases is "as to any claim for damage to cargo, or damage by collision," where the amount claimed does not exceed 300*l.* The statute of 1868 throughout uses the word "vessel," and "vessel" is defined in the general orders made in pursuance of the Act as "every description of vessel used in navigation not propelled by oars only." The City of London Court, then, has no jurisdiction in this case under the statute of 1868, as a dumb-barge is not a vessel within the meaning of the Act. The 3rd section of the Act of 1868 is amended by the 4th section of the Act of 1869 (32 & 33 Vict. c. 51), so as to "extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed 300*l.* The question then arises whether the word "ship" used in this section has a more extensive meaning than the word "vessel" used in the Act of 1868, so as to include a dumb-barge. It is submitted that the word "ship" used in the one Act means precisely the same as the word "vessel" in the other; and,

if that is disputed, then, as the Acts in question transfer a portion of the jurisdiction of the High Court of Admiralty to the County Courts, we must look to the doctrines and practice of that court for the meaning of the word "ship." Tried by that test, "ship" means a vessel used in navigation propelled otherwise than by oars, and does not include a dumb-barge.

The Bilbao, 1 Lush. 149; 3 L. T. Rep. N. S. 338;

Day showed cause in the first instance. The County Courts take an original Admiralty jurisdiction under sects. 2 and 3 of 31 & 32 Vict. c. 71, and not a jurisdiction delegated from the Admiralty Courts. What has been said as to the doctrines and jurisdiction of the High Court of Admiralty has therefore no application to the present case. Under this statute, the County Courts may take cognisance of matters over which the High Court of Admiralty has no jurisdiction. [KEATING, J.—What say you, then, to the 7th section of 31 & 32 Vict. c. 71, which provides that, where it appears that the claim exceeds the prescribed amount, the County Court judge shall transfer the case to the Court of Admiralty? How could that be done, if it were one of these matters, in which the latter court has no jurisdiction.] A jurisdiction in the case is impliedly given by the section to the High Court of Admiralty. The matter then stands thus: the Act of 1869 was never meant to limit that of 1868, and the latter gives the County Court jurisdiction in this case. With regard to the definition of the word "vessel" contained in the general order, the orders in question are of no binding force in this case, as they were made in pursuance of sects. 35 and 36 of 31 & 32 Vict. c. 71, and those sections do not give the Lord Chancellor and the judge of the High Court of Admiralty any power to define the words used in the Act, or to restrict the jurisdiction given under the Act.

KEATING, J.—Cause has been shown in the first instance against an application for a prohibition, with a view to deciding a question arising on the construction of the Acts of Parliament, which transfer a portion of the jurisdiction of the High Court of Admiralty to the County Courts. It appears that a collision has taken place between two barges in the Thames. These barges are confessedly boats that are propelled by oars only, and the question is how far the County Courts have admiralty jurisdiction in such a case. I think that the Acts cannot be said to have invested them with such a jurisdiction. I do not know whether it was the intention of the Legislature to give it; at any rate, we must take the Acts as we find them in deciding the question how far the language of the Acts invests the County Courts with the jurisdiction claimed for them. Looking at the Acts of 1868 and 1869, I cannot assent to the extremely ingenious argument of Mr. Day, that it was the intention of the Legislature to create in the County Courts a new and original admiralty jurisdiction in cases of collision. On the contrary, it appears to me that the Legislature has given the County Courts no jurisdiction in such cases, except where the Court of Admiralty had jurisdiction. Now, it is admitted that the Court of Admiralty has no jurisdiction in the case of vessels like these, and there is, to my thinking, nothing in the Acts of Parliament to give the County Courts jurisdiction in cases where the Court of Admiralty would not have it. Sect. 3 of 31 & 32 Vict. c. 71, provides that any County Court having Admiralty jurisdiction shall have power to try and determine certain causes, enumerated in the four sub-sections appended to the clause. It is suggested by Mr. Day that the

C. P.]

EVERARD v. KENDALL.

[C. P.]

causes here mentioned are not such as, but for this Act, would be termed "Admiralty causes," but that for the purposes of this Act, they are to be considered Admiralty causes, and, but for the Act, would not go by that name. I would not say that the argument is wholly destitute of foundation; but, looking at the whole of the Act, I cannot assent to it. It appears to me that the 7th section of the Act is wholly inconsistent with such an interpretation. There it is clearly provided that where during the progress of an admiralty cause in a County Court it appears that the subject matter exceeds the limit in respect of amount, the County Court judge shall remit the case to the Court of Admiralty. If that is so, it goes far to show that the Legislature intended by these Acts simply to transfer a portion of the jurisdiction of the High Court of Admiralty to the County Courts. It may possibly be that if a cause, which could not be commenced in the Court of Admiralty, is remitted to that court under the 7th section, the section would impliedly give the Court of Admiralty jurisdiction. But that is a strained construction of the Act, and argues a clumsiness in the wording of the Act of Parliament which we ought not to attribute to it. Looking at the other provisions of the Acts, it seems to me clear that Mr. Day's argument cannot be supported. They may confer a jurisdiction over some matters, over which the Court of Admiralty has no jurisdiction, but it appears to me clear that they did not intend to enlarge the jurisdiction of the County Courts as to cases of collision. It is remarkable that the definition of the word "ship" given by any of the Acts relating to the Court of Admiralty excludes a dumb-barge, and there is no definition of the word in any Act which could include it. As then, at the time of the passing of the Acts of 1868 and 1869, the Court of Admiralty had no jurisdiction in the case of a collision between dumb-barges, and the Legislature, by Acts passed in those years, transferred a portion of the jurisdiction of the Court of Admiralty in cases of collision to the County Courts; if the Legislature had intended to give to the latter courts a more extended jurisdiction than that enjoyed by the Court of Admiralty, so as to enable them to entertain a question like the present, we should expect to find a clear expression of that intention in the Act. We find no such expression, and must, therefore, hold that no such jurisdiction was given. That it was not given may be a *casus omissus*; still, that does not alter the question. It is not necessary, in the view I take of the case, to decide how far the general rules framed under the Act of 1868 are of binding authority. My judgment is entirely independent of their efficacy, and is founded on a general view of the Acts.

M. SMITH, J.—I am of the same opinion. The jurisdiction claimed on behalf of the County Courts depends upon two statutes, 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51. The former Act provides that the Queen in Council may appoint certain County Courts to have Admiralty jurisdiction, and assign to the courts so appointed a certain district. I think that that is confined to Admiralty jurisdiction. The 3rd clause provides that certain specified causes shall be tried by the County Courts to whom such jurisdiction shall have been assigned. The object of that clause is to select certain portions of admiralty jurisdiction which are fit to be transferred to the County Courts. The causes to be transferred are enumerated in the four sub-sections appended to the clause. What is the meaning of the words "damage by collision or otherwise?" In considering that question, there is nothing to guide us but a general view of the Act. As far as the subject-

matter of the Act is concerned, the words mean damage by collision by ships. What then, at the time of the passing of this Act, was a "ship" as understood in the High Court of Admiralty, and as defined in the statutes relating to that court? It is considered that the jurisdiction of the Court of Admiralty is confined to vessels propelled otherwise than by oars. I can see no intention on the part of the Legislature to alter the jurisdiction of the Court of Admiralty by any definition of the word "ship." In 24 Vict. c. 10, the word "ship" is defined, and the definition limits its meaning in the way I have mentioned. In 1868, both according to its original jurisdiction and under 24 Vict. c. 10, the Court of Admiralty has no jurisdiction over ships propelled solely by oars. The same state of things prevailed in 1869. The 4th clause of the Act of 1869 does not enlarge the jurisdiction of the County Courts, so as to make it embrace dumb-barges. The object of the clause was to extend the jurisdiction of those courts, so as to include a claim for damages arising from a collision between ships. The Legislature could have had no object in saying "to ships," except that, without those words, the language of the Act would have been too general, and, by using those words, it confined the jurisdiction of the courts to the subject to which the jurisdiction was meant to extend. It seems to me that the words "by ships" employed in this section were used to limit the jurisdiction to ships as defined in the Admiralty Court Act, and known in that court by that name. These are the only statutes on which reliance can be placed, and on a general view of them I am of opinion that the word "ship," as used in this section, does not include a dumb-barge. I agree with my brother Keating that it is not necessary for us, for the purposes of this decision, to give a binding force to the general orders of 1868, though, to say the least of them, they are strong indications of what, in the opinion of two very high authorities, was the interpretation to be put upon the Act.

BRETT, J.—In this case, as I understand it, there was a collision between two barges, in other words, damage done by a barge to a barge, and that damage was done not within the district over which the ordinary jurisdiction of the City of London Court extends. But the barge that was the cause of the injury coming within that district, was seized by the judge of that court, who claimed jurisdiction to adjudicate upon the case under the 4th section of 32 & 33 Vict. c. 51. The 3rd section of 31 & 32 Vict. c. 71 gives to certain County Courts, to be nominated by the Queen in Council, the powers of a Court of Admiralty—to institute proceedings *in rem*. The question for us now to decide is, whether the 4th section of 32 & 33 Vict. c. 51 gives that power to the judge of the City of London in the present case. It is suggested that it does, for that, whereas the Act of 1868 applied only to some vessels, the Act of 1869 applies to all cases of collision by ships, and consequently includes a collision between barges. That depends on the construction to be put on the word "ship," as used in the Act of 1869. As by those Acts Admiralty jurisdiction is given to the County Courts, we must see what is the meaning of the word "ship" in the Court of Admiralty. Now it is clear that in that court the word "ship" would not include a dumb-barge. I should be inclined to think that it was not the intention of the Legislature to enlarge the jurisdiction of the County Courts in cases of collision as to the kind of vessels with which the courts have power to deal, but simply to enlarge their jurisdiction by giving them power to institute proceedings *in rem*. Then, as to the Act of 1868, hope it is not necessary to determine whether

C. P.]

SINCLAIR v. THE GREAT EASTERN RAILWAY COMPANY.

[C. P.]

that Act gave to the County Courts Admiralty jurisdiction at all. I think it did not. The foundation of all Admiralty jurisdiction is the power to commence proceedings by seizure, and that power I do not think the Legislature intended to give. The 3rd section of the Act transferred to the County Courts, to be tried in a particular way, certain classes of cases which before were triable in the Court of Admiralty. Amongst these we find specified (subsect. 3), "Any claim for damage cargo or damage by collision." This evidently means damage done on the water; and sects. 21 and 22 show that it is damage done by "vessels." There is nothing to show that those sections applied to any other vessels than those of which up to that time the Court of Admiralty took cognisance. What were they? The Court of Admiralty has jurisdiction in all cases of collision by ships. What vessels does that word include? Only those that are propelled otherwise than by oars. The statute 3 & 4 Vict. c. 65, gave to the Court of Admiralty jurisdiction in the case of any damage done by a ship or sea-going vessel. The case of *The Bilbao*, L. T. Rep. N. S. 338, decided that that meant vessels not propelled by oars. That being so, the Act of 1868 must be understood as relating to collisions by or to vessels not propelled by oars. If that is the meaning of the Act of 1868 it is also the meaning of that of 1869. It cannot possibly be said that, because the word "vessel" is employed in the Act of 1868, and the word "ship" in that of 1869, the latter statute applies to collisions between vessels not contemplated in the former Act, and not recognised as ships by the Court of Admiralty under either its original jurisdiction or that conferred by statutes. I come, then, to the conclusion that the collision in the present instance was not between "ships" within the meaning of the Act of 1869, and therefore that the City of London Court has no jurisdiction in this case; and no County Court has jurisdiction in such a case as this, unless the collision took place within its ordinary jurisdiction.

Rule absolute for a prohibition.

Attorney for plaintiff, *B. F. French*.

Attorney for defendant, *John A. Farnfield*.

Friday, May 6.

SINCLAIR v. THE GREAT EASTERN RAILWAY COMPANY.

Payment of money into court—Satisfaction of judgment—Abuse of legal process.

Upon an arbitration a large sum was awarded as damages to the plaintiff; judgment for the amount was signed on the 9th Sept.; and on the same day a summons was taken out by the defendants for the purpose of questioning the validity of the award; on the 26th Oct. an order was made by a judge at chambers that proceedings should be stayed until the 5th day of the next term, "defendants bringing into court by Thursday the amount of the award." This amount was accordingly brought into court, and at the beginning of the next term a rule moved by the defendants to set aside the award was refused. Various disputes took place about taxation of costs and the regularity of the judgment, but no obstacle was placed by the defendants in the way of plaintiff's taking the money out of court, and on the 2nd Dec. they wrote to him saying that the money remained there at his peril. On the 1st Feb. following, defendants obtained an order under which this money was paid over to the plaintiff:

Held, that although perhaps the judgment could not be said to have been satisfied by the payment of this money into court, according to the terms of sect. 17 of 1 & 2 Vict. c. 110, yet the court would not permit such an abuse of

its process as to make the defendants under the circumstances pay interest beyond the 9th Nov., the day on which the plaintiff might have obtained the money himself.

This case has been previously reported upon another point: (21 L. T. Rep. 752.)

A rule *nisi* had been obtained on the defendants' behalf, calling upon the plaintiff to show cause why all proceedings in the action should not be stayed, and why satisfaction of judgment should not be entered on payment or tender of costs of so doing by the defendants.

It appeared from the affidavit of the defendants' attorney, upon which the rule was moved, as follows:—

The action was brought to recover the sum of 47,304. 13s. 1d., alleged to be due from the defendants to the plaintiff on a balance of accounts delivered by the plaintiff to the defendants.

The action came on for hearing before Bovill, C. J., at the sittings in London after Hilary Term, on the 23rd Feb. 1869, whereupon a verdict by consent was taken for the plaintiff subject to the award of Thomas James Clark, Esq., one of Her Majesty's counsel.

The arbitrator commenced his sittings on the 5th April, and the arbitration occupied many days.

The arbitrator made his award on the 31st Aug. 1869, finding for the plaintiff on all the issues joined, and awarding to him damages amounting to 28,850l.

On the 9th Sept. 1869, under the advice of counsel, I took out a summons to show cause why proceedings should not be stayed to enable defendants within the first four days of the succeeding Michaelmas Term to move to set aside the said award on certain grounds specified in such summons.

The said summons was returnable on the 10th Sept., and I attended the same with counsel. A clerk of the plaintiff's attorneys attended, and requested that the summons might be adjourned, and I consented to such adjournment.

After several further adjournments for the convenience of either side, it being the Long Vacation, the summons was heard on the 26th Oct. 1869, and the following order was made by the late Mr. Justice Hayes:

"Upon hearing counsel on both sides I do order that all proceedings in this action and in the award be stayed until the fifth day of next term, defendants bringing into court by Thursday the amount of the award; costs to abide the event of proceedings in court on motion. I certify for counsel.—Dated the 26th Oct. 1869."

On Thursday, the 28th Oct. 1869, the amount of the award, 28,850l., was accordingly paid into court by the defendants.

The court was moved by Mr. Keane, Q.C., on behalf of the defendants, on the 8th Nov. last—the case having been put into the reserved list—for a rule *nisi* to show cause why the award should not be set aside or remitted back to the arbitrator; but the rule was refused.

The plaintiff's attorneys, by their clerk, attended the hearing of the said application, and made a charge for such attendance in their bill of costs.

The bill of costs of the plaintiff's attorney was delivered to me for taxation on the 18th Nov. last, and the same was shortly afterwards taxed; and an allocatur was taken on the 23rd Dec. last for 934l. 15s. 10d.

On the 14th Jan. 1870 plaintiff obtained a rule *nisi* for the master to review his taxation upon three grounds—

1. Allowance of only one counsel;
2. Disallowance of the costs of Queen's counsel;
3. Reduction of the arbitrator's fees.

Cause was shown against this rule by Mr. Keane, Q.C., on behalf of the defendants, the 26th Jan. last.

The rule was discharged as to the arbitrator's fees, but was made absolute as to two counsel being allowed. The master appointed the 29th Jan. to review his taxation pursuant to the rule, and the matter was accordingly gone into and disposed of on that day.

The said sum of 28,850l. was paid into court, to await the issue of the application for a rule to send the award back to the arbitrator; and, on such application being refused, the money remained in court, as I believe, at the disposal of the plaintiff.

On the 2nd Dec. 1869 it came to my knowledge that the plaintiff had not taken the money out of court. I then informed plaintiff's attorneys that the money lay there at the risk of their client, and that the defendants would refuse to pay interest after the date of the disposition of the application for the said rule, but they were ready and willing to do all things necessary on their part to enable plaintiff to take the money out of court.

On the 1st Feb. last an order was made by Master Kaye directing the plaintiff to take out of court the said sum of 28,850l. *pro tanto*; and, in pursuance of such order, the plaintiff took the said sum out of court.

On the same day the plaintiff's attorneys applied to the defendants for payment of 1672l. 8s. 9d., being, as they alleged,

C. P.]

SINCLAIR v. THE GREAT EASTERN RAILWAY COMPANY.

[C. P.]

the balance due to the plaintiff, in addition to the money taken out of court. This balance included the amount of plaintiff's costs and 480*l.* 12*s.* 11*d.* for interest from the 9th Sept. 1869 to the 2nd Feb. 1870, upon the sum of 30,041*l.* 15*s.* 10*d.*, stated to be the amount of the judgment.

The defendants were willing to pay interest upon the sum paid into court from the day when judgment was signed, namely, the 9th Sept. 1869, to the day when the rule they applied for was refused, namely, the 8th Nov. 1869, and also interest upon the taxed costs from the said 9th Sept. 1869, to 2nd Feb. 1870; the amount of such interest was 211*l.* 18*s.* 2*d.*, but they declined to pay the remaining 268*l.* 14*s.* 9*d.*, being the amount of interest claimed from the 8th Nov., last mentioned, to the 2nd Feb. 1870, in respect of the amount paid into court.

Accordingly, on the said 2nd Feb., they took out a summons calling upon the plaintiff to show cause why further proceedings should not be stayed on payment of the sum of 1403*l.* 14*s.* in satisfaction of the balance of judgment, debt, and interest. This sum was the balance claimed by the plaintiff less the 268*l.* 14*s.* 8*d.* mentioned in the last paragraph.

On the 5th Feb. 1870, the said summons was heard before Mr. Justice Willes, and the following order was made:—

"Upon hearing the attorneys or agents for plaintiff, and counsel for defendants, I do order that upon payment of 1403*l.* 14*s.*, all further proceedings herein shall be stayed until the 5th day of next term.—Counsel."

This sum of 1403*l.* 14*s.* was on the day of the date of the said order paid to the plaintiff's attorneys, and a receipt for the same was endorsed upon the order by the plaintiff's attorneys.

It appeared from the affidavit of one of plaintiff's attorneys in answer, as follows:

Judgment was signed in this action on the 9th Sept. 1869 for the sum of 28,850*l.* debt, and costs which were to be taxed. The plaintiff's attorneys' bill of costs was delivered to the defendant's attorney on the 18th Nov. last. There were five meetings before the master to tax the said bill of costs, and I, during such taxation before the said master, on several occasions remarked to the defendant's attorney that the adjournments were matter rather for the consideration of the defendants than for the plaintiff, inasmuch as the judgment was carrying interest at the rate of 4*l.* per cent. per annum, which would exceed the costs of the witnesses, with respect to whom the defendant's attorney was raising objections.

The said taxing master gave his allocatur for costs on the 23rd Dec. last, and the plaintiff's attorneys on the same day served a summons to review the taxation of the plaintiff's costs, which summons was from time to time adjourned, and was ultimately dismissed on the 6th Jan. last.

Upon the hearing of the said summons I applied to the learned judge who heard the summons to order that the sum of 28,850*l.* in court should be paid out of court to the plaintiff, but the judge refused to make any such order on the ground that the summons did not contain any notice of application for such order.

On the 1st Jan. last the defendant's attorney sent to the plaintiff's attorneys a cheque for 934*l.* 15*s.* 10*d.*, the amount at which the plaintiff's attorneys costs had at that time been taxed.

This cheque was returned the same day to the defendant's attorney, inclosed in a letter from the plaintiff's attorneys, in which they said, "the judgment is for 29,784*l.* 15*s.* 10*d.*, and we are prepared to receive that sum with interest at 4 per cent. from the 9th Sept. last, the day on which the judgment was signed. As you are aware, however, we have applied to review the taxation of costs, and we can only receive payment without prejudice to that application."

In answer to that letter, the defendant's attorney wrote on the 4th Jan.:

I know of no judgment properly signed in this case; what your clerk did on the 9th Sept. was irregular, and he was told at the time, as on subsequent occasions, that it was a nullity. You are aware that the amount of the award (28,850*l.*) paid to the court under the order of the judge, has been at the disposal of your client since the 9th Nov. last, the day following that on which the motion allowed by the judge to be made was disposed of. It is of course of no importance to the company how long your client chooses to remain out of his money (as I presume from your note he has hitherto elected to do), but it has been explained to your representative on many occasions during the last six weeks or two months that the company repudiated all liability to interest and would not pay it.

The plaintiff's attorneys replied to the last-mentioned letter as follows, on the 5th Jan.:—

We are this morning in receipt of your letter of yester-

day's date. We think you have written under a complete misapprehension. You will recollect that at the trial a verdict was found for the plaintiff, subject to a reference, and that the arbitrator had power to direct the amount for which the verdict was to stand. This he did by his award. The judgment signed by us on the 9th Sept. was perfectly regular, and now stands. You have long known of the judgment. If you had any ground for doing so, you should have promptly applied to set it aside. As to the amount paid into court by way of security, you are wholly mistaken in supposing that it has been at the disposal of our client since the 9th Nov. last. It is not now at his disposal, and cannot be obtained by him. To avoid any possible misunderstanding, we beg to inform you that we shall insist upon the validity of the judgment, and upon payment of the amount with interest at 4 per cent. from the date of the judgment. If your clients are not prepared to pay this amount so soon as the question as to the taxation is settled, we are instructed to issue execution, and we shall do so.

Various letters to the same effect passed between the attorneys of the parties, and on the 14th Jan. a summons, taken out on the defendant's behalf to set aside the judgment on the ground that the same had been irregularly signed, was heard before Mr. Justice Willes, and dismissed with costs.

On the same day, the 14th Jan., this court granted a rule *nisi*, on the plaintiff's application, to review the taxation of the plaintiff's attorneys' costs. The said rule was made absolute on the 26th Jan., and the taxation of costs was finally completed on the 1st Feb. last.

In the interval more letters passed between the attorneys, in which the defendants suggested that the plaintiff should take the money out of court *pro tanto*, without prejudice, and the plaintiff expressed willingness to accept that sum directly from the defendants, stating at the same time that the money in court was merely a collateral security for the payment in full by the defendants.

On the 1st Feb. a claim was made by the plaintiff's attorneys as follows:

The amount of the judgment in this case is ... £30,041 15 10
Interest upon it from 9th Sept. to 2nd Feb. ... 480 12 11

30,522 8 9
Amount in court to be received 2nd Feb. 28,850 0 0
£1672 8 9

for which we shall be glad to receive a cheque in the course of to-morrow.

The order made by Willes, J. referred to in the affidavit for defendants was made on the application of the defendant's attorney, and he might at any time previously have made the same application.

In pursuance of that order, the rule *nisi* above mentioned had been obtained by the defendants, and now came on to be argued.

Sir G. Honyman, Q. C., and Watkin Williams, for the plaintiff, showed cause against the rule. By sect. 17 of 1 & 2 Vict. c. 110, "every judgment-debt shall carry interest at the rate of 4*l.* per centum per annum, from the time of entering up the judgment . . . until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment." The plaintiff, therefore, is entitled to interest up to the day upon which the judgment was satisfied. Merely bringing money into court as collateral security to abide the issue of a motion cannot be said to have been satisfaction of this judgment. There was no duty upon the plaintiff's part to take the money out of court; but it devolved upon the defendants to pay to the plaintiff, as they eventually did, the amount of the judgment against them. The only question for this court is whether the judgment was satisfied before the 2nd Feb. [BOVILL, C. J.—Not exactly. We have to see there was no abuse of the process of the Court. M. SMITH, J.—Surely substantially there was satisfaction of the judgment when the money was paid into court?] The plaintiff demands his legal rights, and he says his misconduct has not been such as to make him suffer as a penalty the loss of this interest. At all events the defendants

C. P.]

JENNINGS (app.) v. THE JUSTICES OF THE CITY OF MANCHESTER (resps.)

[Ex.]

were in the wrong as much as the plaintiff, and, by the law, a debtor is bound to take every step to discharge his debt.

Sir J. Karlake, Q.C. and Marriott, for the defendants, supported the rule.—After the payment of the money into court the defendants could not possibly make any profit out of it, whilst the plaintiff might at any time have taken it out and invested it at a higher interest than that which he now claims from the defendants. The plaintiff's attorneys said in effect throughout the correspondence, We will complete the taxation at our leisure, and when we receive the final allocatur we will issue execution for the whole debt and costs and the interest upon both. It was held by the Court of Exchequer in *Hews v. Pyke*, 1 Dowl. 322, that if money be deposited in court in lieu of bail above, pursuant to the 7 & 8 Geo. 4, c. 71, and the plaintiff obtain a verdict, he must limit his execution to the surplus of his demand beyond the sum deposited; and it was said at the end of the judgment: "The just interpretation of the direction in the Act, that the sum deposited shall remain in court 'to abide the event of the suit,' is that the plaintiff, if he succeeds, shall not be entitled only, but bound to resort to that in the first instance, and can issue his execution for the surplus only." The defendants are entitled to this rule on two grounds: first, the judgment against them was satisfied *pro tanto*, when this sum was paid into court, or, at all events, on the 8th Nov.; secondly, this court has discretionary power over its process, and to allow the plaintiff interest after the date to which the defendants are willing to pay it, would be an abuse of legal right, even if the plaintiff possess that right.

BOVILL, C. J.—If the question in this case had been whether by the strict and technical rules of law this judgment was satisfied by the payment of the money into court, I should think that our answer must have been against the defendants; but what we have to decide with regard to this rule does not depend upon that. The Act of 1 & 2 Vict. c. 110, s. 17, certainly provides that a judgment-debt shall carry interest from the time of entering, until it shall be satisfied; but the court has always had the power to control its proceedings, and to take care that injustice is not done to either party, for instance, if money due is tendered to a creditor, the court will prevent an execution being levied. This is a stronger case than a tender, for, as I understand it, the money was brought into court for the purpose of being paid over to the plaintiff, if a certain motion to be made by the defendants were unsuccessful; no judge nor counsel, nor attorney could, I think, understand the effect of the order in a different sense. On the 8th Nov. a rule to set aside the award was applied for and refused, and there was nothing on the following day to prevent the plaintiff from obtaining possession of the whole sum: there is indeed nothing suggested as a reason for his not having then taken it. The money was in court, and if, having the means of obtaining the money, the attorney for the plaintiff had thought fit to issue execution, the court would, according to the case of *Hews v. Pyke*, have set aside the execution and refused to allow the costs, for it would have been an abuse of the process of the court. I cannot conceive what object the plaintiff could have had in not taking the money out on the 9th Nov. Having referred to the master, I find that if the plaintiff's attorneys had then taken out a summons, and had obtained the defendant's consent, which they were ready to give, and had attended at chambers, the order would have been made as a matter of course, and the costs of the summons and attendance would have been afterwards

allowed them on taxation. This miserable dispute must have arisen, I suppose, from temper, or from one attorney's clerk putting his knowledge of law against that of another attorney's clerk; and the result has been that to one side or the other there must be a loss of all interest upon a large sum of money for three months, and a loss of the amount of costs incurred by the correspondence, and expenses attending this rule. Under the circumstances, it would be the sanction of an abuse of the proceedings of the court if we were to compel the defendants to pay interest upon the money in court for the period after which the plaintiff might have taken it out. The rule therefore will be made absolute.

KEATING, J.—I have not heard the whole of the arguments, but I entirely concur with what has been said by my Lord.

SMITH, J.—I am of the same opinion. It is not necessary to consider whether there could have been set up a plea of payment in satisfaction of judgment, although I certainly think that substantially when paid into court the money was allocated in satisfaction *pro tanto* of the judgment obtained by the plaintiff. This is a stronger case in the defendant's favour than *Hews v. Pyke*, because the money was here paid in for a special purpose; it is, however, unnecessary to decide the exact effect of that payment, because it is clear to my mind that the judgment was substantially satisfied. From the 8th Nov. no obstacle was made by the opposite side, and the plaintiff might at any time have obtained the sum of money in court. We ought, therefore, to prevent an abuse of any strict legal right which the plaintiff might have, and the rule should be absolute.

BRETT, J.—I doubt if the judgment can be said strictly to have been satisfied either on the 8th Nov. or on the 2nd Dec., but when I find that the plaintiff might have had his money without opposition, had it not been merely for temper or some other unexplained cause, I think the court ought to interfere, and order satisfaction to be entered.

Rule absolute.

An application by defendants for costs was refused, no claim having been made for them in the rule.

Attorneys for plaintiff, *Thomas and Hollams*.
Attorney for defendants, *W. H. Shaw*.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Wednesday, April 27, 1870.

JENNINGS (app.), v. THE JUSTICES OF THE CITY OF MANCHESTER (resps.)

Magistrates' law—Beer licence—Granting certificate for—Qualification of house—"Rated in one sum"—House situate in two townships—Rated in two separate sums—Sufficiency of such rating—Extraparochial or other place—3 & 4 Vict. c. 61, ss. 1 and 4—Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), ss. 1 and 8.

By sect. 1 of the 3 & 4 Vict. c. 61, "no licence to sell beer, &c., by retail, shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed; nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township, or place in which such house and premises are situate, on a rent or annual value of 15l. per annum at the least,

Ex.]

JENNINGS (app.) v. THE JUSTICES OF THE CITY OF MANCHESTER (resps.)

[Ex.]

*within any city . . . parish, or place, the population of which shall exceed 10,000." And by sect. 4 of the same Act, "in any extra-parochial or other place, where no rates are made or collected, the excise officers are authorised to grant a licence to any person to retail beer, &c., in a dwelling-house of the real rent or annual value of 15*l.*, according to the situation thereof, as aforesaid."*

*The appellant was the owner of a house, part of which was situate in the township of C., in the city of M., and was rated thereto on an annual value of 8*l.*, and the other part of which house was situate in the township of M., not within the said city, and was rated to such township on an annual value of 8*l.* 10*s.* Both townships, which each contained a population exceeding 10,000, were situate in the same parish and Poor-Law Union, to which union the rates of both townships, though separately levied and collected, were paid over.*

The justices having refused the appellant's application for a certificate for the renewal of a beer licence, under the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27) on the ground that her house was not sufficiently rated within the city of M. in the amount required by sect. 1 of 3 & 4 Vict. c. 61, it was, on appeal against that decision,

*Held, by the Court of Exchequer (Martin, Channell, and Cleasby, B.B.), that the justices were right in their decision. The appellant's house, though rated in two separate sums of 8*l.* and 8*l.* 10*s.* was not rated in "one sum of 15*l.* at the least," and so did not come within the words of sect. 1 of the 3 & 4 Vict. c. 61, and was not therefore within that Act; nor did it come within sect. 4 of that Act, as an "extraparochial or other place where no rates were made or collected."*

This was a special case in the matter of an appeal by Ann Jennings against the justices of the City of Manchester.

At the Brewster Sessions at Manchester, in and for the city of Manchester, on 22nd Sept. 1869, application was made by the applicant for a certificate for the renewal of a beer licence under "the Wine and Beerhouse Act 1869" (32 & 33 Vict. c. 27) and was refused by the justices of the said city, on the ground that the dwelling-house in respect of which the application was made was not rated within the said city in the amount required by sect. 1 of the statute 3 & 4 Vict. c. 61.

Due notice of appeal was given, and by consent of the parties, and by order of Willes, J., of 8th Feb. 1870, the following case was stated for the opinion of the Court of Exchequer.

First, part of the dwelling-house is situate in the township of Chorlton-upon-Medlock, in the city of Manchester, and is rated thereto on an annual value of 8*l.*; secondly, the other part is situate in the township of Moss Side in the county of Lancaster, a township not within the city of Manchester, and is rated to the said township of Moss Side, on an annual sum of 8*l.* 10*s.*; thirdly, both townships are situated in the same parish and in the same union for the maintenance of the poor, to which union the rates of both townships, though separately levied and collected, are paid over; fourthly, the population of the township of Chorlton-upon-Medlock exceeds 10,000, according to the last Parliamentary census; fifthly, the population of Moss Side, according to the last Parliamentary census, exceeds 10,000.

The question for the opinion of the court is whether, under the circumstances above stated, the house was sufficiently situated and rated within the meaning of sect. 1 of the statute 3 & 4 Vict. c. 61, so as to authorise the justices of the city of Manchester to grant the applicant a certificate of the

renewal of her beer licence, under the Wine and Beerhouse Act 1869.

If the opinion of the court shall be in the affirmative thereof, then it is agreed between the parties that the certificate is to be granted. If the court shall be of a contrary opinion, then the refusal of the certificate is to be confirmed.

Appellant's points for argument.

First, that the Act, 3 & 4 Vict. c. 61, was passed to amend the Act to permit the sale of beer, and must be construed liberally so as to effect that object; secondly, that the appellant's house is sufficiently rated within the spirit, if not within the letter, of sect. 1 of 3 & 4 Vict. c. 61; thirdly, that the appellant's house, not being wholly within either of the townships of Chorlton-upon-Medlock or Moss Side, and there being no rates levied for the parish in which both townships are situated, is within sect. 4 of 3 & 4 Vict. c. 61, and must be treated as an "other place" within the meaning of that section.

The following sections of the Acts of Parliament, 3 & 4 Vict. c. 61, and 32 & 33 Vict. c. 27, referred to in argument and the judgment of the court, are material.

By the 3 & 4 Vict. c. 61 (an Act to amend the Acts relating to the General Sale of Beer and Cider by Retail in England) it is enacted by sect. 1:—

That no licence to sell beer or cider by retail under the recited Acts (11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85), or this Act, shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed, nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor for the parish, township, or place in which such house and premises are situate, on a rent or annual value of 15*l.* per annum at the least, if situated . . . within any city . . . parish, or place, the population of which, according to the last Parliamentary census, shall exceed 10,000.

And after reciting that in some extraparochial places no assessments were made or rates collected for the relief of the poor, and it was expedient to provide for persons obtaining licence in such places, it was enacted by sect. 4:—

That in any extraparochial or other place, where no rates are made or collected for the relief of the poor, it shall be lawful for the proper officers of excise, authorised to grant licences, to grant licences to any person to retail beer or cider in a dwelling-house which, with the premises occupied therewith, shall be of the real rent or annual value of 15*l.*, according to the situation thereof as aforesaid; and in such case the person applying for such licence shall produce to, and deposit and leave with, the proper officer of excise granting such licence, a certificate in writing, signed by the inhabitant householders of the township or place, certifying that the party applying is the real resident in and occupier of the dwelling-house sought to be licensed, and also certifying the true and real annual value of the same, with the premises occupied therewith, according to the best of their judgment and belief.

The Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), by sect. 4 provides that no licence or renewal of a licence for the sale by retail of beer, cider, or wine under the provisions of the therein recited Acts (11 Geo. 4 & 1 Will. 4, c. 64; 4 & 5 Will. 4, c. 85; 3 & 4 Vict. c. 61; 24 & 25 Vict. c. 21; 26 & 27 Vict. c. 33; and 23 & 24 Vict. c. 27) shall be granted, except upon the production, and in pursuance of the authority, of a certificate granted under this Act, and that any licence granted or renewed in contravention of the present enactment shall be void.

Sects. 5, 6, and 7 relate to the granting of certificates authorising licences for the sale of beer, &c. on or off the premises, the justices by whom they are to be granted, the form of such certificate, and the notice to be given by applicants of intention to apply for them.

By sect. 8 it is enacted that all the provisions of the Act of 9 Geo. 4, c. 61, as to the terms upon which, and the manner in which, and the persons to whom,

Ex.]

REG. v. WILLIAM ROE.

[C. CAS. R.]

grants of licences are to be made by the justices at the said general and licensing meeting, and as to appeal from any act of any justices shall, so far as may be, have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises shall be refused, except upon one or more of the following grounds, viz. (amongst other grounds), "(4.) That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required." And the section goes on to provide that "where an application for any such last-mentioned certificate is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision."

Ambrose, for the appellant.—By the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), the granting and the renewing of licences for the sale of wine and beer is vested in the justices. But the statute regulating the qualification upon which the certificate, authorising the granting of the licence, is to be issued, is the 3 & 4 Vict. c. 61, and the first section of that statute provides that the house in respect of which the applicant desires to be licensed must, in a place where the population exceeds 10,000, be rated at 15*l.* per annum. [MARTIN, B.—The statute says rated in *one sum*. Do you mean to contend that two separate sums of 8*l.* and 8*l.* 10*s.* are "one sum"?] I would hardly go so far as that. But I would refer to the 4th section of the 3 & 4 Vict. c. 61. It must be remembered that it is an Act to amend the previous Acts relating to the sale of beer and to afford greater facilities for carrying on that trade. The appellant's house is situated in two townships, part of it being in one and part in another, but the whole of the house is in one parish, for which parish no rates are levied. It is submitted, therefore, that it comes within the words in sect. 4, of "an extraparochial or other place." Were the words "other place" not there, this, perhaps, could not be contended for, but it is analogous to an extra-parochial place, and so comes within the provision of sect. 4. It will be said by the respondents that this is a house in the township of Chorlton. That, however, is not so; a part of the house is there, no doubt. The whole house is situate in the parish of Manchester, where no rates are levied. [MARTIN, B.—This is a case apparently not provided for, and how can we amend the defect of the Legislature? The appellant may have the benefit of being under the care of two clergymen, but she has not the benefit of being entitled to a licence for a beer house. CLEASBY, B.—The statute says, "any place not rated," &c. But this house is rated in 8*l.*] Not so; only a part of the house. The words of the 1st sect. 3 & 4 Vict. c. 61, are, "parish, township, or place." Now we are in no township. [CLEASBY, B.—Your argument is that a house must be situated somewhere, but part of a house may be nowhere.] Yes; it is analogous to an "extraparochial place." The intention of the Legislature was not to deprive people of their beer, but to extend the facilities for their getting it, and the Act should have a large and liberal construction given to it. The house is sufficiently rated within the spirit, if not the precise letter of sect. 1 of 3 & 4 Vict. c. 61, but if not it comes within sect. 4.

C. Hopwood, for the respondents, *contra*, was not called upon.

MARTIN, B.—I believe that we are all of opinion that the justices were quite right in the decision to which they came in this case. Accord-

ing to the arguments and views expressed by Mr. Ambrose it might perhaps be well that Parliament should alter the section of the Act in this respect; but that is for them to do, not for the court. It is said, that we ought to construe the Act "liberally," though there are, I fancy, many persons who would say that we ought to do just the contrary. However, in my judgment, our duty is to construe it neither liberally nor illiberally, but fairly and reasonably, according to the plain and ordinary signification of the language used. Now, the Act expressly says (sect. 1 of 3 & 4 Vict. c. 61), that "no licence to sell beer or cider by retail shall be granted to any person who shall not be the real resident holder, and occupier of the dwelling-house in which he shall apply to be licensed, nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the relief of the poor of the parish, township, or place in which such house and premises are situate, on a rent or annual value of 15*l.* per annum, at the least." Now, unfortunately for the appellant, her house does not come within that requirement, for it is not rated "in one sum of 15*l.*," but in two distinct and separate sums of 8*l.* and 8*l.* 10*s.*, making together 16*l.* 10*s.* It does not, therefore, fall within the Act. For my own part, I think that in construing Acts of Parliament we ought not to give a fanciful or conjectural meaning to the words used by the Legislature, but to adhere to their plain, ordinary, and common sense meaning. For these reasons, the decision of the justices will be affirmed, and our judgment be for the respondents.

CHANNELL, B.—I am entirely of the same opinion. The case, in my opinion, is determined by the 1st section of the 3 & 4 Vict. c. 61, and is not within the 4th section of that Act on which Mr. Ambrose has relied. I am sorry to be obliged to come to this conclusion in the present case, but I see no way of escaping from it.

CLEASBY, B.—I am of the same opinion. The argument urged before us is, that parts of a house are not equivalent to a house.

Judgment for the respondents, affirming the decision of the justices.

Attorney for the appellant, *E. K. Randell*, 17, Gracechurch-street, E.C., agent for *Cobbett, Wheeler*, and *Cobbett*, Manchester.

Attorneys for the respondents, *Johnson and Weatheralls*, 7, King's Bench-walk, Temple, E.C., agents for *Higson and Son*, Manchester.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 30, 1870.

(Before BOVILL, C.J., WILLES, BYLES, and HANNEN, JJ., and CLEASBY, B.)

REG. v. WILLIAM ROE.

Birds feræ naturæ—Indictment—Evidence.

The prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded, but was picked up or caught by the prisoner while it was alive but in a dying state:

Held, that the indictment was not proved.

Case reserved for the opinion of this court.

At the general quarter sessions of the peace of our sovereign Lady the Queen for the county of Derby, holden at Derby on the 4th Jan. 1870, before Thomas William Evans, Esq. (chairman), Robert Sacheverell Wilmot Sitwell, Esq. (deputy chairman), and other justices, &c.:

C. CAS. R.]

REG. v. WILLIAM ROE.

[C. CAS. R.]

Whereas at the present sessions William Roe has been tried before me upon an indictment of which the following is a copy :

Derbyshire, to wit. The jurors of our Lady the Queen upon their oath present that William Roe, on the 16th Sept. 1869, feloniously did steal, take, and carry away one dead partridge of the goods and chattels of George Newdigate, Esq., against the peace of our Lady the Queen, &c.

Second count. And the jurors aforesaid upon their oath aforesaid do further present that the said William Roe, on the said 16th Sept. in the year aforesaid, feloniously did receive one dead partridge, of the goods and chattels of George Newdigate, Esq., then lately before feloniously stolen, taken, and carried away by a certain evil disposed person, he the said William Roe well knowing the said last-mentioned goods and chattels to have been feloniously stolen against the form of the statute, &c.

Third count. And the jurors aforesaid upon their oath aforesaid do further present that the said William Roe on the said 16th Sept. in the year aforesaid feloniously did steal, take, and carry away one dead partridge, of the goods and chattels of Francis William Newdigate, against the peace, &c.

On the 16th Sept. last, Colonel Henry Newdigate, Major George Newdigate, and the Rev. Mr. Howman, were out shooting at Kirk Hallam, in this county, on land belonging to Colonel Francis William Newdigate, accompanied by his keeper, Mr. Hancock.

A covey of partridges rose, and was fired at by the Rev. Mr. Howman; one of the birds came back round Major Newdigate, who fired at it. The bird crossed a canal, towered, and fell in a field belonging to Colonel Francis William Newdigate, and over which he had the right of shooting, but in the occupation of his tenant.

The prisoner, who was a boatman, and on the canal bank, entered the field, and either picked up or caught the bird.

The evidence as to the condition of the bird when caught or picked up was conflicting, but it was afterwards given to the keeper by the prisoner, and was dead at the time.

Counsel for the prisoner contended that there was no case to support a charge of larceny; that if there was a single spark of life left in the bird when picked up by the prisoner it could not be larceny.

It is uncertain who gave the bird its mortal wound.

I left to the jury the following questions :

1. By whom was the bird shot?—*Answer.* No evidence to prove by which of the party the bird was shot.

2. Are you of opinion the bird was dead when picked up, or was it in a dying state, and so disabled that it could not escape?—*Answer.* We believe the bird was alive, but in a dying state, and so disabled that it could not escape.

3. Are you of opinion that the prisoner took the bird fraudulently, and with intent to deprive the owner of it?—*Answer.* Yes.

The opinion of the court is asked—First, whether the bird picked up by the prisoner in a dying state and so disabled that it could not escape was the subject of larceny? Secondly, whether the property in the bird was sufficiently laid in Col. Francis William Newdigate?

R. S. W. SITWELL, Deputy Chairman.

No counsel appeared for the prisoner.

C. H. Roe for the prosecution.—The conviction was right. If the partridge was a bird *feræ naturæ*, it was reduced into possession by being killed, and became, therefore, the subject of larceny. [WILLES, J.—It does not appear that it was dead when the prisoner picked it up or caught it, or by whom the mortal wound was given so as to reduce it into possession. It may have been the boatman who was the immediate cause of its death.] The partridge was in a dying condition, and therefore a property was acquired in it *ratione impotentiae*. In 2 Black. Com. 391, it is said that “a man may be invested with a qualified, but not an absolute, property in all

creatures that are *feræ naturæ* either *per industriam*, *propter impotentiam*, or *propter privilegium*. A qualified property may also subsist with relation to animals, *feræ naturæ*, or *ratione impotentiae* on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneyes or other creatures make their nests or burrows in my land and have young ones there, I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires, but till then it is in some cases trespass, and in others felony for a stranger to take them away.” In *Blades v. Higgs*, 31 L. J. 152, C. P.; 7 L. T. Rep. N. S. 798, it was held that if rabbits be started and killed on the land of another, they are the property of the person on whose land they are killed, and not of the captor :

Instit. Book 2, c. 1, s. 13 (Saun. Ed.) ;

Sutton v. Moody, 1 Ld. Ray 250.

[HANNEN, J.—The charge is for stealing a dead partridge, and the proof is that the prisoner took a live partridge.] This partridge was so disabled as to have lost all power of escape, and was therefore to all intents a dead bird. If it is to be taken to be alive, it was reduced into possession by the person who shot it. It was in a field where it could not escape. In *Churchward v. Studdy*, 14 East, 249, it was held that “the plaintiff’s dogs having hunted and caught on the defendant’s land a hare started on the land of another, the property was thereby vested in the plaintiff, who might maintain trespass against the defendant for afterwards taking away the hare. And so it would be, though the hare being quite spent had been caught up by a labourer of the defendant for the benefit of the hunters:” (*Earl of Lonsdale v. Rigg*, 26 L. J. 196, Ex.) [WILLES, J.—Suppose the bird had been shot by a third person, and the keeper picked it up and appropriated it to his own use, would that have been larceny or embezzlement?] Embezzlement. [WILLES, J.—I think that is the right view. If so, the bird has not been reduced into possession by the master.]

BOVILL, C.J.—The prisoner was indicted for stealing one dead partridge, and the only question now is whether the allegation as to that matter was properly proved. The property is laid in different counts to be in George Newdigate and Francis William Newdigate. If the indictment had simply alleged that the prisoner had stolen one partridge it would have been bad, for, to make a partridge the subject of larceny, it must be shown either that it was dead, or if alive that it was reduced into possession, or that it was under the owner’s control. In this indictment it is alleged that the partridge was dead. This allegation is not a matter of form merely, but it is one of substance, as was held long ago in *Rough’s case*, 2 East, P. C. 607. The proof on the trial was that the bird was wounded and was either picked up or caught by the prisoner. At the time it was picked up or caught by the prisoner it was alive, but in a dying state, i.e., the prisoner caught, while it was alive, a wounded partridge. The proof therefore fails to establish the charge in the indictment that the prisoner stole one dead partridge. If the partridge had been reduced into possession there might have been some ground for charging a larceny in a different form, but we cannot enter into the question on the present indictment. The conviction, therefore, cannot be sustained.

WILLES, J.—I am of the same opinion. By the decision in *Blades v. Higgs*, it was never intended that poachers should be put on the same footing with felons. I entirely concur in the judgment of the Lord Chief Justice. I wish, however, to state for myself that I am not satisfied that if the partridge

C. CAS. R.] REG. v. INHABITANTS OF UPPER HALF HUNDRED OF CHART & LONGBRIDGE. [C. CAS. R.]

had been dead when picked up by the prisoner it would have been sufficiently reduced into possession so as to sustain the charge of larceny. I illustrated my view in the course of the argument, by the keeper picking up a dead bird and embezzling it.

BYLES, J.—It was necessary to allege in the indictment that the partridge was either dead or, if alive, that it was reclaimed, or in captivity, or reduced into possession. The indictment here states that it was dead, whereas it is found by the jury that it was alive. The indictment, therefore, was not proved, and the conviction cannot be sustained.

HANNEN, J. and CLEASBY, B. concurred.

Conviction quashed.

REG. v. THE INHABITANTS OF THE UPPER HALF HUNDRED OF CHART AND LONGBRIDGE.

Bridge—Liability to repair—Hundred—5 & 6 Will. 4, c. 50.

The 5 & 6 Will. 4, c. 50, s. 5, does not transfer to parishes the liability to repair a bridge, which the inhabitants of a half hundred have always repaired out of the hundred rate made on the half hundred.

Case reserved for the opinion of the Court for the consideration of Crown Cases Reserved.

At the general quarter sessions of the peace, held at St. Augustine, near Canterbury, on the 29th June 1869, James Adams and Charles Tanton, es representing the inhabitants of the upper half hundred of Chart and Longbridge, in the county of Kent, were tried upon an indictment which charged the said inhabitants with permitting one of the hundred bridges to be out of repair.

It was proved to the satisfaction of the jury that the bridge in question was situate within the upper half hundred of Chart and Longbridge, that it was out of repair and dangerous, and that from time immemorial the repairs of that bridge and all other hundred bridges within the upper half hundred had always been done at the expense of the inhabitants of the half hundred, out of a hundred rate made and levied in the said upper half hundred.

Primâ facie everything was proved which would entitle the Crown to a verdict, but it was contended on the part of the defendants that since the Highway Act, 5 & 6 Will. 4, c. 50, hundred bridges are repairable as highways by the parishes in which they are respectively situate, and that the inhabitants of any hundred or other division of a county are no longer indictable for the non-repair.

The jury found the defendants guilty, and the court decided upon reserving the point raised for the consideration of the Court for the Consideration of Crown Cases Reserved, and respited the judgment until the decision shall be given.

The opinion of the court is requested upon the following question, viz. :—

Whether a public bridge, which has from the time whereof the memory of man runneth not to the contrary been repaired by a hundred, is, since the statute 5 & 6 Will. 4, c. 50, not repairable by the said hundred?

If the court shall be of opinion that it is repairable by the hundred the verdict is to stand; if otherwise, the verdict is to be set aside and a verdict of Not Guilty entered.

THOMAS SYDENHAM CLARKE,
Chairman of the above Sessions.

Biron, for the defendants.—In considering this case, it is necessary to regard the course of legislation upon the subject of bridges. Generally speak-

ing parishes are liable for the repair of the highways within them, but in the case of bridges, county bridges (which are bridges in connection with the main highways), have been, from time immemorial, repaired only by the county rates, while hundred bridges, or bridges in connection with bye-roads or highways less used, have been by prescription repairable by rates on the hundreds, or a collection of parishes. In the Highway Act, 13 Geo. 3, c. 78, there is a series of provisions giving facilities to surveyors of the highways for getting materials for the making and repair of highways. That statute makes no mention of bridges, and the 43 Geo. 3, c. 59, s. 1, was passed for the purpose of extending those provisions to surveyors of county bridges (*eo nomine*). Then the 54 Geo. 3, c. 90, was passed to extend the 43 Geo. 3, c. 59, to bridges and other works maintained at the expense of the hundreds. County and hundred bridges are also spoken of (*eo nomine*) in the 55 Geo. 3, c. 143, s. 5. The Legislature, therefore, has distinctly recognised the two classes of bridges. This 13 Geo. 3, c. 78, has not been repealed, so far as relates to bridges, by the 5 & 6 Will. 4, c. 50.

Reg. v. The Inhabitants of Merionethshire, 6 Q. B. 343;

Reg. v. Brecknockshire, 15 Q. B. 813.

By the 5 & 6 Will. 4, c. 50, s. 5 (the interpretation clause) it is enacted that in the construction of that Act the word "highways" shall be understood to mean "all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridledways, footways, causeways, churchways, and pavements." There being, then, a recognised distinction between county bridges and hundred bridges; hundred bridges by virtue of that enactment in 5 & 6 Will. 4, c. 50, are now to be treated as highways, and are governed by the 5 & 6 Will. 4, c. 50. Then the 5 & 6 Will. 4, c. 50, s. 21, enacts "that if any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county, or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law, before the erection of the said bridge, bound to repair the said highways: Provided, nevertheless, that nothing herein contained shall extend, or be construed to extend to exonerate or discharge any county, or any part of any county, from repairing or keeping in repair the walls, banks, or fences of the raised causeways to any such bridge, or the land arches thereof." Sections 22 and 27 were then referred to. Section 62, which prescribes the proceedings by which highways repairable by any persons or bodies corporate, *ratione tenuræ*, or otherwise, may be made parish highways, does not control the enactment in sect. 5. [Willes, J.—You must show by negative evidence that the hundred is not now liable to repair its bridges.] It is contended that sect. 5 of 5 & 6 Will. 4, c. 50, removes the liability to parishes to repair hundred bridges as well as its highways.

Barrow for the prosecution.—It was found that the bridge had always been repaired by the inhabitants of the half hundred. It's either a half hundred bridge or a county bridge; and in either case the 5 & 6 Will. 4, c. 50, does not apply. The term county bridge has no real meaning; it only means a bridge repairable by the inhabitants of the county. The interpretation clause of the 5 & 6 Will. 4, c. 50, defines "parish" to mean, among other things, "wapentake, division, or any other place or district maintaining its own highways." Therefore, if the bridge is repairable by the parish, construing parish by the interpretation clause, it is still repairable by

[PROB.]

ROBERTSON v. SMITH AND OTHERS—In the Goods of R. R. PEEL.

[PROB.]

the wapentake, division, or district within which it is situated. [He was then stopped.]

BOVILL, C. J.—In dealing with the statute 5 & 6 Will. 4, c. 50, we must consider the state of the law previously existing to which it has reference. Previously there was one set of statutes regulating highways, and another regulating bridges. The 5 & 6 Will. 4, c. 50, was an Act for the consolidation of the laws relating to highways, and does not refer to bridges. That Act seems to relate to highways only as distinguished from bridges; but by the interpretation clause the word “highways” is to be construed to mean, among other things, “bridges not being county bridges.” Now it is contended that under that clause county bridges only being excepted by it, a hundred bridge must be considered as part of the highway. The words “county bridge” is not a term known to the law, but is merely a compendious word for a public bridge. It is not stated in the indictment that this was a county bridge, or that there was any liability on the inhabitants of the county to repair it. There may be a liability on the part of the inhabitants of the hundred, or a division of the county, or of the inhabitants of a county, to repair a bridge. There is no difference in principle, all bridges over a stream are county bridges although repairable by a hundred or division of the county. In some of the statutes a distinction is made between county bridges and hundred bridges as pointed out in the argument by Mr. Biron. But there is nothing in the affirmative enactments of the 5 & 6 Will. 4, c. 50, to take away the liability of persons to repair a highway under previous statutes, and there is no reason for holding that it was intended to take away the liability to repair public bridges, which particular divisions of a county were liable to repair. The conviction will therefore stand.

The rest of the Court concurring,

Conviction affirmed.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Jan. 28, and Feb. 15.

(Before Lord PENZANCE.)

ROBERTSON v. SMITH AND OTHERS.

Will—Codicil—Deed of gift.

A testator executed a codicil to his last will and testament, in which he gave certain specified sums as a deed of gift to certain persons. The court

Held, that the bequest was meant to take effect after death, and granted probate of the codicil.

F. Craven, late of Holloway, died 8th Nov., 1868, leaving a duly executed will with the following codicil:—“I make a free gift to Maria Robertson of 60*l.*, and to John Virtue of 50*l.*, being the sum deposited by me with the Islington branch of the London and County Bank.”

The codicil was attested by two witnesses, one of whom was Mr. Virtue, who therefore forfeited his legacy if the paper were held to be testamentary. The question before the court was whether this codicil was intended to operate as an immediate gift, or not to take effect until after the death.

Littler for the plaintiff, the legatee.

H. T. Atkinson for the defendants, the executors.

Cur. adv. vult.

Feb. 22.—Lord PENZANCE.—In this case the paper cannot be admitted to probate unless it can be shown

that the intention of the testator was that the gift which he makes should depend on his death. The question is, how are you to get at that intention? Looking at all the circumstances of the case, I have no doubt that the testator did intend that the gift should take effect on his death. It was a sum of money which he had in the savings bank—he was dying when he made the provision, and I think he made it in contemplation of his death, and that he did not intend to strip himself of his property if, contrary to all the expectations, he survived.

Solicitors for plaintiff, *Digby, Sharp, and Co.*
Solicitor for defendants, *R. Digby.*

Tuesday, March 15.

In the Goods of R. R. PEEL.

Will—Executor wrongly described—Ambiguity.

The testator by his will nominated “Francis Courtenay Thorpe” as one of his executors. The only person answering to the description was a youth of twelve, but there was every reason to believe that the testator intended to appoint his brother Thomas Corbet Thorpe.

The Court however held that there was no ambiguity, and declined to go into evidence to ascertain which of the two the testator really intended to appoint.

R. R. Peel, late of Hampton, in the county of Middlesex, died July 9, 1869, having duly executed a will on Jan. 28, 1869. One of the executors appointed in the will was “Francis Courtenay Thorpe, of Hampton aforesaid, gentleman.” The only person corresponding to that description was Francis Courtenay Thorpe, a nephew of the deceased, and a minor, aged 12. The testator, however, had a brother, Francis Corbet Thorpe, gentleman, of Hampton. In the same month that the will was executed the testator had asked this brother to be one of his executors, in conjunction with two other gentlemen who were afterwards nominated in the will as executors and trustees, and the brother consented to act. The attorney who drew the will from the instructions of the deceased made an affidavit, in which he stated that he had no doubt the testator intended his brother Francis Corbet Thorpe to be his executor, and that the name of “Courtenay” had been inserted by a mistake.

Dr. Spinks now moved for probate to Francis Corbet Thorpe, as one of the executors of the deceased. The description in the will could not apply to a youth of twelve, and there was, therefore, an ambiguity which would justify the court in looking into the facts, to ascertain what the intentions of the testator were.

Lord PENZANCE.—If the court is at liberty to look into the facts there is no difficulty whatever in deciding that the person the testator really meant was the father; but the question is whether the court is so at liberty. So far as I can see the description “Francis Courtenay Thorpe, of Hampton aforesaid, gentleman,” is a description that does apply to this youth of twelve. He has the christian names therein given, he lives at Hampton, and he is a gentleman, and I can see no ground on which the court can entertain the question as to what the testator meant. He has given a description which, when it comes to be applied to the facts, corresponds with an existing person, and does not correspond with any other existing person. There is, therefore, no ambiguity, and the court is not at liberty to exercise its discretion so as to investigate the question which of the two the testator meant

Div.]

MILLER v. MILLER.

[Div.]

Probably the testator has not expressed his real meaning, but the court cannot inquire whether he has done so or not. Whatever my reluctance may therefore be, I am bound to refuse the application.

Attorney, John Taylor, jun.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

March 8, 22, and 29.

(Before Lord PENZANCE, J.O.)

MILLER v. MILLER.

Restitution—Decree for renewal of cohabitation—Refusal of the wife to obey the decree—Sequestration.

In a husband's suit for restitution of conjugal rights the court pronounced a decree ordering the wife to return to cohabitation. She went abroad, and refused to obey the decree, and her address being concealed by her friends, it was impossible to serve it on her, and substituted service on her attorney was ordered.

The court, without requiring the preliminary process of attachment, issued a writ of sequestration against the separate estate of the wife, with the view of enforcing her obedience to the decree.

This was originally a husband's suit for restitution of conjugal rights, and at the hearing the court decreed that the respondent should return to cohabitation, and subsequently condemned her in the costs incurred by the petitioner. The respondent was abroad, and her friends had concealed her address. The court, on proof of this, allowed substituted service of the decree on her attorney, but she had not obeyed it.

Dr. Spinks (Dr. Tristram with him) now moved on behalf of the petitioner that a writ of sequestration be issued against the separate estate of the wife for the purpose of compelling her to return to cohabitation.

Dr. Deane (Hemming and E. Browning with him) on behalf of the respondent, opposed the motion. The property against which the sequestration is asked is in the hands of trustees and cannot be reached:

Dent v. Dent, L. Rep. 1 P. & Div. 366; 13 L. T. Rep. N. S. 252;

Sharpe v. Cumano, L. Rep. 1 P. & Div. 622;

[Lord PENZANCE.—The court has nothing to do with that. A general writ of sequestration is asked for in order to compel the respondent to return to cohabitation, and it may be that when the writ is issued the sequestrator can find nothing to seize.] By the practice of the Court of Chancery a writ of sequestration must be preceded by an attachment:

Morgan and Chute's Chancery Statutes and Orders, Order 29, rule 1537;

Braithwaite's Records and Writ Practice, 239-241;

Seton on Decrees, 1224.

The practice was modified in the case of ecclesiastical decrees by 2 & 3 Will 4, c. 93, and exception has also been made in the case of debtors by the Debtors' Act 1869 (32 & 33 Vict. c. 62); *Sykes v. Dawson*, L. Rep. 1 Eq. Cas. 228. In cases where plaintiffs have shown that an attachment would be a worthless preliminary, the court has dispensed with it, but that has always been done *ex parte*. The party must show that he is in a position to issue an attachment, and that is not the case here, because there has been no personal service: (*Hope v. Carnegie*, L. Rep. 7 Eq. Cas. 26; 13 L. T. Rep. N. S. 624.) [Lord PENZANCE.—It would be unreasonable to say that if a party keeps abroad you

cannot serve an attachment, and that without an attachment you cannot have a writ of sequestration.]

Dr. Spinks, in reply, relied on *Dent v. Dent* and *Clinton v. Clinton*, in submitting that this court could issue a writ of sequestration without issuing an attachment previously. In *Hope v. Carnegie*, it did not appear that the lady's address was ever known although she was abroad; but here the lady's address had been persistently concealed by her friends and solicitor. To require personal service under such circumstances would be to say that the court should not have power to enforce its own decrees; but by rule 16 (Rules and Regulations 1866) substituted service was permitted where personal service could not be effected, and that had been done in this case.

Cur. adv. vult.

March 22.—Lord PENZANCE.—This case involved the question whether the court could properly issue a writ of sequestration with a view of compelling a party to the suit to obey its order. That question depended upon another, and it was this, whether courts of equity, whose powers in this respect are by the Probate Act conferred upon this court, have or have not been in the habit of issuing writs of sequestration for such a purpose? It was not denied that they had; but it was said that it was the universal practice in courts of equity before such an order could be made that it should be preceded by the issuing of a writ of attachment. Now it would certainly be a very unfortunate state of things if that were so, because it would lead to the necessity for issuing a writ of attachment, which in many cases would be a mere idle proceeding, as a preliminary to taking the only step which would be of any use; for if a person who was in contempt was out of the jurisdiction, the issuing of a writ of attachment would be of no avail. What courts of equity have been in the habit of doing is this, to look upon this writ of sequestration as a further measure to be resorted to if the writ of attachment, which is the ordinary method of enforcing its orders and decrees, should prove unsuccessful. Where the writ of attachment would be productive of any benefit it would first be tried before they resorted to a writ of sequestration; but it would be rather singular if where a writ of attachment would be entirely useless, they should insist upon it before granting a writ of sequestration. Upon looking into the cases I do not find that the proposition, as regards the practice of courts of equity which has been contended for, has been maintained. In the case of *Hodgson v. Hodgson* a decree was made ordering the defendant to pay a certain sum of money into court, and to pay the costs of the suit. Previous to the decree the defendant had gone to Australia. The plaintiff, by mistake, issued an attachment into the county of Westmoreland, instead of in the county of Lancaster, in which the defendant had resided before going abroad, and a return had been made of *non est inventus*. The court was then moved that a writ of sequestration might issue without a return to an attachment in the county of Lancaster, and the Master of the Rolls said, "It would be an idle form to issue another attachment. Take the order." I am quite of the same opinion as the Master of the Rolls; it would have been a very idle proceeding indeed to have issued an attachment under such circumstances. Again, in *Butler v. Matthews*, 19 Beav. 549, the question was, whether the party, being out of the jurisdiction, the court should proceed and take the bill *pro confesso*. The Master of the Rolls said, "To obtain a decree *pro confesso* you must proceed with the greatest care." The case stood over for consideration, and two cases having

NISI PRIUS.]

SAUNDERSON v. PERRIN.

[NISI PRIUS.]

been produced in which it was held that when a defendant was out of the jurisdiction an attachment need not be issued, the order was made. That, no doubt, is only an analogous case, but it proceeded on the same principle, that where a writ of attachment would be of no use it need not issue. In the case of *Re The East of England Bank*, 18 L. T. Rep. N. S. 550; 10 Jur. N. S. 1093, which is a more recent case, and very much to the purpose, application was made to Sir R. T. Kindersley, V. C., for a writ of sequestration, without attachment, against Mr. W. Hall, who had been placed upon the list of contributories to the bank, and who was abroad. The learned judge said, "If the practice is, that in order to obtain a writ of sequestration, you must first get a writ of attachment, the effect is, that there is no provision for sequestration in the case of persons who are not resident in England;" and he made the order for a writ of sequestration to issue without any previous writ of attachment. That is a direct authority in favour of what appears to me to be the more sensible course to pursue. I shall order the issue in this case of a writ of sequestration, it being understood that the court does not now enter into the question as to what property may or may not be affected by it. That is a question which may arise hereafter, and when it does it will have to be argued. I do not decide it now. The writ of sequestration will issue with costs.

March 29.—Dr. Tristram.—The application for the writ was on the ground of non-compliance with the decree of the court, and for nonpayment of costs. We have since learned that the costs were paid the day before the motion, and we are, therefore, not entitled to the writ on that head.

Lord PENZANCE, J. O.—It was not granted for that, but for the disobedience of the wife to the monition of the court in not returning to cohabitation.

Attorney for the petitioner, *R. Miller*.

Attorneys for the respondent, *A. Jones and Co.*

NISI PRIUS.

Reported by JOHN ROSE, Esq., Barrister-at-Law.

Wednesday, May 4.

(Before LUSH, J.)

SAUNDERSON v. PERRIN.

Interpleader—Equitable assignment—Common Law Procedure Act 1860.

A., being indebted to B., gave him a written authority addressed to C., from whom certain sums of money were accruing due to A., authorising C. to pay those sums to B. Notice of this instrument was given to C.

Held, first, that the authority was not such an order for the payment of money as would require a stamp; secondly, that it was an equitable assignment of the moneys in C.'s hands to B., creating a lien or charge upon them which might be successfully set up by C. when served with a garnishee order by a subsequent judgment-creditor of A.; thirdly, that a mistake appearing on the face of an interpleader issue as to the statute under which it is directed does not invalidate the issue.

Interpleader issue directed on the application of the Planet Permanent Building and Investment Society which had been served with a garnishee order upon a judgment obtained by the defendant against one Francon.

The issue was in these terms:

James Saunderson affirms, and Edward William Perrin

and John Thomas Perrin deny, that on the 7th Feb. 1870, he the said James Saunderson was entitled to a lien on the amount in the hands of the Planet Permanent Building and Investment Society as against C. D. Francon. And it has been ordered by Master Henry John Hodgson pursuant to the statute 1 & 2 Will. 4, c. 58, and 1 & 2 Vict. c. 45, that the said question shall be tried by a jury, and such said jury shall find what, if any, was the amount of the said lien as aforesaid. Therefore let, &c.

Clay for plaintiff.

Finlay for defendant.

Saunderson the plaintiff, having advanced moneys to Francon, a builder, the latter gave him the following authority:

120, Holborn-hill, London.

22nd July, 1867.

To the Directors of the Planet Permanent Building and Investment Society.

Gentlemen,—I hereby authorise you to pay to Mr. James Saunderson of the above address all moneys coming to me in respect to my contract with you for building houses in Napier-terrace, Battersea, and to accept his receipt for the same, which I hereby acknowledge shall be a sufficient discharge to you.—I am, yours truly,
E. P. FRANCON.
(Witness) Ed. G. Burton.

Notice of this document was given to the society on the day following its date.

LUSH, J. ruled that it was not an order for the payment of money which would require a stamp.

At the close of the case for the plaintiff,

Finlay submitted that no case had been made out; that the document was a mere authority to pay moneys coming to Francon in respect of the houses in Napier-terrace, and might be revoked. It was not an order or it would have needed a stamp, and it was not an equitable assignment. [LUSH, J.—It is an authority from a debtor to pay a debt owing by him to another person, why is not that an equitable assignment?] In *Bell v. The London and North-Western Railway Company*, 15 Beav. 553, the Master of the Rolls said, "If a creditor employ a person to collect the debts due to him, and inform the debtor that such person has authority to receive the debt due, this would not be an assignment of the debt to the agent, even though the agent should be a creditor of his principal; but the debtor might with propriety and without risk, afterwards pay the debt to the creditor, or to any fresh agent whom he might appoint to receive it." [LUSH, J.—That is quite intelligible; there an agent was employed to collect a debt, but here Francon did not make Saunderson his agent to collect a debt. The intent is manifest.] The order might be revoked by Francon at any time. [LUSH, J.—Suppose it could be—it has not been revoked.] But to constitute a good equitable assignment it must be irrevocable. [LUSH, J.—This is not an order merely to receive the money as agent, but to receive it on his (Saunderson's) own behalf—that constitutes an equitable assignment.] He then argued that as the case was an interpleader issue the plaintiff must make out a legal title. He cited from 2 Chitty's Archbold, p. 1394 *Frost v. Heywood*, 12 L. J. N. S. 242. [LUSH, J. referred to 23 & 24 Vict. c. 126 (The Common Law Procedure Act 1860), s. 29,—“Whenever in proceedings to obtain an attachment of debts . . . it is suggested by the garnishee that the debt sought to be attached belongs to some third person who has a lien or charge upon it, the judge may order such third person to appear before him, and state the nature and particulars of his claim upon such debts,” and sect. 30.] There is here no evidence of lien.

Clay, contra, cited *Lett v. Morris*, 4 Sim. 607:—A. having contracted to pay to B. 2360*l.* by instalments, B. signed and gave to C., for valuable consideration, a paper authorising A. to pay part of each instalment to C., and 460*l.* to be reserved in A.'s hands out of the balance of the contract, and

ARCHES.]

LEE v. MEREST.

[ARCHES.]

C.'s receipt was to be a discharge to A.; A. was served with notice of the order on the day on which it was signed: Held, that the writing was an equitable assignment of the sums mentioned in it to C.

LUSH, J.—I quite agree; that case is precisely in point.

Finlay asked that leave might be reserved for him to move upon the points raised.

LUSH, J.—I cannot give leave because that would import I have a doubt, and I have none.

Finlay.—The issue on the face of it purports to be under the Interpleader Act.

LUSH, J.—That is a mistake, but it does not invalidate the issue, which is really under the garnishee clauses of the Common Law Procedure Act 1860.

Verdict for plaintiff.

Attorneys for the plaintiff, Noon and Davies.

Attorney for the defendant, C. Harris.

ARCHES COURT.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Nov. 26 and 29, 1869.

(Before the Right Hon. Sir J. PHILLIMORE, Dean of the Arches.)

LEE v. MEREST.

Simony—Stat. 12 Anne, st. 2, c. 12—Evidence—Sentence.

The defendant was presented to a living by W., who had shortly before bought the advowson, on May 27, 1868. On June 10 M. brought an action against the defendant for 350l., and judgment went by default "by arrangement between the parties." Execution was issued, and 5l. was levied. On Aug. 3 the defendant was instituted on the presentation of W. These circumstances, taken in conjunction with certain suspicious letters written by W. to the defendant, and with the fact that the defendant did not offer himself as a witness to rebut the above evidence, were

Held, to prove that the presentation to the living was the result of a corrupt and simoniacal contract between the parties, and that the defendant was therefore guilty of simony under the stat. 12 Anne, st. 2, c. 12.

The defendant, having also been convicted of threatening to publish a libel upon W., with intent to extort money, the sentence, in addition to the penalties for simony by sect. 2 of the stat. of Anne, was of deprivation from the ministry, and from the performance of all clerical functions within the province.

This was a suit instituted under the Church Discipline Act, promoted by John Benjamin Lee against the defendant, the Rev. James John Merest, vicar of Upton-Snodsbury, in the county of Worcester, for having entered into a simoniacal contract for procuring the then next presentation to the vicarage of Upton-Snodsbury, and for having been corruptly and simoniacally presented to the same; and also for having pleaded guilty, at the Worcester Assizes, on March 4, 1869, to a charge of unlawfully threatening to publish a libel upon one Murray Richard Workman, with intent thereby to extort money from him.

The Bishop of Worcester sent the case by letters of request to this court.

This was the first proceeding in an ecclesiastical court against a clerk for simony under the stat. 12 Anne, st. 2, c. 12.

The articles were in the following form:—

1. That by the laws, canons, and constitutions ecclesiastical of this realm, all clerks and ministers in holy orders are particularly enjoined and required to be grave, reverend, and orderly in their general deportment and behaviour in

every respect, and to abstain from any excess whatever, and from anything that may give rise to scandal and evil report, and always to do the things which shall appertain to honesty, and to endeavour to profit the church of God, and to forward the progress of true religion, bearing in mind that they ought to excel all others in purity of life, and to be examples to other people under pain of degradation or deprivation from their ecclesiastical benefices, suspension from the exercise of their spiritual functions, or such other ecclesiastical punishment as the exigency of the case and the law thereupon may require or authorise.

2. That by the said laws, canons, and constitutions ecclesiastical, if a clerk in holy orders of the Church of England be simoniacally promoted or presented to any benefice or living ecclesiastical, he is deprivable of the same by reason of such simoniacal promotion or presentation, on due examination and proof thereof, and if such clerk shall have been a party or privy to such simoniacal promotion or presentation he shall be adjudged guilty of simony. And moreover by the stat. 12 Ann, st. 2, c. 12, it was enacted and provided that, "If any person shall for money, reward, gift, profit, or advantage, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, or for money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name or in the name of any other person, take, procure, or accept the next avoidance of or presentation to any benefice, with cure of souls or living ecclesiastical, and shall be presented, thereupon such presentation and every admission, institution, investiture, and induction upon the same shall be deemed a simoniacal contract; and it shall be lawful for the Crown to present or collate unto such benefice for that one time or turn only; and the person so corruptly taking, procuring, and accepting the said benefice or living ecclesiastical as aforesaid shall thereupon be adjudged a disabled person in law to have and enjoy the said benefice, and shall also be subject to any punishment, pains and penalties prescribed or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice had become vacant."

3. That you the said James John Merest are and have been for some years last past in holy orders of the said Church of England.

4. That by deed, dated the 29th Feb. 1863, the Rev. Henry O'Donnell, clerk, sold and conveyed the advowson of the vicarage and parish church of Upton-Snodsbury, in the county and diocese of Worcester, to one Murray Richard Workman.

5. That the said Murray Richard Workman purchased the said advowson from the said Henry O'Donnell with your knowledge, privity, and consent, with intent to present you, the said James John Merest to the said vicarage and parish church upon the then next avoidance, in pursuance of an agreement made by and between you and the said Murray Richard Workman in that behalf.

6. That about the end of the year 1867, or the beginning of the year 1868, you the said James John Merest made an agreement or promise by which you undertook to pay the said Murray Richard Workman a sum of money or otherwise to reward, profit, or benefit the said Murray Richard Workman, in consideration of his procuring for you the next avoidance of, or presentation to, the said vicarage and parish church, or of his presenting you, or causing you to be presented to, the same, on the then next avoidance thereof.

7. That you were thereupon and in pursuance of such agreement or promise of or for a sum of money, reward, profit, or benefit, as in the last preceding article mentioned, presented to the said vicarage and parish church by the said Murray Richard Workman on the next avoidance thereof, which said avoidance took place by and upon the resignation of the said Rev. Henry O'Donnell on or about the 25th March 1868.

8. That in or about the month of June 1868 it was agreed between you and the said James John Merest and the said Murray Richard Workman that in consideration of the said Murray Richard Workman obtaining for you the said next avoidance of, or presentation to, the said vicarage and parish church, or of his presenting, or causing you to be presented, to the same on such next avoidance as aforesaid, the said Murray Richard Workman should commence an action against you in the Court of Exchequer of Pleas at Westminster to recover the sum of 350l. as and for money lent to you by the said Murray Richard Workman, and that you should suffer judgment by default in the said action; and that on the 10th June 1868 an action was accordingly commenced in the said court, in which the said Murray Richard Workman was plaintiff, and you, the said James John Merest was defendant; and on the 22nd June 1868 the said Murray Richard Workman signed judgment against you in the said action for the sum of 350l. and costs.

9. That on the 3rd Aug. 1868 you, the said James John Merest, were, upon the presentation aforesaid, admitted and instituted to the vicarage and parish church of Upton-Snodsbury by the Right Rev. the Lord Bishop of Worcester after you had made and subscribed the declaration against simony required by the Clerical Subscription Act 1865.

10. That by reason of the premises you the said James John Merest have been guilty of the offence of simony, and have knowingly entered into a simoniacal contract, and

ARCHES.]

LEE v. MEREST.

[ARCHES.]

have by reason of an agreement or promise of, or for a sum of money, reward, gift, profit, benefit, or advantage taken, procured, or accepted the next avoidance of presentation to the said vicarage and parish church, and have been presented to the same thereupon.

11. That by reason of the premises you the said James John Merest have been corruptly and simoniacally promoted and presented to the said vicarage and parish church.

12. That you the said James John Merest were on the 19th Feb. last committed for trial at the then next assizes for the county of Worcester on a charge of knowingly and feloniously sending to the said Murray Richard Workman a letter, demanding money with menaces and without reasonable or probable cause.

13. That at the assizes for the said county, held at Worcester on Thursday, the 14th March last past, you the said James John Merest were acquitted on the charge in the last preceding article mentioned, no evidence being offered in support of the same by the said Murray Richard Workman; but you, the said James John Merest, then and there pleaded guilty to and were convicted of a charge of unlawfully threatening the said Murray Richard Workman to publish a libel upon and touching and concerning him, the said Murray Richard Workman, with intent in so doing to extort money from the said Murray Richard Workman, against the form of the statute in such case made and provided; and you were thereupon ordered to enter into your own recognisances in the sum of 250*l.* to appear and abide the judgment of the court when called upon.

14. That by reason of the premises there exist great scandal and evil report concerning you, the said James John Merest; and you have caused great scandal to the Church of God and your holy order to the hindering of the progress of true religion.

15. That by reason of the premises and of a certain Act of Parliament, passed in the session of Parliament holden in the 3rd and 4th years of Her present Majesty, being an Act for better enforcing church discipline, and of the letters of request under the hand and seal of the Lord Bishop of Worcester, in whose diocese you hold preferment, you were and are subject to the jurisdiction of this court.

16. And in part supply of proof of the matters hereinbefore alleged, and for all other lawful purposes herein, the proctor for the promoter annexes hereto, and prays to be taken and read as part hereof a paper writing marked A., being a true and authentic copy, certified under the hand of the proper officer in that behalf, of the original record, proceedings, and conviction of the said James John Merest, had, done, and made at the assizes for the county of Worcester, hereinbefore mentioned, or referred to in the 12th and 13th preceding articles, and also a paper writing marked B., being an office copy of the *præcipe* for the writ of summons in the action, in the 8th preceding article mentioned, and also a paper marked C., being a duly certified copy of the extract of the judgment signed in the said action in the 8th preceding article mentioned.

17. And the proctor for the promoter further propounds and alleges articles and objects that all and singular the premises are true public, and notorious, and he prays that, on legal proof thereof, the right honourable the official principal, or other the judge of this court, will be pleased to declare that the said James John Merest has offended against the said laws, statutes, constitutions and canons ecclesiastical in respect of the matters hereinbefore alleged, or of some one or more of them, and that he has incurred the sentence of degradation, or deprivation, or suspension from the ministry and from the performance of all clerical functions whatsoever within the province of Canterbury, and that he be involved in the pains and penalties of law for having been convicted and having caused such scandal as aforesaid, and that he be duly and canonically corrected and punished according to the gravity of his offences and the exigency of the law, and also that he be condemned in the costs made and incurred on the part and behalf of the said John Benjamin Lee, the promoter in this cause, and be compelled to the payment thereof, and that the said James John Merest is a disabled person in law to have and enjoy the said vicarage, and parish church of Upton-Snodsbury, and that his presentation to the said vicarage and parish church, and his admission and institution upon the same were and are utterly void and frustrate, and of no effect in law.

Sir Travers Twiss, Q. C. (Queen's Advocate), Archibald, and Cowie, for the promoter.

The defendant was represented by his proctors.

Dr. Tristram appeared for the Rev. Richard Murray Workman, a witness in the cause.

Witnesses were examined, and counsel for the promoter addressed the court on Nov. 26.

Cur. adv. vult.

Nov. 29.—Sir R. PHILLIMORE.—In this case the office of the judge is promoted by the secretary of

Vol. XXII., N.S., No. 550.]

the Lord Bishop of Worcester against James John Merest, clerk in holy orders, and *de facto* vicar of the parish of Upton-Snodsbury in the county and diocese of Worcester. The case is sent by letters of request to this court, under 3 & 4 Vict. c. 86, in the first instance. The offences charged against the clerk are two: first, that of simony, by reason of his having corruptly and simoniacally obtained presentation and institution to his vicarage; and, secondly, that of conduct unbecoming a clergyman in unlawfully threatening the Rev. Murray Richard Workman to publish a libel upon him with the intent of extorting money, of which offence he was duly convicted at the assizes for the county of Worcester held on March 4, 1869. This conviction for this offence was duly proved before me by the record of the conviction produced by the clerk of indictments on the Oxford Circuit. Upon the charge of simony the evidence may be briefly stated as follows: A certain Mr. O'Donnell was patron and incumbent of the benefice of Upton-Snodsbury at the beginning of the year 1868. He sold the advowson to the Rev. Murray Richard Workman, at whose prosecution the defendant has been convicted for the offence which I have mentioned. The deed of conveyance was produced and read before me. The date was Feb. 29, 1868; the purchase-money was 400*l.* Mr. O'Donnell resigned the living on March 24, 1868, and his resignation was accepted on the following day by the bishop. On May 27, following the defendant was presented by Mr. Workman to the benefice. On June 10 Mr. Workman brought an action against the defendant for the sum of 350*l.*, and on the 22nd recovered that sum—judgment being allowed to go by default “by arrangement,” as Mr. Workman in his evidence said, between the parties. Mr. Workman afterwards issued execution on his property, and levied 5*l.* On Aug. 3 the defendant was instituted upon the presentation of Mr. Workman to the benefice. The dates of these transactions, taken in conjunction with their character, and with the profession of the parties, all of whom I regret to say were clergymen, are calculated of themselves to excite a grave suspicion of corrupt practices connected with the presentation to this living. That suspicion has been turned into complete proof by the evidence, which has been adduced before me. The defendant, who has appeared in the suit by a proctor, has not appeared by counsel or in person before me in court; he has declined to plead any defence or give any issue but by his proctor, who is still before the court, has prayed justice. It appears from the evidence, that some quarrel took place between Mr. Workman and the defendant, from which probably has arisen the means of unravelling this transaction. Certain letters were produced in evidence before me, and were proved to have been used before the magistrates who committed the defendant for trial at Worcester. Among these letters were two which Mr. Workman proved were in his handwriting and were produced to him by the defendant's solicitor, when he, Workman, was cross-examined by the solicitor. The first letter bore date Nov. 19, 1867, and is as follows:—

Church and School Gazette Office, 10, Southampton-street, Strand, W.C.

My dear Sir,—As all the smaller livings are very dear in proportion, and your capital not sufficient to obtain one with possession, I propose getting some assistance for you, but in doing this I act without your knowledge, or my endeavours might be abortive. Hence I am silent for your own sake, and you also must be the same. Suffice it to say that the course I propose will cost you nothing. I wish to have Marston, in Derbyshire, for you, but, failing that, a rectory in North Devon, with 160*l.* and a house. This, however, is dearer, and Marston must be had if possible. You should not attempt Branksea when the weather is bad.

—Yours faithfully,

The Rev. J. J. Merest.

P.S.—You must preserve the strictest silence about the

M. E. WORKMAN.

ARCHES.] *Re* EUROPEAN BANK (LIMITED); *Ex parte* ORIENTAL COMMERCIAL BANK (LIMITED). [CHAN.]

names of any living mentioned to you or your succession will be prevented.

The second letter was dated Dec. 19, 1867, and is as follows:

Church and School Gazette Office, 10, Southampton-street, Strand, W.C.

My dear Sir,—I enclose a copy of another letter for the bishop, which please send at once. The whole affair has been so far conducted very cleverly, and I am anxious for you not to spoil it by the least injudicious act or word. I have no time for more upon this subject to-day. As regards Upton-Snodsbury the income is from tithe and glebe, and the present net 120*l.* about; capable of improvement. There is only single duty, and each rector has either held a curacy of 80*l.*, or made that extra by occasional duty. It is three miles from Spetchley, and six miles from Worcester. There is no house at present, but there will be one shortly, and in the mean time you can have reasonable lodgings either at Spetchley or nearer into Worcester. It is a very nice place indeed; to my mind you could not have a more eligible little living. It is the presentation, not advowson. You have not enough money for the latter, and these small livings are all much dearer in proportion. In fact, they are most difficult to get hold of at all, and the trouble and difficulty I have for you cannot well be told. I spoke of Marston, but you would have to wait some time for it, and Upton is nicer. I withheld the name, having promised to do so till I heard definitively from your uncle, but he will render no help, and you want a small sum. I have now applied elsewhere, and if I can arrange all things I shall have to see you. I can help you to improve the income of Upton, and you can go to it at once. It is the cheapest and nicest thing I can get for you, and for some time to come the only one likely.—Yours faithfully, M. R. WORKMAN.

The Rev. J. J. Merest.

Your uncle's allowance will not come till Jan. 6, and he must not be asked for it. I enclose a check for 5*l.*

Mr. Workman said he had no doubt he had received answers to these letters, but he had not kept them. Taking these letters with their history, as proved in this court, in conjunction with the dates and the transactions to which I have referred, especially the transaction by which judgment for 350*l.* was recovered "by arrangement" between the presentee and the patron, it would be difficult to doubt that the presentation to this living was the result of a corrupt and simoniacal contract between the patron and the presentee. But that difficulty becomes a moral impossibility when it is remembered that it was competent to the defendant, as his proctor must have informed him, to have entered the witness box and have rebutted by an explanation if such were in his possession, the otherwise irresistible influence of guilt arising from the testimony and the circumstances to which I have adverted. I am of opinion that the promoter of my office has proved both the charges laid in the articles against the defendant. It is not necessary that I should refer to authorities for the purpose of establishing the jurisdiction of this court in cases of simony. That authority both as it rests upon the general ecclesiastical law, and upon the statute law, cannot be gainsaid; though happily the reported instances in which it has been exerted have been few and far between. The cases will be found collected under the title "Simony," in the last edition of Burn's Ecclesiastical Law, vol. 3. By the general law, and by the 40th canon of 1604, as by the stat. 31 Eliz. c. 6, the offence of simony is considered as one of a very grave character; and though the oath formerly taken under the 40th canon by the presentee against simony has been abolished by 28 & 29 Vict. c. 122, by the 2nd section of that statute a solemn declaration against simony has been substituted for it. The defendant, though not technically guilty of perjury, must have deliberately used upon a very solemn occasion a very solemn declaration, which he knew at the time he made it to be absolutely false. The stat. 12 Anne, st. 2, c. 12, has not, as far as I am aware, ever been put in force by the Ecclesiastical Court. By the second section of that statute, the obtaining by a clergyman the next avoidance of, or next presentation to, any benefice is treated as a simoniacal contract, and the presen-

tation and institution are to be utterly void, frustrate, and of no effect in law, the simoniacal presentee is to be adjudged a disabled person in law to have the same benefice, and the Crown is to present for the next turn. I see no reason why this statute should not be put in force by this court; but I found my sentence as well upon the general ecclesiastical law as upon the statute law. I must, in accordance with the exigency of the law, pronounce that the defendant is a disabled person in law to have or enjoy the vicarage and parish church of Upton-Snodsbury, that the presentation thereto, and his admission and institution therefore are void and frustrate, and of no effect in law; and having regard to all the circumstances of this case, and the offence of misconduct, apart from the charge of simony proved against him, I must pronounce upon the defendant a sentence of deprivation from the ministry and from the performance of all clerical functions whatsoever in the province of Canterbury; and I must also order this sentence to be promulgated in the usual manner by affixing the same to the door of the church of Upton-Snodsbury for the usual time. I must further condemn the defendant in the costs of this suit. I shall also direct the registrar to apprise the Queen's proctor of this sentence in order that Her Majesty may exercise the right of presentation to the vacant benefice given by this statute.

Proctors for the promoter, *Shepherd v. Skipwith*.

Proctors for the defendant, *Clarkson, Son, and Greenwell*.

Solicitors for Mr. Workman, *Hughes, Hooker, and Buttanshaw*.

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by T. BROOKSBANK and E. STEWART ROCHE, Esqrs.,
Barristers-at-Law

Jan. 29 and 31, and Feb. 8 and 18.

(Before Lord Justice GIFFARD.)

Re THE EUROPEAN BANK (LIMITED); *Ex parte* THE ORIENTAL COMMERCIAL BANK (LIMITED).

Winding-up—Overdue bills of exchange—Purchase and subsequent sale—Equities affecting subsequent purchaser—Right to follow bills—Appeal motion—Completion of evidence—Practice as to costs.

P., with moneys of the *O. Bank*, of which he had been manager, but which, at the time of the purchase of certain bills by him, was being wound-up, purchased overdue bills of exchange drawn upon, and accepted by, the *E. Bank*, which was then also in liquidation. Two days after he sold these bills to the *E. C. Co.*, then but recently incorporated, of which, by the articles of association, he was sole director:

Held, that *P.* must be taken to have acted in this last purchase, not as a partner in, but as an agent for, the *E. C. Co.*, which was, therefore, not affected with notice of the fraud committed by him on the *O. Bank*, for he could not be taken to have disclosed his own fraud.

But, inasmuch as the bills were overdue when the *E. C. Co.* took them, that *Co.* had no better title than *P.* himself had; and if they had remained in his hands the *O. Bank* might clearly have followed their moneys into them.

Although the practice of the court admits new evidence on an appeal motion, yet where there was in the court below an incomplete case which was not completed until the appeal, no costs will be given to the successful appellant.

CHAN.] *Re EUROPEAN BANK (LIMITED); Ex parte ORIENTAL COMMERCIAL BANK (LIMITED).* [CHAN.]

This was an appeal by the liquidator of the Oriental Commercial Bank against an order of Malins, V.C., directing that a sum of money due from the European Bank upon certain bills of exchange drawn upon and accepted by them, which that bank (now in liquidation) was ready to pay, should be paid to the Eastern Commercial Company instead of the appellants, by whom it was claimed.

The evidence was considerable, but the judgment of Giffard, L.J., contains all that it is necessary to state in this respect, except that the Eastern Commercial Corporation was a company not registered until two days before the purchase on its behalf of the bills of exchange in question; that, by its articles of association, Mr. Demetrio Pappa, formerly the manager of the appellant's company, was appointed the first director thereof, there being no other; and that he was paid for the transfer of the bills out of the assets of the Eastern Commercial by means of a cheque drawn and signed by himself as its director.

Jackson and W. W. Karlake supported the appeal contending that the moneys paid for the bills clearly belonged to the appellants, and were fraudulently appropriated by Pappa; that as Pappa was a member of the Eastern Commercial, that company had notice of his fraud; and that that company could stand in no better position than he would have stood in if he had not parted with the bills, because they were overdue when he transferred them.

Lord Justice GIFFARD said that he was of opinion that the Eastern Commercial Bank were not affected through Pappa by the fraud he had committed on the Oriental Bank, and directed counsel for the respondents to confine themselves to the other points of the case.

Pearson, Q.C., and Locock Webb supported his Honour's order.

Glasse, Q.C., and Hastings for the European Bank.

The authorities cited were

Kennedy v. Green, 3 My. & K. 699;
Hewitt v. Loosemore, 9 Hare 449;
Charles v. Marsden, 1 Taunt. 224;
Lee v. Zagury, 6 Taunt. 114;
Re Carew's Estate Act, 31 Beav. 39;
Oulds v. Harrison, 10 Ex. 572; 3 W. R. 160;
Ex parte Swan, L. Rep. 6 Eq. 344; 18 L. T. Rep. N. S. 230;
Esdaile v. Lanauze, 1 Y. & C. Ex. 394;
Re The Peruvian Railways Company, L. Rep. 2 Ch. Ap. 617; 16 L. T. Rep. N. S. 315.

W. W. Karlake having replied,

Lord Justice GIFFARD said:—This is an appeal from an order of Malins, V.C., dismissing a summons taken out by the Oriental Commercial Bank. That summons had reference to certain bills drawn on, and accepted by, the European Bank. The holders are the Eastern Commercial Bank. The Vice-Chancellor was of opinion that the holders were entitled to the proceeds of the bills, and that the Oriental Commercial Bank had failed to prove their case. The European Bank is in liquidation, but willing to pay whoever is entitled. It is alleged on the part of the Oriental Commercial Bank that the bills in question were bought with their moneys by Demetrio Pappa, and that the Eastern Commercial Bank had notice of this through Demetrio Pappa, and that, whether they had notice or not, they can stand in no better position than Demetrio Pappa would have stood in if he had not parted with the bills, because they were overdue when he transferred them.

The first question to determine is whether Deme-

trio Pappa bought the bills wholly or in part with the moneys of the Oriental Commercial Bank. The bills are several in number for different sums, amounting in the whole to 1000*l.*, and he bought them on the 21st March 1867, for 15*s.* 4*d.* in the pound, when they were overdue. Demetrio Pappa, in his evidence before the Vice-Chancellor, swore in general terms that he bought them with his own moneys. He had an account with the National Bank of Scotland in the name of Geo. John Pappa, called "Geo. Jno. Pappa's Trust Account," and this account, he says, is his. It appears that there was paid in to this account, under date of the 19th March 1867, the sum of 2594*l.* 6*s.* 1*d.*, and drawn out under date of the 21st March as against that the sum of 2300*l.* The 2300*l.* was applied in the purchase of a number of bills, of which the bills in question formed part. The other bills were bills on the Oriental Commercial Bank for 2000*l.* The 2300*l.* was made up in part of a sum of 2094*l.* 6*s.* 1*d.*, which is clearly traced by an affidavit made and filed since the case was before the Vice-Chancellor. The purchase of the bills on the Oriental Commercial Bank for 2000*l.* and on the European Bank for 1000*l.* as one transaction, is proved by the affidavit of Arthur Cooper. [His Lordship then went through the evidence, which showed that John George Pappa, a cousin of Demetrio Pappa, was sent by him to Patras and elsewhere in the Mediterranean, to collect assets of, and debts due to, the Oriental Commercial Bank; that this was after the winding-up petition in the matter of that bank had been presented, upon which Arthur Cooper was appointed liquidator; that John George Pappa returned to London in March 1867 and handed the moneys he brought back with him to Demetrio Pappa—in all about 2094*l.* in bills upon London houses, and his reason for handing them to his cousin and not to the liquidator was that he had been sent out by the former and had to account to him; that the bills he so handed over he had bought with moneys which he had collected on account of the bank.] His Lordship then stated: This is how the question stood before the Vice-Chancellor, in whose opinion the case was not conclusively proved, but since the hearing before him fresh affidavits have been filed, one of which traces the whole transaction, and it is proved to demonstration that the 2094*l.* was the amount arising from the discount of bills belonging to the Oriental Commercial Bank, and that these, with a further sum of 500*l.*, constituted the sum which appeared in the trust account under date 19th March 1867, and that the sum of 2300*l.*, under date the 21st March on the other side of the account, was drawn out and applied in the purchase of the bills from Melas Brothers, of which the bills in question, amounting in all to 1000*l.*, formed part, the rest being bills for 2000*l.* on the Oriental Commercial Bank. To speak plainly, and in such a case there ought to be plain speaking, Demetrio Pappa has sworn that which is not true, and has applied to his own purposes the moneys arising from the discount of bills, which bills he knew belonged to the Oriental Commercial Bank.

Now, at all events, the facts have been proved, and it remains to be seen what the law is as applicable to these facts. The bills and moneys belonging to the Oriental Commercial Bank were not received either by J. G. Pappa or Demetrio until after the presentation of the petition for winding-up that bank; therefore no question of account as between the bank and Demetrio Pappa arises. The 237*l.* which was paid over by Jno. G. Pappa to the liquidator has nothing to do with this matter; it is no way concluded by any receipt given by or settlement of accounts with the official liquidator, and if the bills in question were now in the hands of

CHAN.] *Re* CONSTANTINOPLE AND ALEXANDRIA HOTELS CO. (LIMITED); EBBETT'S CASE. [CHAN.]

Demetrio Pappa, beyond all question the Oriental Commercial Bank could follow their moneys into them, and assert a right to a proportional part of the proceeds. Is, then, the Eastern Commercial Company in any better position than Demetrio Pappa would have been? In my opinion they were not affected with notice through Demetrio Pappa. He purchased the bills before the Eastern Commercial Company was formed. He stood in the relation of vendor to that bank, and though he was managing director and something more, and paid himself by cheque, he is not in the position of a partner in an ordinary firm, but of agent acting for the bank as his principal. He cannot be taken to have disclosed his own fraud. *Kennedy v. Green* therefore applies; but the want of notice is not conclusive on the case. The bills were overdue when the Eastern Commercial Company took them—there were equities affecting the bills, and the Eastern Commercial Company has no better title, either legal or equitable, than Demetrio Pappa had. The law on this subject cannot be better stated than by Malins, V.C. in *Ex parte Swan*, in pp. 359 and 360 of his judgment.

In this case there is an equity attaching directly to the bills. The result, therefore, is that the Oriental Commercial Bank can follow their moneys into the bills in the possession of the Eastern Commercial Company precisely in the same way as though Demetrio Pappa had not parted with them. I have not calculated the exact amount which was applied in payment of these bills, but the amount applied in payment of them and the other bills was 2300*l.*, and the 2300*l.* was drawn against a sum of 2594*l.* 6*s.* 1*d.*, which was made up of a sum of 2094*l.* 6*s.* 1*d.* belonging to the Oriental Commercial Bank, and of 500*l.* belonging to Demetrio Pappa, and it must be taken, according to the case of *Pennell v. Deffell*, 4 De G. M. & G. 372, that those two sums contributed rateably. It will follow that the Oriental Commercial Bank is entitled to so much of the proceeds of the bills as is represented by their proportion of the purchase-money, and the Eastern Commercial Company by so much as is represented by the 500*l.*—the proportion will be somewhere about four-fifths and a fraction on the one side, and a fraction less than one-fifth on the other. There will be a declaration to this effect and payment accordingly. The amounts can be calculated.

As regards costs, the European Bank are in the position of plaintiffs in an interpleader suit, and must have them both here and below out of the fund. The other parties must bear their own costs. The Oriental Commercial Bank have failed in part, that is as regards the 500*l.*, and they completed their case by evidence which was not before the Vice-Chancellor. The practice of the court admits of the introduction of new evidence on an appeal motion; but where there is an incomplete case in the court below, and a complete one only on the appeal, I shall, as a general rule, adopt the course of refusing to give any costs.

The order of the Vice-Chancellor will be discharged, and the order I have suggested substituted for it. If the additional evidence had been before him, I gather from his judgment that his order would have been the same as that which I now make.

Solicitors for the appellants, *Upton, Tatham, and Co.*

Solicitors for the Eastern Commercial Company, *George Lawrence and Co.*

Solicitors for the European Bank, *Taylor and Jaquet.*

Thursday, Feb. 10.

(Before Lord Justice GIFFARD.)

Re CONSTANTINOPLE AND ALEXANDRIA HOTELS COMPANY (LIMITED);
EBBETT'S CASE.

Company — Winding-up — Contributory — Infant — Confirmation.

An infant applied for shares in a company, and they were duly allotted to him. Five months after he attained 21. Fourteen months after that, the company was ordered to be wound-up, and during that period the infant did nothing to repudiate the shares which were registered in his name:

Held (affirming the decision of the Master of the Rolls) that the infant was liable as a contributory, inasmuch as he could not be heard after what had taken place to say that the contract to take the shares was voidable by him.

This was an appeal from an order of the Master of the Rolls fixing a Mr. Ebbetts on the list of contributories of this company in respect of 150 shares which were registered in his name. The hearing before the Master of the Rolls is reported 21 L. T. Rep. N. S. 574, and it is only necessary now to state that Mr. Ebbetts applied for the shares when he was an infant; that they were duly allotted to him and registered in his name; and that the order to wind-up the company was not made till fourteen months after Mr. Ebbetts attained twenty-one. During that period of fourteen months he took no steps to repudiate the shares. The Master of the Rolls held that he must be placed on the list of contributories and from this decision he appealed.

Ince, argued the appellant's case, relying mainly on some new evidence to show that notice of allotment was never given to the appellant.

Bevir, for the official liquidator, was not called upon.

Lord Justice GIFFARD said that, assuming notice of allotment to have been given to the appellant this was as clear a case as possible. For more than a year after the appellant attained twenty-one, the company continued to carry on business as a going concern, and during that period he never took any steps to repudiate, and in that state of things he could not afterwards be heard to say the contract to take the shares was voidable on his part. As to the question of allotment, the evidence failed to show that notice of the allotment was not given to the appellant. It was to be regretted that the practice upon appeal motions admitted of an entirely different case being brought forward on appeal from that which was made on the original hearing, and the present case was an instance of the mischief resulting from that practice. His Lordship, without hesitation, dismissed the appeal with costs.

Solicitor for the appellant, *Rogers.*

Solicitors for the official liquidator, *Routh and Stacey.*

Monday, Feb. 14.

(Before Lord Justice GIFFARD.)

Re THE PANAMA, NEW ZEALAND AND AUSTRALIAN ROYAL MAIL COMPANY (LIMITED); *Ex parte* THE OFFICIAL LIQUIDATOR.

Company — Borrowing powers — Debenture — "Undertaking" — Charge on — Priority among creditors.

A company, having power to borrow money upon mortgage of its property, or effects, or upon bonds or

CHAN.] *Re THE PANAMA, NEW ZEALAND, AND AUSTRALIAN ROYAL MAIL CO. (LIMITED).* [CHAN.]

debentures, or upon such other security as the directors might think fit, issued so-called "Mortgage Debentures" under their common seal, charging the said "Undertaking" and all sums of money arising therefrom, and all the estate, right, title and interest of the company therein, with payment of the sum borrowed and interest. The principal was to be repaid on the 2nd January, 1870; but, in the year 1868 the company was ordered to be wound-up:

Held (affirming the decision of Malins, V.C.), that the word "Undertaking" had reference to all the property of the company, not only that which it possessed at the date of the debenture, but everything which might afterwards become its property, and therefore that the debenture holders possessed a priority over the general creditors.

So soon as the company had to be wound-up, the rights of the debenture holders attached, and put them in as good a position as if, their interest and principal being unpaid, they had filed a bill to enforce their debentures against the company's property.

This was an appeal by the official liquidator of this company, which is now being wound-up in the chambers of Malins, V.C., against an order whereby his Honour decided that the holders of certain debentures issued by the company were a charge upon the property of the company which gave them a priority over the general creditors.

In the month of June 1866, the company were in need of money, and the board of directors being empowered to borrow money for the purposes of the company, either upon mortgage of the whole or any part of the property or effects of the company, or upon bonds or debentures of the company, or upon such other security, and upon such terms and conditions as they might from time to time think fit, issued a circular inviting applications for the issue of debentures, which referred to the large number of steam vessels and other ships belonging to the company, and the original costs of such vessels and ships, and pointed out that they afforded ample security for the sums intended to be raised.

The debentures issued were in the following form:

The Panama, New Zealand, and Australian Royal Mail Company (Limited).

Mortgage Debenture, 100l.—No. 403.

By virtue of the powers contained in our articles of association, we the Panama, New Zealand, and Australian Royal Mail Company (Limited), in consideration of the sum of £1. paid to us by _____ are held and firmly bound, and do hereby for ourselves, our successors and assigns, charge the said undertaking, and all sums of money arising therefrom, and all the estate, right, title, and interest of the company therein, with payment to the said _____, his executors, administrators, or assigns of the said sum of 100l., together with interest for the same at the rate of 6l. for every 100l. by the year, the principal sum to be repaid on the 2nd Jan. 1870, and the interest to be payable in the meantime half-yearly, on the 1st Jan. and the 1st July in each year, until the repayment thereof.

Given under our common seal this 4th Jan. 1870.

Interest, as stipulated, was paid on such of the debentures as were issued until the 1st July 1868, soon after which day the winding-up order was made. The question which was the subject of the appeal then arose between the holders of the debentures on the one hand, and the company's general creditors, represented by the official liquidator on the other, and the learned Vice-Chancellor having pronounced the decision above stated, the official liquidator appealed.

Cole, Q.C., and Lindley, supported the appeal, relying upon

Gardner v. The London, Chatham and Dover Railway Company, L. Rep. 2 Ch. App. 201; 15 L. T. Rep. N.S. 644;

Holroyd v. Marshall, 10 H. of L. Cas. 191; 7 L. T. Rep. N. S. 172.

Re the State Fire Insurance Company, 1 De G. J. & S. 634; 9 L. T. Rep. N. S. 108;

Re The Marine Mansions Company, L. Rep. 4 Eq. 601; 17 L. T. Rep. N.S. 50;

Wickham v. The New Brunswick Railway Company, L. Rep. 1 P. C. Cas. 64; 14 L. T. Rep. N. S. 311;

Re the New Clyddach Sheet and Bar Iron Company, L. Rep. 6 Eq. 514;

Furness v. The Caterham Railway Company, 27 Beav. 358.

Pearson, Q.C., and Hastings, in support of his Honour's order were not called on.

Lord Justice GIFFARD said: This is an appeal from an order of Malins, V.C., by which he has declared that the mortgage debentures issued under the seal of the company are a charge upon the proceeds of the sale of the company's vessels and other property. Now before going to the terms of the mortgage deed itself, one may first of all deal with the cases; and of course the cases which have been quoted as to policies of insurances can have no application to the present; for the policies of insurance have a very different effect, and are of a very different nature to these debentures. Neither can *Gardner v. The London, Chatham and Dover Railway Company* have any application to this, because in that case there was a particular, peculiar subject matter over which it was held that the debenture operated—that is to say, a permanent railway which it was well known to everybody was permanent and could not be touched by judgment-creditors, and could not be mortgaged or sold, or dealt with in any way. And all that *Gardner's* case decided was, that in that particular instance, having regard to the position of the parties, there was a particular subject-matter which was intended to be affected by the instrument, and no other. The same thing might be said of the other cases which have been referred to. What I have to decide in the present case is simply this—what are the rights of the debenture holders, the state of things being that the company is being wound-up, and that the whole of its property is being realised? I confess that I can have no doubt whatever as to what the effect of the debenture is. First of all, as regards the power given to the company, there was a power given to mortgage and a power to raise money by debentures; but of course the company might include in one and the same instrument a mortgage and a debenture—that is to say, a mortgage and a bond. Accordingly they did issue what they called a mortgage debenture, which was in substance a bond, and a charge upon their property for the sum borrowed on bond. The terms of the instrument are not an assignment, but a charge; the company charge the undertaking, and all sums of money arising therefrom, and all estate, right, title, and interest of the company therein, with payment of the principal sum and interest. I asked in the course of the argument what could be the subject-matter of that charge, and the answer given was that there were valuable contracts, and that all that the charge was meant to cover was the income arising from the business being carried on, and that it would not extend to property such as the ships and other matters of that sort, which were absolutely essential to the carrying on of the concern. I cannot accede to any such proposition as that. I have no hesitation in saying that in this particular case, and having regard to the state of this particular company, the word "undertaking" had reference to all the property of the company, not only such as existed at the date of the debenture, but whatever might afterwards belong to the company. And I take the object and meaning of the debenture to be

CHAN.] *Re THE ESTATES CO. (LIMITED AND REDUCED)*—*Ex parte* GOODIER; *Re* GOODIER. [CHAN.]

this, that the word "undertaking" necessarily implies that the company will go on. I take it that even the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal, and he continued unpaid; and I take it that the meaning and object of the undertaking was this, that the company might go on during that interval; and furthermore, if the debenture holder chose to stand by, that he would not be entitled to any account of mesne profits, or of any dealing with the property of the company in the ordinary course of carrying on their business. I do not at all say this of such things as sales of property or mortgages of property, but the ordinary application of funds and property which came into the hands of the company, as, for instance, the ordinary using of their coals and other matters of that description. I see no difficulty in giving that effect to this instrument, and I cannot see that any difficulty will arise from its being so construed. But the moment you come to this, that the company has to be wound-up, and the property has to be realised, that moment the rights of these parties beyond all question attach, and they are in quite as good, if not in a better, position than if, their interest being unpaid and their principal being unpaid, they had filed a bill. My opinion is that even if the company had not stopped they might have filed a bill, and they could not have been in a worse position than a judgment creditor. I cannot see, having regard to the position of these parties, why they could not have filed a bill and realised their securities if the company did not choose to pay them their principal and interest. But seeing that the company is being wound-up, and that all I have to determine is simply between them and the general creditors, I hold that under these debentures they have a charge upon all property of the company, past and future, by the use of the term "undertaking," and that they stand in a position superior to that of the general creditor, who can touch nothing until they are paid.

The application must be refused with costs, and the matter will go back to the Vice-Chancellor.

Solicitors for the official liquidator appealing, *Ashurst, Morris, and Co.*

Solicitors for the debenture holders, *W. and W. A. Waller.*

Saturday, March 19.

(Before Lord Justice GIFFARD.)

Re THE ESTATES COMPANY (LIMITED AND REDUCED).

Companies Act 1867—30 & 31 Vict. c. 131, s. 10—

Company limited and reduced—Reduction of capital—Change of name—Time for which the words "and reduced" ought to be used.

When an order is made by the court, under the powers conferred by the Companies Act 1867, confirming resolutions passed by a Company for the reduction of its capital, as a general rule the company will be ordered to continue to use the words "and reduced" as part of its title for three months from the date of the order: (Re Sharp, Stewart, and Co., L. Rep. 5 Eq. 155; 17 L. T. Rep. N. S. 197.)

This company passed resolutions under the Companies Act 1867, to reduce their capital. A petition was then presented for an order to confirm these resolutions. An order accordingly was made by Stuart, V.C., but his Honour was of opinion that the company ought to continue to use the words as part of their title until the date of their dissolution or previous winding-up, and directed accordingly. (See 22 L. T. Rep. N. S. 119.) From this direction the company appealed.

Greene, Q.C., and Wickens, on behalf of the company, urged that three months from the date of the Vice Chancellor's order was a sufficient period for the use of the words "and reduced" as part of the company's title. That was the period fixed by Hatherley, L. C., when Vice-Chancellor, in *Re Sharp, Stewart, and Co.*, L. Rep. 5 Eq. 155; 17 L. T. Rep. N. S. 197. It would be an injury to the company to have to use the words "and reduced" as long as they existed. There was no reason for a longer period than three months in the present case, as the company was entirely an English one, and had no foreign creditors or shareholders.

Lord Justice GIFFARD said that he should fix the same period as was fixed by Wood, V.C. in *Re Sharp, Stewart, and Co.*, viz., three months from the date of the order, for the use of the words "and reduced" as part of the company's title.

Solicitors for the company, *Walters and Gush.*

April 30 and May 2.

(Before Lord Justice GIFFARD.)

Ex parte GOODIER; *Re* GOODIER.

Bankruptcy—Order of discharge—Refusal to grant—Contracting debts without reasonable or probable ground of expectation of being able to pay them—F frivolous or vexatious defence to an action or suit—Patent suit—Defence—Costs—The B. A. 1861, s. 159, cl. 3.

In order that a bankrupt's order of discharge may be refused under sect. 159 of the B. A. 1861, on the ground that he could not have had, when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same, it is necessary that the debts in question should be strictly debts arising out of contract. It is not enough that they be debts provable in the bankruptcy.

The costs payable by an unsuccessful defendant to a patent suit, though provable by the plaintiff in the defendant's bankruptcy, are not a debt arising out of contract.

*A suit was instituted by B. against G. to restrain the latter from infringing B.'s patent, and for an account and other consequential relief. The validity of the patent had been already established at law in an action against another infringer. G. defended the suit, and at the hearing issues were directed by the Master of the Rolls to try the validity of the patent. On the trial a verdict was found in favour of G. B. moved for a new trial, and the motion, though resisted by G., was successful. The new trial took place, and a verdict was found in favour of B. After this G. moved for a new trial, and his motion was refused by the Master of the Rolls and also by the Lord Chancellor on appeal. A decree was then made granting a perpetual injunction against G., and he was ordered to pay the costs of the suit. An inquiry as to damages was also directed. During the proceedings, G. executed an assignment for his creditors, and the defence of the suit was after that carried on at the cost of other persons who were interested in contesting the validity of the patent, though it was conducted in the name of G. After the decree was made, G. became a bankrupt. The costs of the suit, including those of the trials at law, amounted to more than 12,000*l.* G. had scarcely any other debts, but his assets were only about 50*l.* B. waived his right to damages, and proved in the bankruptcy for the costs:*

Held (reversing a decision of the Chief Judge in Bankruptcy) that the costs of the suit were not a debt contracted by the bankrupt, and also that the bank-

CHAN.]

Ex parte GOODIER; Re GOODIER.

[CHAN.]

rupt's defence of the suit was not frivolous or vexatious. Held, therefore, that he was entitled to an immediate order of discharge.

This was an appeal from an order of the Chief Judge in Bankruptcy refusing to grant to Mr. James Goodier, a bankrupt, any order of discharge. The adjudication of bankruptcy was on the 18th of March, 1869, and proceeded upon a petition presented by the bankrupt himself on the same day. The bankrupt filed the usual accounts, and passed his last examination. His balance-sheets, filed with the proceedings, showed that his debts amounted to 12,221*l.* 15*s.* 6*d.*, his assets to 53*l.* 3*s.* 5*d.*; but the only debt which was proved was the sum of 12,216*l.* 8*s.* 6*d.* due to Messrs. Benjamin and Walter Bovill, being the amount due to them for costs under an order and decree of the High Court of Chancery in a suit commenced by the late George Bovill (whose executors they are), and continued by them until its termination against the bankrupt, as the sole defendant.

After a lengthy examination of the facts the Chief Judge concluded his judgment thus:—

"I am asked now to decide whether, having regard to the manner in which, and the circumstances under which, the debt proved has been contracted, the bankrupt has contracted any of his debts at a time when he could not have had any reasonable or probable ground of expectation of being able to pay the same. Considering the condition to which he had reduced himself in Aug. 1866 (while as yet the amount of costs incurred was comparatively small), and that he must be taken to have known that, from that time at least, if the decision should be against him, he had no means of satisfying any costs for which he might become liable, while the utmost success in the litigation would be simply to defray some of the costs which his solicitor and the millers incurred in his name, but on their behalf—and seeing that the debt due for costs is provable and has been proved in this bankruptcy—I am of opinion that on this head the case falls within the provisions of the 159th section. Another question to be decided is whether the bankrupt has put any of his creditors to unnecessary expense, by a frivolous or vexatious defence to a suit for recovering a sum of money due from him. In four different courts, before four different judges, the plaintiff's right has been established, and by the ultimate decree his right to be paid by the defendant the money claimed by the plaintiff at the time when the bill was filed, and which was then a debt, although the amount of it was not then ascertained, has been decreed. The evidence satisfies me that the defence, at least from the month of August 1866, has been merely vexatious; that the bankrupt has lent his name to the proceedings which have been carried on with the full conviction that, if the plaintiff should ultimately succeed, he could not procure payment of the money for which he sued the bankrupt, nor of the costs which had been incurred, either from the bankrupt or from those persons whom he had permitted to use his name for a merely vexatious purpose. Upon the principles upon which the law of bankruptcy has always been administered, it has been established that when a bankruptcy has been resorted to, not for the legitimate purposes of bankruptcy, but to answer and cover some merely ulterior or foreign purpose, the mere name and colour which may have been adopted are not effectual to accomplish such purpose. Various Acts of Parliament have been passed modifying and regulating the proceedings, and embracing cases not before contemplated, and combinations of circumstances which the earlier statutes had not provided for adequately; but I am not aware that

the primal original principles upon which the administration of the law in bankruptcy is founded have ever been abrogated, and, as I read the law, a bankruptcy which has been instituted and prosecuted, not for the legitimate purpose for which that law was established, is as it has always been, an abuse of the law and of the proceedings in the court in which it has been practised. It is needless to consider in the case what might have been the decision if an application had been made to dismiss the petition upon the ground that it had emanated from a debtor who had substantially only one creditor, and who, having no estate to distribute, had resorted to the court for the purpose only of defeating the just rights of that creditor; for no such application has been made to me. To grant the order of discharge in the present case would confer upon the bankrupt a full and unqualified immunity from every claim that his creditors could make; to withhold that order is merely to leave him liable to satisfy, if by any change in his fortunes he shall be able to satisfy, demands the justice of which is open to no question. He is in no danger in any event of personal imprisonment, and I cannot conceive that, having regard to his conduct, and to the provisions of the statute, he is for any reason entitled to the protection and immunity which he claims, as to any property which he may hereafter become possessed of or entitled to. Under these circumstances, having given the best consideration I can bestow to the case before me, I am forced to the conclusion that the bankrupt, upon the grounds I have before stated, has disentitled himself to the protection which would be afforded by an order of discharge. I must, therefore, refuse the order of discharge for which he has applied."

From this decision Mr. Goodier appealed.

Little, Q.C. and *Ford North*, on behalf of the appellant, argued that it was settled by previous decisions, that to bring a bankrupt within the provision of sect. 159, the debt in question must, in the strictest sense, have arisen out of contract.

Ex parte Glass, re Boswall, 6 L. T. Rep. N. S., 407; *Re New and Thorne*, 31 L. J. 87, Bank.; 6 L. T. Rep. N. S. 732;

Ex parte Crabtree, re Taylor, 10 L. T. Rep. N. S., 361;

Ex parte Griffiths, re Griffiths, Ib. 705;

Re Clayton, 21 L. T. Rep. N. S. 342; L. Rep. 5 Ch. 13.

The debt in this case was simply one for costs and even the suit itself was not one to recover a debt. Moreover, the circumstances properly considered showed that the bankrupt's defence to the suit was not frivolous or vexatious.

De Gex, Q.C., and *Bagley*, for the respondents, argued that the cases cited for the appellant were distinguishable from the present case. In a patent suit the plaintiff in equity in effect adopted what had been done by the defendant, and, treating him as his agent, asked an account of the profits which he had made. And with regard to the costs, each party to an action entered into an implied contract with his adversary to pay his costs if unsuccessful. An implied contract was enough to satisfy the words of sect. 159. Moreover, the suit was one to recover a sum of money. The prayer of the bill asked for an account and payment of what should be found due. And the defence was frivolous and vexatious at any rate after the second trial, the validity of the patent having been affirmed in the year 1867 in several other suits, e.g., *Bovill v. Crates* and *Bovill v. Smith*. They referred to

Ex parte Rufford, 2 De. G. M. and G. 234; *Robinson v. Yale*, 2 B. & C. 762;

CHAN.]

Ex parte GOODIER; *Re* GOODIER.

[CHAN.]

Bovill v. Keyworth, 7 E. & B. 725;
Ex parte Barker, 9 L. T. Rep. N. S. 672;
Ex parte Mee, L. Rep. 1 Ch. 337; 14 L. T. Rep.
 N. S. 318;
Ex parte Birch, 4 B. & C. 880.

Without calling for a reply :

Lord Justice GIFFARD said: I have had a full opportunity of considering this case during the course of the very able arguments that have taken place on both sides. Certainly if it had stood under the old law, and the case had been left to my discretion, I should not have been disposed to differ from the Chief Judge; but my hands are completely tied by the 159th section of the Act of 1861. I have no doubt that the cases which have been decided upon the subject were more or less present to the learned judge's mind when he decided this case, because he goes into reasoning for the purpose of pointing out how in his opinion the matter is brought within the Act of Parliament. Now, I think it may be as well first of all to consider the cases which have been decided under the 159th section of the Act. The first of those cases is *Ex parte Glass*; *Re Boswall*, in which there was the most flagrant conduct on the bankrupt that there could possibly be. I may call it shockingly flagrant and criminal conduct. There was an action for damages, and although it was a debt certainly proveable under the commission, inasmuch as the verdict was before the proceedings in bankruptcy, the court held that it could not take into consideration the conduct of the bankrupt in respect to that. Then there have been the cases of *Re New and Thorne*, of *Ex parte Crabtree*, and of *Ex parte Griffiths*, and I believe in all these cases, although some of them were for damages for seduction, others of them were for damages which had been recovered in the Divorce Court, the court held that these cases gave no jurisdiction whatever to interfere. And although, in one of them at all events, the bankrupt had made himself a bankrupt with the sole view of escaping liability in respect of these damages, the court with reference to that could not help itself. But if these bankruptcy proceedings and those bankruptcy proceedings had stood till there was an application for a discharge, the bankrupt was entitled to his discharge, unless it could be proved that he had committed some one of the offences pointed out in the 159th section. Now, in this case it is alleged that two offences have been committed. I quite agree that what the court has to do is this: the court has to proceed to consider the conduct of the bankrupt before and after adjudication, and the manner and circumstances in and under which his debts have been contracted. The court is to consider that, but it is not to found itself entirely upon that consideration—it must go on further, and what the Act of Parliament says is this, that if the court shall be of opinion that the bankrupt has done certain specified things, then the court may refuse his discharge. Now, the first offence charged against this bankrupt is that "he could not have had, when any of his debts were contracted, any reasonable or probable ground of expectation of being able to pay the same." As I understand the learned judge, he is of opinion that if the debt was provable in the bankruptcy it would come within the meaning of that clause. That is in opposition, undoubtedly, to the decided cases. The mere fact of a debt being provable will not bring it within the meaning of the section. It must be, in some sense or other, a debt "contracted"—that is to say, not a debt which is the result, at all events, of proceedings in tort. What the amount of the debt in respect of the user of the patent in this case would have been I do not know. The user of the patent *prima facie* would be

a tort, but there is a good deal in Mr. De Gex's argument that where there is a tort of that description the plaintiff may waive the tort, and affirm the act, and take it as being *quasi ex contractu*. There is a good deal in that, but there is not before me a single fact or any means of ascertaining what amount was due, whether it was 5*l.* or 50*l.*, in respect of the actual use of the patent—nothing but the costs of the suit, and I do not hesitate to say that the costs of the suit are not a debt "contracted" within the meaning of the clause. Nor can I draw any distinction between costs in a suit and damages given in proceedings in the Divorce Court, or damages for a malicious injury, as in *Re Boswall*. I am satisfied that the costs alone stand entirely in the same category as the cases of damages, and that defending the suit and thereby incurring costs is not contracting a debt within the meaning of the 159th section, and the cases have laid it down that merely because the debt is provable in the bankruptcy is not enough to bring it within the section.

That disposes of the first part of the case. I have then to come to the second part of the case which is this: Has, or has not, the bankrupt put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action or suit to recover any debt or money due from him? I think doubts might be entertained whether this is not altogether outside the section, but I do not at all found my judgment on any such doubts. I quite admit Mr. De Gex's proposition, founding it on that case of the action at law where coals were improperly taken from another man's land and sold, and then an action was maintained for money had and received, but although I admit, for the purposes of this decision, that it is possible that a suit affirming the use of a patent, and asking for an account in respect of profits, would be a suit within the meaning of this clause; yet, on looking at all the circumstances of the case, to say that this defence was frivolous or vexatious would, I think, be going far beyond anything that this court would be justified in doing. Just observe, for a moment, what the grounds are upon which it is said by the learned judge in the court below that this defence was frivolous and vexatious. What he says is this, "That subsequently to Aug. 1864 this gentleman gave up his business as a miller, that he was brought to a standstill, that he was quite aground, that he had no money to go on, and could not go on, and his solicitor says to him, there are persons in communication with me who have great interest in contesting this patent; they will supply the money for going on with this litigation, if you will allow the litigation to go on in your name." The first thing that would occur to one would be this—if a number of gentlemen were ready to supply the money for the purpose of going on with this litigation, they, at least, one would think, must have had some opinion that there was a chance of success in that litigation, for it is quite manifest that it was not done to assist Mr. Goodier, but for the purpose of having the patent declared invalid. It is manifest, also, that such must have been the opinion of Mr. Wynne, the bankrupt's solicitor, and the position of Mr. Goodier at the time undoubtedly was this, that supposing he had stopped at that moment he would have been entirely at Mr. Bovill's mercy, and Mr. Bovill might have made him a bankrupt, or done anything he chose with him. He must have known that, and supposing that it had stopped there, the costs would have amounted to 3000*l.* or 4000*l.* I cannot say, nor do I think, that this gentleman was not advised at that time that there was a reasonable prospect of success, nor can I say but that the litigation was at that time of a very doubtful character. The records of all the courts in the kingdom show that if there is one thing which

CHAN.]

Re STREET (a Solicitor).

[ROLLS.

is more uncertain than another, it is the questions with respect to patents, and still more so is litigation uncertain with respect to a patent for a combination, more especially where that combination is of a most complicated character. In this case no doubt the validity of the patent had been more or less affirmed by at least one decision in the Court of Queen's Bench before the suit was instituted against this gentleman. But the suit was instituted against him, replication was filed, evidence was entered into, the case was heard before the Master of the Rolls, and probably, principally because there appears to have been some evidence on which the plaintiff had not satisfied the court, the Master of the Rolls thought himself bound to direct an issue. He came to the conclusion that, notwithstanding Sir J. Rolt's Act, and although there had been a decision of the Court of Queen's Bench affirming the validity of this patent, yet that he was not entitled at the solemn hearing of the cause, on evidence given and replication filed, to do more than grant what was really an *interim* injunction, and to direct an issue. Up to that time I cannot say there was anything either frivolous or vexatious in the defence to that proceeding. Then, what is the next step? The issue is tried, and upon one material point, unquestionably, of the several issues directed in the case, there is a finding against Mr. Bovill. Then Mr. Bovill moves for a new trial in consequence of that finding. Am I to say that when a man has been to a jury under those circumstances, and been successful to that extent, that it is frivolous or vexatious in him (because he happens to be a poor man, and not to have the means of paying), to resist the motion for a new trial, and to see whether he cannot hold that verdict which he has obtained from the jury? I cannot come to any such conclusion. Then a new trial was granted. Is there anything frivolous or vexatious in his going again before another jury to see whether he cannot obtain the same result from another jury which he had obtained from the jury before? I cannot say there was anything frivolous or vexatious in that second trial, although the result of the trial happened to be adverse to the defendant. Then there was a motion for a new trial before the Master of the Rolls, which, as he said he had a bias in the case, was not discussed before him, but was refused *pro formâ*, and was taken at once before the Lord Chancellor. Does the Lord Chancellor say that the motion before him was frivolous or vexatious, or that there was no ground for it, or that the case was not open to argument, or that it was not a matter on which different persons might fairly and reasonably entertain a different opinion? He says nothing of the sort. I am therefore of opinion that there was no offence within the meaning of the statute in the shape of a frivolous or vexatious defence to a suit such as this. As I have said, I do not think it necessary to say that certainly this is a suit within the meaning of the Act, although if it had been the only question I had to determine upon it I should certainly have taken time to consider and have reserved my judgment; but, assuming it be a suit within the meaning of the section, still I say that when he has come to a particular stage of the proceedings, those proceedings being matters about which reasonable people might entertain a reasonable doubt, and advice might be given in one way or another, and a number of persons are ready to subscribe to the litigation because they think the result of it may possibly put an end to this patent, I cannot by possibility say that this is a frivolous or vexatious defence. That being so, I think this gentleman is entitled to his discharge. I can only say, as I have said in a former case, it is to be regretted the law was in that state, and it is matter of congratulation that the

present state of the law is very different to what it was under the statute of 1861.

Solicitor for the appellant, W. W. Wynne.
Solicitors for the respondents, Harrison, Beal, and Harrison.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Tuesday, May 3.

Re STREET (a Solicitor).

Solicitor and client—Taxation—Time of application—Payment—Order to tax—5 & 7 Vict. c. 73, s. 41.

The 41st section of the Attorneys and Solicitors' Act (5 & 7 Vict. c. 73), does not apply to a bill of costs which has not been delivered.

Accordingly, where a solicitor, who was trustee for sale of three estates belonging to the same cestuis que trust, sold the estate at different times, and after each sale retained the amount of his bill of costs out of the purchase-money, and obtained a receipt from the cestuis que trust, who also signed the accounts, but the solicitor did not deliver the bills of costs till some time afterwards:

Held, that, notwithstanding the fact that more than twelve months had elapsed between the delivery of the first bill, and the taking out of the summons to tax, the three bills must be taxed.

Adjourned summons. This was an application for an order to tax three bills of costs relating to the sale of three estates, of which the solicitor, Mr. Street, was a trustee for sale, empowered by the trust-deed to charge for business done by him as solicitor. The three sales were completed in Aug. 1867, Sept. 1868, and July 1869 respectively; on the completion of each sale Mr. Street retained the amount of his bill of costs out of the purchase-money, and sent to each of the *cestuis que trust* an account crediting him with his share of the purchase-money, and deducting his share of the costs. He then paid the balance to the *cestuis que trust*, each of whom gave him a written receipt for his share and signed the account. The bills of costs were delivered on the 30th Dec. 1868, the 25th Feb. 1869, and the 18th Aug. 1869 respectively. The solicitor of the applicants made an affidavit in which he deposed that various items in each of the bills were in his opinion overcharges.

The summons for taxation was taken out on the 10th Jan. 1870, and the application as to the first of the three bills was resisted on the ground that it had been paid more than twelve months before the summons was taken out, and as to all the bills it was resisted on the ground that they had been paid under the 41st section of the Attorneys and Solicitors' Act (6 & 7 Vict. c. 73), which provides that the payment of a bill of costs shall in no case preclude the court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment.

Rasch, in support of the summons, contended that retainer by the solicitor of the amount of his bills of costs out of the purchase-money did not constitute payment under the 41st section of the Act. He cited:

Re Forsyth, 11 L. T. Rep. N. S. 616; 34 Beav. 145;
Re Pugh, 32 Beav. 173; 8 L. T. Rep. N. S. 586;

ROLLS.] *Re* PROGRESS ASSURANCE COMPANY; *Ex parte* BATES—COOPER v. COOPER. [V.C. S.]

Re Blake and Young, 9 Beav. 209;
Ex parte Sheckell, 2 De G. M. & G. 842;
Re Pender, 3 Beav. 390;
Rumsey v. Rumsey, *Ex parte Rumsey*, 21 Beav. 40;
Re Harper, 10 Beav. 284.

Speed, for the solicitor, contended that the *cestuis que trust* having given a receipt for the purchase-money and signed the accounts, there had been payment within the words of the 41st section of the Act. He cited

Ex parte Hemmings; *Re Bischoff and Coxe*, 28 L. T. Rep. O. S. 144.

LORD ROMILLY.—I am of opinion that all these bills must be taxed. The 41st section of the Attorneys and Solicitors' Act does not apply to a bill that has not been delivered. Here the amounts of the bills of costs were retained by the solicitor out of the purchase-moneys, and the balance was made over to the *cestuis que trust*, who severally gave receipts and signed the accounts. This is not the species of payment that can be pleaded under the 41st section of the Act. Moreover, all these sales formed one transaction, and the *cestuis que trust* would have been justified in saying that they would not pay one bill till they saw them all together; the lapse of over twelve months from the date of the delivery of one of the bills before the summons to tax was taken out, is, therefore, immaterial. This is not a case in which a common order to tax could have been obtained, and it was quite necessary to come here.

Solicitors for the applicants, *Tanqueray, Willaume, and Co.*

Cohen (with him *Jessel, Q.C.*), for Bates, contended that as the two debts were admitted, and the amounts of them ascertained, there was a clear right of set-off, which was not affected by the winding-up. He cited:

Castelli v. Boddington, 20 L. T. Rep. O. S. 64; 1 Ell. & Bl. 66;

Luckie v. Bushby, 21 L. T. Rep. O. S. 186; 13 C. B. 864;

Porter v. Cooper, 1 Cr. M. & R. 387;

Re Agra and Masterman's Bank, Anderson's case, L. Rep. 3 Eq. 337; 36, L. J. 73, Ch.;

Sir Richard Baggallay, Q.C., and Robinson, for the liquidator, contended that there could be no set-off, inasmuch as Bates's claim had not been admitted, and the amount of it had not been ascertained until after the commencement of the winding-up.

LORD ROMILLY.—I am of opinion that there must be a set-off. An ascertained amount is due by the company to Bates, and another equally ascertained amount is due by Bates to the company, and the debts are admitted by both parties. Why then should there not be a set-off? The fact that the company is in liquidation makes no difference. If this were not a case for a set-off, there never could be such a case. The rule is the same both at law and in equity; the amounts of the debts must be ascertained. There must therefore be a set-off, and Mr. Bates must have leave to prove for the balance.

Solicitors for Bates, *Field, Roscoe, and Co.*

Solicitors for the liquidator, *H. W. Mackreth*, for *Hull and Co., Liverpool*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

Feb. 22 and 23.

COOPER v. COOPER.

Election—Power—Valid appointment by deed—Subsequent invalid appointment by will.

A testatrix, who by a deed had validly exercised a power of appointment over certain real estate in favour of her three sons in equal shares, by her will, after affecting to appoint the same property in favour of her eldest son absolutely, gave divers benefits to the second son, and the children of the third son, who had died since the first appointment. This second appointment was, in a suit for the administration of the property, held to be invalid. Subsequently, the eldest son instituted proceedings for the purpose of compelling his surviving brother and the children of his deceased brother, to elect between the benefits conferred upon them by the will and their respective shares under the deed.

Held that there was no case for election.

This cause came on for further consideration upon a question as to whether a case of election arose under the following circumstances:—

William Cooper, by his will dated the 30th May 1840, after making certain specific bequests devised, *inter alia*, an estate called Pain's Hill, in the county of Surrey, to three trustees, in trust for his wife Harriett Cooper for life; and after her death, upon such trusts and subject to such provisions as were thereafter expressed concerning the residue of his real and personal estate; and after giving certain directions as to the sale of the Pain's Hill estate, and the raising of certain sums of money out of his general, real, and personal estate, and declaring the trusts of such moneys, he declared that the proceeds of the sale of his real estate, and the residue of his personal estate, should be held in trust for all

Re PROGRESS ASSURANCE COMPANY; *Ex parte* BATES.

Company—Winding-up—Set-off—Insurance premiums—Claim allowed after winding-up.

B. insured a ship with a company. The ship was lost, and B. sent in his claim, which was not, however, admitted till after the company had been ordered to be wound-up. B. owed the company a sum for premiums on other policies of insurance. The amounts owing from and to the company were ascertained and admitted:

Held, that B. was entitled to set-off the amount owing by him to the company against the company's debt to him, and that the winding-up did not affect his right.

Adjourned summons.

This was an application by Edward Bates, that a sum due from him to the Progress Assurance Company, which was being wound-up voluntarily under the supervision of the court for premiums on policies of marine insurance, might be set-off against a claim made by him against the company on another policy, and that he might be allowed to prove for the balance.

In Dec. 1868, Bates effected an insurance with the above company for 2000*l.* on the ship *Sarah Sands*, for a voyage from Liverpool to Bombay. The ship was lost on her voyage, and in June 1869, before the commencement of the winding-up, Bates sent in his claim which was not, however, admitted till after the winding-up had commenced.

The sum of 166*l.* 4*s.* 3*d.* was due from Bates to the company for premiums on policies. Shortly after the commencement of the winding-up, which took place on the 26th June 1869, the liquidator brought an action against Bates for the amount due for premiums, whereupon Bates applied for leave to bring an action for the amount due to him in respect of the loss of the *Sarah Sands*. The present summons was subsequently taken out by arrangement to settle the question.

V.C. S.]

COOPER v. COOPER.

[V.C. S.]

or any of his children, grandchildren, and issue—to be born prior to such appointment—in such manner and form as his said wife at any time or times, and from time to time, before each and every of his children should have attained the age of twenty-five years, by any deed or instrument in writing to be sealed and delivered by his said wife, in the presence of and attested by two witnesses, should either absolutely or with power of revocation and new appointment appoint and subject thereto, in trust for the younger children in equal shares.

The testator died in Sept. 1840, leaving his widow Harriett Cooper and three sons, viz., the plaintiff William Henry Cooper, Roland Edward Cooper, and the defendant Frederick John Cooper, surviving him. Each of the sons attained the age of twenty-five, the youngest in 1851.

By a deed, dated the 5th April 1841, Mrs. Cooper, the widow, exercised the power given to her by the testator in following manner. After reciting the greater part of the testator's will, she directed that the trustees should transfer the money arising from the sale of the testator's real estates, and the rents, issues, and profits in the mean time, and all the said trust funds and accumulations, and all other his personal property (if any) upon certain trusts for securing certain sums to be paid to her sons, and as to all the rest and residue and remainder of the aforesaid general residuary fund to or in trust for her three sons equally on their attaining the age of twenty-one; and by the same deed she reserved to herself a power of revocation and new appointment by any deed or instrument in writing, to be sealed and delivered by her in the presence of two witnesses.

Mrs. Cooper by her will, dated the 10th April 1841, gave and appointed the Pain's Hill estate to her eldest son, the plaintiff, absolutely; and afterwards, by a codicil, she confirmed the appointment to him, and devised and bequeathed the residue of her real and personal property equally between her said three sons. Subsequently (by another codicil, after reciting the death of her son Roland Edward Cooper, who died in Sept. 1858, leaving three children) she devised and bequeathed two third parts of Roland Edward Cooper's share to his children, and the remaining one-third between her two surviving sons. Mrs. Cooper died in May 1863.

After her death a suit (*Cooper v. Mostyn*) was instituted by the children of Roland Edward Cooper for the administration of the estate of their grandfather (the testator), in the course of which a question arose whether the Pain's Hill estate was well appointed by Mrs. Cooper to her eldest son, or whether the estate or the proceeds of the sale thereof passed under the appointment of the deed of April 1841. The Vice-Chancellor was of opinion that the estate was well appointed by the deed among Mrs. Cooper's three sons, and that the power of revocation and new appointment reserved by the deed was not well exercised by the will and codicils, and this decision was afterwards affirmed on appeal by the Lords Justices.

The present suit was instituted by the plaintiff William Henry Cooper, for the purpose of compelling the defendants (his brother Frederick John Cooper and the children of Roland Edward Cooper) to elect between the benefits conferred upon them by the will and codicils, and their respective shares under the deed in the Pain's Hill estate.

The bill prayed for a declaration that the defendants were not entitled to claim both the benefits under the will or codicils of the testatrix, and also the shares and interests of them the said defendants under the deed of appointment of and in the Pain's Hill estate, or the proceeds thereof; but that the defendants were bound to elect between the benefits conferred upon them by the will and codicils, and

their respective shares under the deed of appointment.

Greene, Q. C., Bristowe, Q. C. and Kekewich, for the plaintiff, contended that the defendants could not take both under the will and the deed of April 1841. It was well established that where there was an invalid execution of a power, the objects of the power could take no other benefit under the instrument affecting to exercise it without being put to their election. The case clearly came within the authorities on the subject. They cited

Whistler v. Webster, 2 Ves. 367;
Reid v. Reid, 25 Beav. 469;
Thelluson v. Woodford, 13 Ves. 200;
Tomkyns v. Blane, 28 Beav. 422;
Woollaston v. King, L. Rep. 8 Eq. 165; 20 L. [T. Rep. N. S. 1003;
Ingram v. Ingram, 1 Ves. 159;
Jarm on Wills, 3rd edit., 415;
Sugden on Powers, 578.

Springall Thompson, for the defendant Frederick John Cooper, stated that his client, of his own free will, and out of regard to the plaintiff, elected to accept the benefits under the testatrix's will.

Dickinson, Q. C. and Rawlinson, for the children of Roland Edward Cooper, contended that their title was derivative. They took their share of Pain's Hill from their father, and not from the testatrix's act. The doctrine of election, therefore, could have no application. They referred to

Cavan v. Pulteney, 2 Ves. 544;
Grissell v. Swinhoe, L. Rep. 7 Eq. 291;
Cooper v. Martin, L. Rep. 3 Ch. 47; 15 L. T. Rep. N. S. 268.

Francis Bacon appeared for the trustees of one of the children.

Greene, Q. C. in reply.

THE VICE-CHANCELLOR.—The case raised by the plaintiff is, as far as I know, entirely new. He claims a right to compel the legatees under Mrs. Cooper's will to elect between the benefits under that will, and their shares under the deed of 1841, in the Pain's-hill estate, or the proceeds thereof. There seems to be an insuperable difficulty against applying the doctrine of election to the case. It does not come within any of the definitions of the doctrine, nor under any of the authorities which have been cited on the subject. In order to raise a case of election it is well settled that there must be a disposition by the person who executes the instrument, or an affected disposition by that person of property over which he has no disposing power; and there must also be a disposition of his own property on such a footing as shows that he had power to dispose of the property of another. Here there is no gift or disposition of property which was not the testatrix's. There is indeed an appointment, and it has been argued upon the authority of *Whistler v. Webster* (*sup.*) and other cases, that because that power of appointment has been defeated by a defective or invalid execution a case of election has been raised. In all of the cases referred to, the question was between the person in whose favour there was an invalid execution of the power and those persons entitled in default of appointment; and the case of election arose by reason of there being two gifts under the same instrument, one an invalid gift, and the other a valid one, and upon the presumption that the valid gift was made on the footing that the invalid gift would take effect. There is great difficulty to my mind, in applying the doctrine of election to the execution of powers at all; but it has been so applied, and I think legitimately applied by Lord St. Leonards, who has

V.C. J.]

WOOD v. CHART.

[V.C. J.]

clearly expounded the principle upon which the doctrine has a proper application. But what has that principle to do with the case of an invalid appointment, when the question arises between the appointee claiming under the invalid appointment, and other persons claiming under the will of the appointor. The persons claiming under the will of the appointor claim by her gift, while the appointee claims under the invalid appointment. It is, therefore, very difficult to see how the doctrine of election can apply. This is not, however, the only or the greatest difficulty. The whole doctrine of election rests upon intention. Now this invalid appointment was preceded by another appointment by the same person, which the court has pronounced to be valid, and the court could only have decided that the first appointment was valid upon an intention expressed to that effect, and upon failure of any clearly expressed intention that the second appointment should be a good one. Therefore, there is an insuperable difficulty and inconsistency, where intention must be the basis, and there are two intentions, one properly and the other improperly expressed, in saying that the court, after giving effect to the one properly expressed, should then, on the doctrine of election, give effect to the other, which is improperly expressed. There is also this further inconsistency. The plaintiff by claiming under the invalid appointment, indirectly defeats the effect of the appointment which the court has declared to be valid. Even if there were no other difficulties, the plaintiff, upon his own doctrine of election, could not succeed. He comes upon an invalid appointment, to disconcert a valid one, and while wishing to disconcert the valid appointment, he wishes also to take a benefit under it, less, however, than he would take under the invalid appointment. He cannot be permitted, upon his own doctrine, to approbate and reprobate, to say that he will take under the valid appointment and also under the appointment which is inconsistent with the valid appointment. These are difficulties that seem to me irremovable. They certainly have not been removed by the arguments addressed to me, or any of the authorities cited. The bill, therefore, as far as it relates to the question of the election, must be dismissed. The question, however, has not been unfairly raised and the costs of all parties will come out of the estate. There will be a declaration to that effect, and the usual directions as to the administration of the estate.

Solicitor for the plaintiff, *White, Broughton, and White.*

Solicitors for the defendants, *Simpson and Dimond.*

V. C. JAMES'S COURT.

Reported by Hon. ROBERT BUTLER, Barrister-at-Law.

April 27 and 29.

WOOD v. CHART.

International Copyright Act (15 Vict. c. 12)—Translation within meaning of—Piracy.

In order to obtain for the author of a work the benefit of the International Copyright Act, and for that purpose to comply with the requisitions in the 8th Section of the Act, it is essential that an actual translation of the work, and not an adaptation, must be registered.

The registration of an adaptation confers no rights under the Act.

This suit was instituted by George Wood, music publisher, to restrain the defendant, H. Nye Chart, from permitting to be performed at the Theatre Royal, Brighton, or elsewhere in the United King-

dom, a piece entitled "Frou-Frou, or Fashion and Passion," or any other translation of the French play of "Frou-Frou," and that the other defendants, Beatrice Binda and Horace Wigan, might be restrained from performing the same.

The following are the facts.

On the 30th October, 1869, Henri Meilhac and Ludovic Halévy published a comedy entitled "Frou-Frou," and on the same day the piece was represented for the first time at the Théâtre au Gymnase, in Paris.

The authors reserved all rights of reproduction, translation, and representation, and in accordance with the 15 Vict. c. 12 (The International Copyright Act), the play was registered and a copy duly deposited in Stationers' Hall, on the 2nd December, 1869. On the 18th January, 1870, the authors assigned to the plaintiff all the rights of representation, whether in English or French, throughout the United Kingdom.

On the 29th Jan. 1870, the plaintiff commenced the publication in the "Musical World" of a translation of "Frou-Frou" entitled "Like to Like," a comedy in five acts, being an English version of MM. Meilhac and Halévy's "Frou-Frou," written by H. Sutherland Edwards. Edwards assigned to the plaintiff all his interest in the English version, and the plaintiff was registered as the proprietor thereof. On the 28th Jan. 1870, the defendant, Beatrice Binda applied to the plaintiff for permission to represent an English version of the French comedy, for which permission the plaintiff required a royalty of 5% for every night the English version was represented.

After various ineffectual attempts by the defendant, Beatrice Binda, to induce the plaintiff to make a reduction in his royalty, on the 31st Jan. 1870, she instructed a Mr. Nimmo to enter for her at Stationers' Hall a manuscript translation of "Frou-Frou," by Benjamin Webster, and to take the necessary steps to get the manuscript translation approved by the Lord Chamberlain for the purpose of representation; and about the same time the defendant, Beatrice Binda, informed the plaintiff of her intention to take a theatre and to bring out a representation of the manuscript translation of Frou Frou, and that she had engaged a company, and had made all other necessary arrangements. The plaintiff still refused his sanction to its representation at any less sum than the royalty of 5% a night. A few days after the defendant, Beatrice Binda, wrote a letter to a Mr. Knowles which he forwarded to the plaintiff, in which she stated, "I certainly cannot give Mr. Wood 5%, nor even 3%, as I can make mine an adaptation, and so escape the letter of the law." The defendant, Binda, soon after called on the plaintiff, and told him that she withdrew all the offers she had made to him, and on the 15th Feb. 1870, she again called on the plaintiff and told him that she had agreed to sell back the play to B. Webster, the younger, who had translated the play for her, and at the same time she told the plaintiff that Benjamin Webster, the elder, was going to bring out the play at once. Thereupon Messrs. Pike and Son, the plaintiff's solicitors, wrote to Benjamin Webster informing him that if he produced the play without the plaintiff's permission, he should take the earliest opportunity of obtaining an injunction against him. The plaintiff heard no more of the production of the play until on the 11th March, 1870, when an article appeared in the *Theatrical and Musical Review*, containing a passage headed "Theatricals and Music in Brighton," stating that an entirely new version of the Parisian play called "Frou-Frou," was to be performed at the theatre, Brighton, on the following Saturday. Thereupon the plaintiff's solicitor wrote to the manager and lessee of the

V.C. J.]

WOOD v. CHART.

[V.C. J.]

Theatre Royal, Brighton, informing them that Mr. George Wood was the proprietor of the play, and that he would not allow any representations to take place without his sanction, and that if they produced it at their theatre he would obtain an injunction against them at the earliest opportunity. To the letter, the defendant, Beatrice Binda, replied that she was not about to play a translation of the French piece, but an adaptation of the same, and naming Mr. W. Murray as her solicitor.

The characters in the defendants' playbills were the same as those in the French play of "Frou-Frou," and the scenic directions in the acts followed the same order and arrangement as in the French comedy.

The plaintiff and Mr. Sutherland Edwards were present at the first representation of "Frou Frou, or Fashion and Passion," at Brighton, and were of opinion that it was a literal translation of the original play, and all the incidents connected with it were the same as in the original.

The bill then prayed that the defendants might be restrained from performing or permitting to be performed the play entitled "Frou-Frou, or Fashion and Passion."

Eddis, Q.C., *Robertson Blaine*, and *D. C. Beale* appeared for the plaintiff, and contended that the plaintiff had complied with all that was required of him by the 15 Vict. c. 12, to entitle him to sustain the suit. The characters, locality, plot, scenes, and dialogue were substantially the same, the only difference being that in the translation they had been anglicised, and certain speeches had been omitted which were unfit for the English stage.

D'Almaine v. Boosey, 1 Y. & Coll. 302.

Kay, Q.C., and *Lindley* were for the defendants, and submitted that the plaintiff had not complied with the Act by registering a translation. The so-called translation was simply an adaptation of a French play to the English stage, and not a translation within the meaning of the Act. The plaintiff had not even retained the name of "Frou-Frou," but had called his version "Like to Like," he had also changed the names of the characters, and the locality of the play he had transferred from Paris to London. There were no less than eighty-two speeches omitted in the first act, and fifty-nine speeches omitted in the second act, many of the omissions being most important.

The VICE-CHANCELLOR then called upon *Eddis*, Q.C. to show that the play which the plaintiff had registered was a translation of the French play of "Frou Frou."

Eddis, Q. C. in reply, contended that nothing material had been omitted from the plot or framework of the piece, the only omissions being conversations immaterial to the plot, and unfit for an English audience—true, the situations had been changed, but they were only such changes as were necessary to make the play intelligible to English people. It was impossible always to translate literally as was exemplified by the proverb, *in silvam ligna ferentes*, which was rendered in English, "Carrying coals to Newcastle." He also submitted that the defendants intended to further infringe the copyright by performing the piece in the French language.

The VICE-CHANCELLOR.—With regard to the last point, it seems to me to be merely an after-thought suggested at the very last moment. There never has been any question between the parties as to the representation of the play in French. With respect to the representation of the English play, the plaintiff has got to make out his title,

which depends upon the convention, and upon the Act. Now the Act of Parliament for some reason or other—I suppose a sufficient reason, but I do not know what it may be—has required, in order to give an author or the assignee of that author the particular copyright in question, that the original work shall be deposited in the United Kingdom: and then with regard to works other than dramatic works, it says, "the translation sanctioned by the author or part thereof, must be published in the British dominions, not later than one year after the registration and deposit in the United Kingdom of the original work." That is, the translation of part thereof; and the whole of such translation must be published within three years of such registration and deposit. It contemplates and requires that the whole work shall be translated. But it would not be a compliance with that to translate a quarter, or half, or three quarters of a work that is protected; and then say, "That is all I want protected, that is my authorized translation; and I have published the whole of that part which I have thought right to have translated." The thing is, that the work must be translated, and that translation must be published in the country. And then, for some other sufficient reason, it is provided that in the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work. Now, I do not think it is possible to say that that means that anything which the author shall sanction as a translation must be published within three calendar months; that the translation, that is to say, the thing being a translation which has been authorized or sanctioned by the author, must be published within three calendar months of the registration of the original work. Now, it appears to me that the plaintiff in this case has gone out of his course to dig a pitfall for himself; for that which he says he has done is, the original thing being called "Frou-Frou," he has published in England a comedy called "Like to Like"—"Like to Like," a comedy in five acts, being an English version of M.M. Meilhac and Halévy's "Frou-Frou," written by H. Sutherland Edwards." Then he has introduced English characters; he has transferred the scene to England; he has made the alterations necessary for making it an English comedy, and not a translation of a French comedy; and he has left out a great number of speeches and passages—a great deal more in the first act, which would seem to me to imply at first that he was really making an imitation or adaptation, and afterwards was minded more completely to make a translation. The first two acts seem to me particularly to be that which is referred to in the Act itself as an imitation or adaptation. Whether it is a fair imitation or adaptation is another question; but if one wanted to have an example of what is an imitation or adaptation to the English stage, one would have said that this is exactly the thing which is meant—it is an imitation and adaptation to the English stage; that is, you have transferred the characters to England, you make them English characters, you introduce English manners, and you leave out things which you say would not be suitable for representation on the English stage. Now, that is not, in my view of the case, what the Act requires for some sufficient purpose, as I have said before, when it requires that a translation should be made accessible to the English people. It is that the English people should have the opportunity of knowing the French work as accurately as it is possible to know a French work by the medium of the version in English. That seems to me to be what was intended. Having come to the con-

V.C. J.] COMMISSIONERS OF SHOREHAM HARBOUR v. THE CHURCHWARDENS OF LANCING. [Q. B.]

clusion that this is not a translation, I have also come to the conclusion that the plaintiff has failed in complying with the condition precedent which the Act has imposed upon him to entitle him to sustain this suit. It is said that we ought to give a liberal interpretation to it, and that one ought not to strain the meanings of "translation" or any other word for the purpose of depriving a foreign author of the benefit of the Act. Of course not; one ought to take a liberal view, and one ought not to strain the words, and one must apply and give a natural meaning to them. According to my view of the case, there never would have been the slightest difficulty whatever in the plaintiff obtaining the full benefit of his assignment, and of putting himself in a position to prevent any representation of the French play; or of any English translation of it, if he had simply employed Mr. Sutherland Edwards to do what he could very well have done, namely, have made a translation; that is to say, if he had said, "Now make a translation of this—do not be thinking of adaptation or imitation for the English stage, but make a translation of it;" he could have made a translation, and the translation could have been published in this country; and if that translation had been published in this country, then it would have been quite open to the author, or the person claiming under the author, to have represented that with any abbreviation, excision, alteration, or with any adaptation which he might have thought fit for the purpose of making it more suitable to the English stage. I have no doubt whatever, if he had published the translation, that he could then have acted the thing which Mr. Sutherland Edwards has called a version, and that nobody else could have acted anything like that—anything approaching to that; because I think it right to say upon that, although I say this is not a translation but in my view is rather an imitation or adaptation to the English stage, I have no hesitation whatever in saying that if the author had complied with the condition required by the Act of Parliament, or any other person claiming under the author had complied with that, I should at once have restrained the acting of this very thing as not being a fair imitation or adaptation, but as being a piratical translation of the original work—that that would have been the proper thing for me to have done in this case; but the plaintiff having brought his suit, not having a title, must fail, and must fail, of course, with the usual consequences of the experiment which he has tried, and he must pay the costs. At present I am bound to say I should have thought that the thing complained of is still nearer a translation. I have not heard Mr. Lindley out on that part of the case, and it would have been more easily attacked if the plaintiff had had a proper title. That cannot, in my opinion, make any difference as to the costs, because it is brought by him upon a title which he has not got. He must therefore pay the costs.

Solicitors for the plaintiff, *Pike and Sons*.Solicitors for the defendants, *Murray and Hutchins*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Saturday, April 30.

THE COMMISSIONERS FOR IMPROVING THE HARBOUR
OF SHOREHAM (apps.) v. THE CHURCHWARDENS
OF LANCING (resps.)*Harbour—Rateability of works necessary to the right to
collect tolls.*

By certain local and personal Acts commissioners were empowered to manage and improve a harbour, to make an artificial cut or entrance, to cleanse, scour, &c., the same, to make piers, dams, sluices, &c., and the necessary works for preserving the navigation; in consideration of which they were authorised to take certain tolls the amount of which depended upon their keeping the channel accessible to ships of a certain tonnage. The commissioners had no property in the harbour or its accessories beyond such a special property as would enable them to use legal means for the protection thereof; and they never exercised the powers of purchasing land for the purposes of the harbour which they were expressly empowered to do.

On either side of the entrance to the channel piers were erected for the purpose of keeping the channel open, but for which it would have silted up and become impassable so as to prevent the possibility of earning tolls:

Held, first, that the commissioners were not the occupiers of the entrance to the harbour; and, secondly, that the occupation of the piers and the right to take tolls were too remote to be connected for rating purposes.

Case stated under the 12 & 13 Vict. c. 45, s. 11.

The appellants are the commissioners for carrying into execution the 56 Geo. 3, c. lxxxii., intituled "An Act for the more effectual security and improvement of the harbour of New Shoreham, in the county of Sussex," passed in 1816.

The respondents are the parish officers of Lancing, in the county of Sussex.

The respondents made a poor rate for the parish of Lancing, dated the 10th Sept. 1868, in which they charged the appellants as "occupiers and owners of New Shoreham Harbour works, tolls, and dues," in a gross estimated value of 4500*l.*, and a rateable value of 4000*l.*, and the sum of 100*l.* as a rate at 6*d.* in the pound.

Against this rate the appellants gave notice of appeal, and the following are the only grounds of appeal necessary to be stated for the purposes of this case, viz.:

2. That the commissioners are not the occupiers of the said harbour works and other tenements in respect whereof they are in the said rate or assessment rated.

4. That the said harbour works, tenements, tolls, and dues respectively are not rateable to the relief of the poor of the said parish.

5. The other said commissioners are not rateable to the relief of the poor in respect of the said harbour works, tenements, tolls, and dues respectively.

By an Act of 33 Geo. 2, c. xxxv., passed in 1759, certain commissioners were appointed to make a new cut through the sea beach opposite the village called Kingston, and to erect a pier or piers, and to do such other works as should be necessary in order to make and maintain a new and more commodious entrance into the said harbour.

The above works were executed by the commissioners, and by sect. 2 the right and property of all and every the piers and all other works executed in pursuance of the said Act, and the property of

Q. B.] COMMISSIONERS OF SHOREHAM HARBOUR v. THE CHURCHWARDENS OF LANCING. [Q. B.]

the ground whereon such piers and works were erected, as well as all such right and property as then belonging to the harbour of New Shoreham were thereby vested in the said commissioners.

By an Act of 29 Geo. 3, c. 21, passed in 1789, for the purpose of reducing the tolls authorised by the Act of 1759, it was amongst other things recited (as the fact was) that for the purposes of the Act of 1759 piers had been erected, and a new cut made, but that from various causes the channel took a different direction, and then ran into the sea half a mile to the eastward of the place where the piers were erected, and that the said piers had been washed away, and no other works had since been erected, but that the harbour was then in as good a state as it had usually been for many years past.

The new channel referred to in the Act of 1789, as near half a mile to the eastward of the original cut made under the Act of 1589, afterwards from various causes became stopped up, and in 1816 the channel or entrance to the harbour was about a mile to the east of the new entrance made under the Act of that year hereinafter set forth, being the Shoreham Harbour Act now in force, and by which the appellants are constituted commissioners to carry the same into execution.

By sect. 26 of the Act of 1816 (56 Geo. 3, c. clxxxi.), the right and property of all the wharves, quays, and buildings, and of all timber, ironwork, wood, stone, and other materials then belonging to the commissioners, under the therein recited Acts or either of them, are to be purchased for any of the purposes of the present Act, and the property of all and every the works erected in and about the said harbour in pursuance of such Acts or of the present Act, are vested in the said commissioners for the time being.

By sect. 27 of the Act of 1816, the limits of the harbour are defined; and by the same section the commissioners are authorised and required to deepen, cleanse, scour, and enlarge the channel of the said harbour within the limits aforesaid, which they did, and to make a new pier or piers, with the necessary wharfing, to confine the channel opposite to and near the then intended, and since constructed, entrance into the said harbour, which they were thereby required to open and to amend and improve as they might see expedient, and also to make the necessary dams, sluices, platforms, and other works in the eastern division of the harbour, for the purpose of sluicing it, and also such works as should be found necessary to accelerate the closing up of the then entrance of the said harbour, and likewise to construct a dredge boat for removing shoals within the limits aforesaid, and to construct lighthouses, storehouses, storeyards, and other buildings, and to make and effect such other works within the aforesaid limits as should be necessary for improving and preserving the navigation of the said harbour, and the use thereof by the persons trading thereto, and to effect various other works, as in the said section expressed.

The said harbour, so far as the same is used for vessels of burden, is divided into two arms or branches; the western arm commences about half a mile south of Old Shoreham bridge, and runs eastwardly to the new entrance referred to in the said 27th section, which is made between the eastern and western piers also referred to in the same section. The eastern arm, consisting of a canal and basin, extends eastwardly from the said entrance to the Wish. The said entrance is common to both arms of the harbour, and the entire harbour, except at the entrance, is separated from the sea by a bank of shingle, and is about two miles in length for vessels of burden, and its breadth varies from about

100 to 300 yards; the said new entrance is about midway of the whole length of the harbour.

The limits of the port of New Shoreham, are much larger than the limits of the harbour, and extend to the parish of Rottingdean on the east, and the parish of Keene on the west, and comprise a sea frontage of about sixteen miles.

By sect. 55 of the Act of 1816, and by other sections, the commissioners are authorised to purchase land for the purpose of improving the harbour, but their powers have never been exercised, nor any purchase of land or hereditaments made by the said commissioners, except a way in the parish of Kingston to the lighthouse, for the purchase of which 5*l.* was paid.

By sect. 73 of the Act of 1816, after reciting that several persons had agreed to subscribe 40,000*l.* towards carrying the purposes of the Act into execution, it is enacted that the money in the hands of the commissioners, or which should come to them by means of such subscription, should be applied in payment of the expenses of obtaining the Act, and making and improving the harbour and other works hereinbefore authorised, and keeping the same in repair, and of all such damages, costs, and other expenses thereby provided for, and directed to be paid to the said commissioners, and in payment of the interest of such moneys as should be raised by way of mortgage, as hereinafter mentioned, and that when all such charges and expenses as aforesaid should be paid and satisfied, all the money remaining in the hands of the commissioners, together with the rates and duties which should from time to time be received by them by virtue of the Act up to the 30th day of June in each year, should be annually divided in the month of July in each year to and amongst the several persons subscribing as aforesaid, rateably and in proportion to the amount of each person's subscription.

By sect. 82 of the Act of 1816, the commissioners are authorised to borrow on credit of the rates to the extent of 10,000*l.* This power has been exercised to its fullest extent, but the whole amount borrowed has since been paid off.

Sect. 83 of the Act of 1816, enacts that from and after the whole of the piers, dams, sluices, and other works thereby authorised to be made, should be made and completed, there should be paid by every person who should load or unload, or import or export any grain, seeds, goods, wares, merchandises, baggage, parcel, or other article, matter, or thing whatsoever, within the limits of the port of New Shoreham, the several rates and duties contained in schedule B. to the Act; and sect. 84 empowers the commissioners to fix reasonable rates upon the lading, unlading, importing or exporting of any article not enumerated in such schedule.

Sect. 85 of the Act of 1816, provides that until all the works are completed, only one-fourth of the rates and duties shall be paid subject to the provisions made by sect. 86, viz., that as soon as the works are so far completed that vessels of 200 tons may pass and repass in safety between the piers to be made in pursuance of the Act at high water, then and thenceforth one-half of the rates and duties should be payable.

By sect. 87 of the Act of 1816 lower rates are imposed in respect of coals, corn, and certain other articles, landed within the limits of the port, unless imported to or exported from the harbour of New Shoreham.

By the 88th sect. of the Act of 1816 certain articles landed on the beach within the parish of Brighton for the use of the Brighton Town Commissioners are to be charged one quarter only of the rates authorised by the schedule.

The 89th section of the Act of 1816 provides that in the event of the channel of the said harbour

Q. B.] COMMISSIONERS OF SHOREHAM HARBOUR v. THE CHURCHWARDENS OF LANCING. [Q. B.]

falling into so bad a state that vessels of 200 tons cannot any longer pass in safety between the piers into or out of the harbour, and so remain for a year, thenceforth only one quarter of the rates authorised by the schedule shall be payable until such vessels can pass in safety at any time at high water; but the commissioners have from time to time so well cleansed and kept the channel that vessels of 200 tons could always pass in safety between the piers into or out of the harbour at any time at high water. By sect. 90 of the Act of 1816 the duties imposed by the Act, and also all penalties imposed by it, may be levied by distress and sale of the goods of the offender, or person, or persons liable.

By sect. 91 of the Act of 1816 any master, part owner, or other person, eluding payment of any of the rates or dues, is to stand charged with, and liable to, the payment of the same, to be recovered by the commissioners, with treble costs of suit, in any of Her Majesty's Courts of Record at Westminster.

By sect. 94 of the Act of 1816 the master, or other person having command of any ship or vessel coming within the said port or harbour, is made subject to the payment of all rates and duties imposed by the Act on such ship, and on the cargo therein contained, which may be discharged or landed within the limits of the said port and harbour, to the collectors appointed by the commissioners, and the master or other person paying such rates is empowered to recover them from the owner of the ship, or the proprietor of the cargo.

By sect. 95 of the Act of 1816 the collector of customs at the port is not to give a discharge or report outwards for any ship in the said harbour of New Shoreham, or within the limits thereof, until all rates and duties have been paid.

By sect. 101 of the Act of 1816 the commissioners are required to hoist a flag on the lighthouse in the parish of Kingston, and exhibit lights on or near the entrance, so as to indicate the depth of water.

By sect. 102 of the Act of 1816 it is enacted that, for defraying the expence of the said lights and lightkeeper, there shall be levied upon all ships or other vessels entering the said harbour after the erection of the said light or lights the sum of 4d. upon every foot depth of water which any such ship or vessel may draw on entering the same to the extent of 12ft., and 6d. for every additional foot which the said vessel shall draw at such time above 12ft.

The commissioners under the Act of 1816, in pursuance of the powers contained in sect 27, formed a new entrance, and made new piers to confine the channel opposite to and near the entrance, and made the necessary drains and sluices for the purpose of sluicing it, and have since formed a canal or basin, and constructed a light house in the parish of Kingston, and are rated to the poor in that parish on an annual value of 8*l*. They have not erected any storehouses or other buildings, but they rent storehouses, &c., in the parish of Kingston, for which they are rated in that parish as occupiers irrespective of the profits derived from the above-mentioned rates and duties; and with a view of preventing persons from taking beach and boulders for ballast from the part of the shore lying west of the harbour, they entered into an agreement in 1847 to become yearly tenants to the owner of the right of soil of and in the land covered with sea beach or gravel at a rent of 5*l*. The commissioners have never removed any beach under this agreement. The piers of the entrance are for the purposes of this case to be taken as situate in the parish of Lancing, and from the entrance of the harbour, and afford facilities for entrance to vessels making use of it.

Some of the articles in respect of which the rates and duties, except the light dues, are authorised to

be levied, were formerly landed on the beach within the said port, but not within the said harbour of New Shoreham; and was therefore chargeable with duty at the reduced rates under the 87th and 88th sections of the Act; but much the greater part of the articles in respect of which rates, &c., are authorised to be levied were landed in that part of the port which lies within the limit of the said harbour, and during the last year, and for some time past, the whole (with very slight exceptions) has been landed within the limit of the harbour.

The receipts of the said commissioners for rates and duties levied under the said schedule B, and for the rates or light dues authorised by sect. 102 of the Act are for the purposes of this appeal and case only to be taken at the annual sum of 9000*l*., subject to deductions for labour, repairs, materials, and otherwise, and it is agreed that for the purposes of this appeal and case, only 4000*l*. shall be taken as the net annual revenue or profit, which it is agreed for the purposes of this appeal and case shall be deemed to be derived under sects. 83 and 102 respectively, viz., 3930*l*., under sect. 83, and 70*l*. under sect. 102.

The question for the opinion of the court is, whether the said commissioners are rateable upon or in respect of the said harbour piers and other works, or any or either of them, upon the amount of the net revenue or profits derived from the said rates, duties, and dues, or any portion thereof; and if so, what portion.

Pollock, Q.C. (*Archibald and Merrifield* with him), for the appellants.—First, the commissioners have no property in the soil of the harbour or any of its accessories. It is true that by sect. 2 of the Act of 1759 the property in the piers and the ground on which they are erected, and the works constructed in pursuance of that Act is vested in the commissioners, but this state of things is now superseded, and sect. 26 of the Act of 1816 gives them only such a property in the wharves and materials as would enable them to protect them from wrongdoers. There is, therefore, no difference between this case and that of the area covered by a navigable river. [*BLACKBURN, J.*—Are not the commissioners the occupiers of the artificial channel?] In *Rex v. The Mersey and Irwell Navigation Company*, 5 B. & C. 95, where powers were conferred upon a company for scouring and enlarging a river for the purposes of navigation, and to dig and cut the banks, and to make cuts and trenches through the adjoining lands, *Bailey, J.*, in delivering judgment, says that “the correct view of the case is that they are not the occupiers of land covered by water, but had an easement only in the land.” And to a similar effect are the observations of *Parke, J.* in the same case. [*BLACKBURN, J.*—The means of access to the harbour can only be secured by the maintenance of the piers erected at the entrance. Is there no occupation by the commissioners of the entrance?] Even if so, they have no exclusive occupation, but, in fact, they have simply the power of repairing, as appears from sect. 27 of the Act of 1816, which gives directions respecting an already existing channel which they are to keep open, cleanse and amend as occasion may require. *Rex v. The Aire and Calder Navigation*, 9 B. & C. 820, is also in point, where it was held that the undertakers having an incorporated hereditament only in the bed of the river were not rateable. Then, secondly, as to the piers, it is contended that this is like the case of the dam sought to be rated in *Rex v. The Aire and Calder Navigation*, 3 B. & Ad. 139, which Lord Tenterden designated an attempt to evade the decision of the court in the case last cited, and held that the undertakers were not rateable as occupiers of the bed of the river, having merely an easement

Q. B.]

Ex parte THE LITTLEBOROUGH LOCAL BOARD DISTRICT.

[Q. B.]

in it; that no rate could be laid upon them for the water of the river made navigable by them, and if so none could be imposed in respect of the dam, for to rate the dam because it kept up the water would be equivalent to rating the water itself. And even if rateable the piers could not be considered as enhanced in value by reason of the tolls:

Lewis (app.) v. The Churchwardens, &c., of Swansea (resps.), 25 L. J. 23, M. C.;
Reg. v. The North and South Shields Ferry Company, 1 E. & B. 140.

Mellish, Q. C. (*Gates* with him) for the respondents.—The question is not as to the property of the commissioners in the harbour and its accessories; but it is contended that they are the occupiers of all the artificial works enumerated in sect. 83 and the following sections of the Act of 1816, and that whatever they have affixed to the soil for the purposes of their undertaking is rateable exactly as the pipes of a water company or the wires of a telegraph would be. The channel comes within the term "works" in the above section, and is in the occupation of the commissioners. Then, as to the piers, it is clear that it is only by their means that the channel can be kept open; and, consequently, it is upon their maintenance that the right of taking the tolls and dues depends. It is also important to observe that the amount of tolls to be taken varies according to the facilities afforded by the commissioners, as appears by sects. 85 and 89, by the latter of which one quarter of the tolls only is to be taken in case they should suffer the channel to become impassable to ships of a certain tonnage. The piers are, therefore, inseparably connected with the profits derived from the harbour, and are rateable according to their value to the commissioners, who without them would be left without any profits at all, inasmuch as the consequence of their removal would be ultimately that the harbour would become inaccessible.

BLACKBURN, J.—The difficulty in this case consists in the application of the principles upon which property is rateable. By various statutes the commissioners are empowered to take upon themselves the management and improvement of the harbour in question. They are empowered to make an artificial cut or entrance, together with other necessary works, and as pointed out by Mr. Mellish, they are not to charge the full amount of tolls to which they are to be entitled under the later Acts until the works are so completed as to allow vessels of 200 tons to pass and repass; and in the event at any time of the channel of the harbour becoming so choked up as to be impassable for ships of that burthen, then a lower rate of tolls only is to be imposed. The amount of tolls depends therefore upon keeping the entrance clear and open, and it is contended on behalf of the respondents that the amount of tolls thus earned is to be taken into account in rating the property on shore; but tolls *per se* are clearly not rateable, and can only be so considered when they are connected with and enhance the value of land. The first question for our decision is, are the commissioners the occupiers of the entrance to the harbour, and in my opinion they are not. By sect. 26 of the latest of these Acts the stone, timber, and other materials belonging to the commissioners under the previous Acts, and the property in all works erected in or about the harbour in pursuance of any of the said Acts are vested in the present commissioners, but the object of this seems simply to enable them, in case of need, to prefer indictments and take such other legal steps with respect to such property as may at any time become necessary. Then, by sect. 27, general directions are given to the new commis-

sioners as to the cleansing, deepening, and enlarging the entrance, and the construction of necessary works; but, although by a subsequent section they are expressly empowered to purchase land for the purposes of the harbour, it seems that they have never exercised those powers. I think, therefore, that we should be unduly straining the words of the statute if we held that the property in the entrance to the harbour vested in the commissioners, and that Mr. Pollock's contention that they are not to be taken as occupiers, but simply as exercising the powers given them of keeping the passage clear and open, must prevail. Then, secondly, with regard to the piers, I think these must be taken as works vested in the commissioners, and that in occupying them they occupy the land upon which they are erected. Then comes the main question in this case, viz., are we to hold that the receipt of the tolls and dues is so connected with the occupation of these piers as that the rateable value of the piers is to be considered as enhanced thereby, and if so, to what extent? Upon this point, notwithstanding the argument of Mr. Mellish, that but for the piers the entrance to the harbour would silt up and become impassable, and so no tolls could be earned, I am of opinion that the two things are too remote to be connected for the purposes of rating. The case I put in the course of the argument of fen land in one parish kept and maintained by means of a sea wall erected in another parish seems perfectly analogous to the present question.

MELLOR, J.—The commissioners were empowered to perform certain works connected with the harbour in question; and although they do not appear to have acquired any property in the actual soil, they must, nevertheless, be taken to be in occupation of the piers and the land upon which they are erected, but it seems to me impossible to say that the rateable value of the piers is to be considered as enhanced by the tolls, for the reason given by my brother Blackburn, viz., that the two things are too remote.

LUSH, J.—The rateable value of property is ascertained by arriving at the rent which it would command from year to year, free of taxes, and the other things to be deducted. Toll of themselves are clearly not rateable, and for the reasons already given, I think that the connection between them and the piers is too remote to enable us to adopt the views of the respondents. To arrive, therefore, at the rateable value of the piers, we must ascertain what a tenant would give for them from year to year; and it is clear that the simple occupation of the piers under a yearly tenancy would not entitle the tenant to any profits arising from the harbour.

Attorney for appellants, *S. Clarke*, Brighton.

Attorney for respondents, *R. Edmunds*, Worthing.

Judgment for the appellants.

Wednesday, May 11.

Ex parte THE LITTLEBOROUGH LOCAL BOARD DISTRICT.

Local Government Act 1858—Adopting same—Taking a poll—Who to preside.

Where a meeting of ratepayers and owners of a place having a known and defined boundary is called for the purpose of adopting the provisions of the Local Government Act 1858 (21 & 22 Vict. c. 98), the chairman is the person to take the sense of such meeting unless a poll be demanded. But if a poll be demanded, the functions of the chairman will thereupon cease, and

Q. B.]

Ex parte THE LITTLEBOROUGH LOCAL BOARD DISTRICT.

[Q. B.]

such poll should be taken, and all things connected therewith be carried out by the summoning officer.

This was rule calling upon Her Majesty's Principal Secretaries of State to show cause why a writ of *mandamus* should not issue directed to them, commanding them or one of them, pursuant to the 19th section of the Local Government Act 1858, forthwith to publish in the *London Gazette* a notice given to the Home Secretary by Henry Trewis, the younger, the summoning officer of the Littleborough Local Board District, dated 28th Dec. 1869, that the Local Government Act 1858 had been adopted for the said district of Littleborough, the time for an appeal against such adoption having expired.

The rule was moved upon the following affidavit of Mr. Henry Trewis, the younger, the summoning officer, which was uncontradicted, and which sets out all the facts:—

1. Littleborough was, prior to the 27th July 1869, a place not having any known or defined boundary within the meaning, and for the purpose of the Local Government Act 1858.

2. A petition stating the proposed boundaries of the place, and signed by more than one-tenth of the ratepayers resident within such boundaries, was presented to Her Majesty's Principal Secretary of State for the Home Department, and was supported by such evidence as he required; and upon receipt of such petition he directed inquiry to be made as to the genuineness of the petition, and as to the propriety of the proposed boundaries, and fourteen days' notice of the time, place, and object of such inquiry was given within the place to which the said petition referred, and the said Secretary of State afterwards, upon consideration of the matter, and in pursuance of the provisions of the Local Government Act 1858, made order and settled the boundaries of the place for the Littleborough district, which order is dated the 27th July 1869, and thenceforth for the purposes of the said Act, the said district has been and now is deemed to be a place with a known and defined boundary, and might adopt the said Act accordingly, and for the purpose of enabling it so to do, and in further pursuance and in exercise of the powers of the said Act, I was appointed by the said order settling the boundaries the summoning officer, and, therefore, it became my duty forthwith to take all such steps as might be necessary for convening a meeting of the ratepayers to decide as to the adoption of the said Act.

3. A meeting for the purpose of the sections of the said Local Government Act 1858 preceding the 13th section thereof, was summoned by me as such summoning officer as aforesaid for the said district, on the requisition in writing of twenty ratepayers of the said district; and I fixed the time and place for holding such meeting, and I forthwith gave notice thereof by advertisement in two newspapers, viz., in the *Observer* and *Pilot* newspapers, respectively published at Rochdale and circulated within the district of Littleborough, and by causing such notice to be affixed to the principal doors of all the churches and chapels in the said district to which notices are usually affixed, and also in many other public places throughout the said district.

4. The paper marked T 1 and shown to me is a duplicate of my said notice convening the said meeting, and the printed newspapers marked T 2 and T 3 now produced to me are the said newspapers in which the said notice was advertised.

5. The said meeting was held on Thursday, the 23rd Sept. 1869, at the National School in Littleborough, within the said district. The said meeting, on its assembling together, chose Mr. John Molesworth, one of its members, as chairman; no adjournment took place, and the said Mr. John Molesworth, as chairman, proposed to the meeting the resolution for the adoption of the said Act within the said district, and the said chairman declared that such resolution was rejected.

6. Thereupon, Mr. Henry Newell, a ratepayer within the said district, demanded that such question be decided by a poll of the owners and ratepayers of the said district, and afterwards I, as such summoning officer as aforesaid for the said district, proceeded to take the said poll by voting papers, in the form A given in the schedule, to the said Local Government 1858, in the same way and with the same conditions as to notice of voting—delivering, filling up, collection, examination, declaration of the result, custody of voting papers, penalty for neglect or refusal to comply with the provisions of the Act, scale of votes, and in all other respects whatsoever as is provided in the Public Health Act 1848, in respect of the election of local boards of health.

7. The printed notice marked T 4, now produced and shown to me, was signed by me in pursuance of the 23rd section of the Public Health Act 1848, and the said notice was published at all the churches and chapels within the

said district as required by the said Act, and was placarded throughout the said district; and I duly prepared, signed, and issued voting papers to all the ratepayers and owners within the said district, and afterwards caused them to be duly collected, and, with the assistance of a legal assessor, I scrutinised, examined, and cast up the votes; and I ascertained and determined upon the said poll that the resolution adopting the said Local Government Act 1858, had been passed in the said district of Littleborough by 766 legal votes in favour of, whilst there were only 518 votes against such adoption.

8. Thereupon, and in pursuance of the said Act, I, as such summoning officer as aforesaid, forthwith gave notice in writing under my hand of such adoption as aforesaid, to Her Majesty's Principal Secretary of State for the Home Department, and I, as such summoning officer as aforesaid, published a copy of such notice by advertisement for three successive weeks in the said *Observer* newspaper, which was and is a newspaper circulated within the said district, and by causing a copy of such notice to be affixed on the principal doors of every church and chapel in the said district to which notices are usually affixed, and in many other public places within the said district. The newspapers marked respectively T 5, T 6, and T 7, now produced and shown to me are the newspapers in which the said notice of adoption was advertised. The printed paper marked T 8, now produced and shown to me, is a copy of the said notice of adoption sent to the said Home Secretary.

9. And after such notice of adoption had been so given as aforesaid, and the time for an appeal against the validity of the vote for the adoption of the said Act had expired, I, as such summoning officer as aforesaid, applied to and requested that a notice should be published in the *London Gazette* by one of Her Majesty's Principal Secretaries of State, that the said Act had been adopted within the said district, but the Home Secretary declined to publish such notice in the *Gazette*, alleging that the chairman of the said meeting, and not the summoning officer for the said district, was the proper officer and functionary to issue voting papers and conduct the said poll by examining and casting up the votes, although he admitted that I, as summoning officer, and not the said Mr. Molesworth, as chairman of the meeting, was the proper person to sign the said voting papers and the public notices, and to declare the result.

10. For the purpose of this application, and in order that the legal question may be raised and determined whether the summoning officer or the chairman of the meeting was the proper person upon whom was imposed the duty and power of taking and conducting the said poll, and examining and casting up the votes, and declaring the result, it has been arranged that for the purposes of this case it shall be taken to the Court of Queen's Bench that there has not been any appeal against such adoption, and that no question of appeal was or is the excuse or justification for declining to publish the said notice of adoption in the *Gazette*.

11. I am an owner of property and also a ratepayer in, and am personally resident within, the said district of Littleborough, and in my capacity of owner and ratepayer, independently of, and in addition to, my character as summoning officer as aforesaid, I have required, and still do require, the said notice of adoption to be gazetted by one of Her Majesty's Principal Secretaries of State, which hitherto has been declined.

12. The said Mr. Molesworth, as chairman, applied to me to sign notices and voting papers prepared by himself in the said form A, which, for reasons hereinafter stated, I declined to sign, and it was and is admitted by the Home Secretary that any poll taken by the said Mr. Molesworth, as chairman, would not be, and could not be, legal, unless I, as the summoning officer for the said district, signed the said notices and voting papers. I was asked by the said Mr. Molesworth to sign voting papers which, in some cases, were for married women who were not entitled to vote at all, and to sign voting papers in other cases which were for a larger or less number of votes than I knew the voters to be entitled to. For these and many reasons I declined to sign the notices and voting papers prepared and presented to me by the said chairman, and I denied, and still deny, his power and jurisdiction to issue voting papers or to examine or cast-up the votes, or to take the said poll, even if I had consented to sign the said notices and voting papers.

By the Local Government Act 1858 (21 & 22 Vict. c. 98) it is enacted by sect. 12 that the Act may be adopted (by sub-sect. 3):—"In all other places having a known or defined boundary by a resolution of the owners and ratepayers."

By sect. 13 it is enacted that meetings for the purposes of the preceding section shall be summoned on the requisition in writing of any twenty ratepayers or owners.

In places having known and defined boundaries not being corporate boroughs or towns under the jurisdiction of such improvement commissioners, as are hereinbefore mentioned by the churchwardens, or one of them, or if there are no churchwardens the overseers, or one of them, or if there is none of the officers respectively above enumerated, or if

Q. B.]

Ex parte THE LITTLEBOROUGH LOCAL BOARD DISTRICT.

[Q. B.]

such officer in any case neglects, is unable, or refuses to perform the duties hereby imposed on him by any person appointed by one of Her Majesty's Principal Secretaries of State. 2. In any places, as last aforesaid, the summoning officer shall upon such requisition fix a time and place for holding such meeting, and shall forthwith give notice thereof; and, 3. The meeting on its assembling together shall choose one of its number as chairman, who may, with the consent of a majority of the persons present, adjourn the same from day to day. 4. The chairman shall propose to the meeting the resolution for the adoption of the Act, and the meeting shall decide for or against such adoption. Provided that, if any owner or ratepayer shall demand that such question be decided by a poll of the owners and ratepayers, such poll shall be taken by voting papers in the form A, given in the schedule to the Act in the same way, and with the same conditions, as to notice of voting, delivery, filling up, collection, examination, declaration, of the result, custody of voting papers, penalty for neglect or refusal to comply with the provisions of the Act, scale of votes, and in all other respects whatsoever, as is provided in the Public Health Act 1848, in respect of the election of local boards of health; and if no poll be demanded, or if the demand of a poll is withdrawn by the parties making the same, a declaration by the chairman shall, in the absence of proof to the contrary be sufficient evidence of the decision of such meeting.

The provisions of the Public Health Act 1848 (11 & 12 Vict. c. 63), above referred to, are as follows. Sect. 21 enacts:

That at every election by owners of property and ratepayers under this Act the chairman of the local board of health, or in case of the first election such person as shall be appointed by order of Her Majesty in Council, or by provisional order of the general board of health (as the case may require), shall have the powers and perform the duties vested in or imposed upon the said chairman by this Act in relation to any such election, and shall perform all other duties to which it may be requisite for him to perform in conducting and completing elections under this Act, &c.

Sect. 22 provides for the production to such chairman of parochial books. Sect. 23 enacts:

That the said chairman shall before every such election prepare, sign, and publish a notice which shall contain the particulars following, that is to say, the number and qualification of the persons to be elected, the person by whom and the places where the nomination papers hereinafter mentioned are to be received, and the last day on which they are to be sent, the mode of voting in case of a contest, and the days on which the voting papers will be delivered and collected, and the time and place for the examination and casting up of the votes; and he shall also cause such notice to be affixed on such places in the parts for which the election is to be held as are ordinarily made use of for affixing thereon notices of parochial business, &c.

By sect. 19 of the first-mentioned Act, the 21 & 22 Vict. c. 98, it is enacted that:

Whenever a resolution adopting this Act has been passed in any place, notice thereof shall be given to one of Her Majesty's principal Secretaries of State by the following persons, that is to say:—In corporate boroughs, by the mayor; in other places, under the jurisdiction of such improvement commissioners as aforesaid, by the chairman of the board of commissioners; in other places, by the summoning officer. The notice so sent shall be in writing under the hand of the officer hereby required to give the same and it shall be the duty of such last-mentioned officer to publish a copy of such notice in manner following, and when such notice has been so given, and the time of such appeal has expired, or such appeal has been dismissed, a notice shall be published in the *London Gazette* by one of Her Majesty's Principal Secretaries of State, that this Act has been adopted within such place.

The voting paper in the schedule referred to in the 13th section is directed to be "signed by the summoning officer."

The *Attorney-General* (Sir R. P. Collier), and *Archibald*, now showed cause. The Home Secretary feels no further interest in the question than as being desirous that a correct rule should be laid down for his guidance. The question is, whether when a meeting is held to determine upon the adoption of the Local Government Act 1858, and a poll is demanded, the chairman of the meeting or the summoning officer is the proper person to take such poll? Littleborough is a place within the third subsection of sect. 12, as being a place having a known or defined boundary, and therefore a resolution of the owners and ratepayers is necessary

before the Act can be adopted, and in such case, by the third subsection of the 13th section, the meeting at which this resolution is to be come to, is to be presided over by a chairman to be chosen by such meeting. At that meeting a resolution is to be proposed by the chairman for the adoption of the Act, and then the meeting divide for or against it, and he declares the result; but if a poll is demanded, it is to be taken accordingly. Now the difficulty arises at this point, for the Act, instead of giving instructions as to the taking of the poll, refers to certain provisions in the Public Health Act 1848, ss. 21, 22, and 23, and the doubt is whether the summoning officer should take the poll or the chairman of the meeting. Now the Home Secretary is of opinion that it should be taken by the chairman of the meeting, and as that was not done, but was taken by the summoning officer, he has refused to publish a notice in the *London Gazette* that the Act has been adopted. The sections in the Public Health Act 1848 have reference to a very different state of things. The contention by the Secretary of State is that, where there is a chairman of a meeting, it is for him to preside and carry out to their termination the proceedings of the meeting, and that the taking of a poll is in fact only a part of the proceedings of the meeting. In cases where there is no chairman, as in the case of a first election of a local board, then such election is to be presided over by a person to be appointed by the Secretary of State; but that is not the case in the present instance, inasmuch as the statute provides for the appointment of a chairman, and one was appointed who put the resolution to the meeting. The policy of the Act seems to be that where you have a chairman, he is to conduct the proceedings. There seems to be no reason for departing from the usual course in such matters. Very many of the provisions in the 21st, 22nd, and 23rd sections of the Public Health Act 1848, will not apply to this case, and there is really no reason why they should be resorted to with reference to this point. [MELLOR, J.—The other side will rely upon the 19th section, which requires the notice of the adoption of the Act to be given to the Secretary of State by the summoning officer.] He may have that duty to perform, since it is his duty to summon the meeting, and therefore it would be proper for him to report the result. If it had been intended that the summoning officer should take the poll, the Act would have provided for his being the chairman of the meeting. The summoning officer has merely to call the meeting and report the result; he appears to have nothing to do with conducting it.

Manisty, Q. C. and *Kemplay*, in support of the rule.—When all the sections are read it is clear what was meant by the Legislature. [COCKBURN, C. J.—The chairman is to preside over the meeting, and if there is no poll he would announce the result.] But it is the summoning officer who reports to the Secretary of State whether there has been a poll or not, and then, when the report is made, it is the duty of the Secretary of State to act. If a poll is demanded, very important duties have to be performed; notices have to be prepared, signed, and published, containing information as to the persons by whom, and the places where the voting papers are to be received, the last day on which they are to be sent, the mode of voting, and the days on which the voting papers will be delivered and collected, and the time and place for the examination and casting-up of the votes. These are duties more fit for the summoning officer than a mere chairman of a meeting, and in respect of them the expenses are allowed by the 35th section of the Act. It could never have been intended that a mere

Q. B.]

REG. v. THE INHABITANTS OF ST. GEORGE, MIDDLESEX.

[Q. B.]

chairman of a meeting should have all these duties cast upon him. [COCKBURN, C. J.—Is the poll anything more than an adjournment of the meeting to ascertain correctly the wishes of the ratepayers and owners of property?] In some sense it is not; but a poll in this case differs from an ordinary poll, inasmuch as a great variety of duties are imposed upon the party taking the poll which do not exist in ordinary cases. Certainly the person most suited for taking the poll is he who has ultimately to declare it. The fair inference to be drawn from the sections is that the chairman's duties cease when a poll is demanded, and that then the duties of the summoning officer recommence. The schedule which directs that the voting papers are to be signed by the "summoning officer," shows that the person who calls the meeting is to make out the voting papers.

COCKBURN, C. J.—I think that this rule should be made absolute. At first I was strongly disposed to think that the poll should have been taken by the chairman of the meeting, but this view has been shaken by the arguments of counsel. The Act is certainly so framed as to render it extremely difficult to put an accurate construction upon it; and I must admit that I think the question is still open to some doubt whether or not the Legislature really intended that the summoning officer should take the poll. The inclination of my opinion, however, is, that it did so intend, and we should, therefore, make the rule absolute.

BLACKBURN, J.—It is certainly somewhat difficult to say what the Legislature really meant, and it is very much to be regretted that Acts of Parliament should be drawn in this form, but I cannot but think that the summoning officer is a better party to take the poll than the chairman of the meeting, and that it was probably intended that he should do so.

MELLOR, J.—I am of the same opinion. I feel all the difficulty referred to, but my impression is with the counsel for the prosecution.

Rule absolute.

Attorneys for the local board, A. G. and T. W. Eastwood, Todmorden.

Attorney for the Secretary of State, The Solicitor to the Treasury.

Wednesday, April 27.

REG. v. THE INHABITANTS OF ST. GEORGE
MIDDLESEX.

Poor law—Order of removal—Wife of a foreigner who has no place of settlement—Chargeability in absence of her husband—Status of irremovability acquired before marriage.

The pauper, before her marriage, obtained the status of irremovability in the parish of A., by residence. Her husband was a foreigner, having no settlement, and, whilst he was absent at sea, she became chargeable to the parish of A., where she continued to reside after her marriage. An order having been obtained for her removal to the union of B., which comprised the parish of her settlement:

Held, that the order was bad, as she had acquired and retained the status of irremovability in the parish of A.

This was a case stated by the Middlesex Sessions upon an appeal, whereupon an order of removal was quashed, as follows:—

At a general quarter sessions of the peace holden in and for the county of Middlesex, upon an appeal, wherein the guardians of the poor of the Stepney

Union, in the county of Middlesex, were appellants' and the churchwardens and overseers of the poor of the parish of St. George-in-the-East, in the said county, were respondents, against an order dated 24th Sept. 1868, made by two of Her Majesty's justices of the peace for the said county, for the removal of Margaret Schooler and her child, aged four months, from the said parish of St. George-in-the-East, to the said Stepney Union. It was ordered, that the said order be quashed on the ground of the irremovability of the paupers, subject to the opinion of the Court of Queen's Bench on the following

CASE.

The said Margaret Schooler is the wife of Samuel Schooler, a native of Boston, in the United States of America and he has no settlement in England.

The order of removal was therefore founded on the maiden settlement of the pauper in the parish of Limehouse in the Stepney Union.

The pauper's husband earns his livelihood as a sailor. She was married to him on 7th Oct. 1867, and on the 21st of the same month, while residing in the parish of St. George, he left her there and went to sea in the usual course of his occupation as a sailor, but without having made any provision for her maintenance.

In the month of May 1868, she became chargeable to that parish, and continued chargeable to the time of the making of the order of removal, 24th Sept. 1868, at which time her husband had not returned to her, but he returned to her between the date of the order and the time of the appeal.

The pauper's husband had not at the date of the order of removal himself resided in the parish of St. George for so long as one year.

Previously to her said marriage, the pauper, Margaret Schooler, had resided in the said parish of St. George for three years and upwards, and she was at that time irremovable from such parish by reason of her residence therein under the provisions of the Acts 9 & 10 Vict. c. 66, s. 1; 24 & 25 Vict. c. 55, s. 1; and 28 & 29 Vic. c. 79, s. 8. After her marriage she continued to reside in such parish up to the date of the order of removal, and she would, if she had remained a *feme sole*, have then been irremovable from the said parish by virtue of such residence. The appellants contended that as the said husband of the said Margaret Schooler was a foreigner without any settlement or place to which he could be removed, the said Margaret Schooler was not in his absence removable from the said parish of St. George, as she had herself acquired a status of irremovability by residence therein. And further, that as whenever her husband was present with her they would both be irremovable, she was also irremovable in his absence until his death or desertion.

The respondents contended that the said Margaret Schooler, whilst she remained a married woman, lost the status of irremovability which she had acquired by residence as a *feme sole*, and that as her husband had not acquired a status of irremovability by residence under the provisions of the said statutes she, in his absence, was removable to her maiden settlement.

The court of quarter sessions decided in favour of the appellants, and quashed the said order of removal, on the ground of the irremovability of the paupers.

The question for the opinion of the Court of Queen's Bench is, whether the said pauper and her child were, under the circumstance above stated, irremovable from the said parish of St. George. If the court shall answer this question in the affirmative, the order of sessions is to be confirmed; but if in the negative, the said order of sessions is to be quashed, and the said order of removal is to be confirmed.

Q. B.]

DAVIS v. PEARCE.

[C. P.]

By the 9 & 10 Vict. c. 66, s. 1, it is enacted—

That from and after the passing of this Act no person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years (now one year), next before the application for the warrant.

By the proviso in sect. 1 of the 11 & 12 Vict. c. 111, it is enacted—

That whenever any person should have a wife or children, having no other settlement than his or her own, such wife and children shall be removable from any parish or place from which he or she would be removable, notwithstanding any provisions in the said recited Act, and should not be removable by reason of any provision in the said recited Act.

Taylor appeared for the appellants.—The pauper having acquired the status of irremovability before marriage, it was not thereby affected inasmuch as her husband had no settlement himself, nor had he acquired anywhere the status of irremovability. The marriage would not destroy the irremovability, it merely suspended it. If she had married an Englishman she would have acquired his settlement, but as her husband in the present case was not an Englishman and had no settlement she falls back upon her own settlement, and her status of irremovability attaches. He cited

Reg. v. Cottingham, 7 B. & C. 615;

Reg. v. St. Sepulchre, 28 L. J. 187, M. C.;

Reg. v. Glossop, 12 Q. B. 117; 17 L. J. 171, M. C.

Foland and *Poynter*, for the respondents.—The fact of her marriage destroyed, or at least suspended, her status of irremovability. [BLACKBURN, J.—When her husband is with her she cannot be removed, but here he is away.] The whole theory of irremovability is founded upon the position occupied by the head of the family. If the husband is irremovable so is the wife, and she is not so when he is not so. During the wife's coverture her status cannot be considered. [BLACKBURN, J.—But you really are considering it, for you are removing her to her maiden settlement.] During coverture we can only look at the status of the husband, and if he has no settlement or status of irremovability, the wife can be removed to her maiden settlement.

Reg. v. Much Hoole, 17 Q. B. 548; 21 L. J. 1, M. C.

BLACKBURN, J.—Though the Legislature has certainly used language as though its intention was to disguise its meaning, I think that the sessions have come to the right conclusion. If the husband and wife were living together they could not be removed if the husband had no place of settlement, or if he were removable his wife would be removable with him. Now the question upon reading the 1st section of the 9 & 10 Vict. c. 66, and the proviso in the 1st section of the 11 & 12 Vict. c. 111, is, What is the meaning of the Legislature? Has the pauper lived in the respondents' parish to gain the status of irremovability? In the present case the pauper had acquired that status before her marriage, and *Reg. v. Glossop*, shows that that status may be joined to her after residence as a widow. Well, then, here the woman has resided for more than a year in the respondents' parish. She marries and continues to reside in the same parish. It is then said that she falls within the proviso of the 11 & 12 Vict. c. 111, s. 1, inasmuch as her husband has not resided there the requisite time, and that she is therefore not irremovable. But I think as her husband is not living with her her status of irremovability is resumed, and that no order could be made for her removal.

MELLOR and HANNEN, JJ., concurred

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING,
Esqrs., Barristers-at-Law.

Saturday, April 30.

DAVIS v. PEARCE.

Practice—County Court—Proof of service of summons—Notice to defend—30 & 31 Vict. c. 142, s. 2.

Where in an action brought in a County Court a summons has been served on the defendant in the form contained in schedule B to 30 & 31 Vict. c. 142, and the defendant has given notice to defend, the plaintiff need in no case prove the service of the summons.

This was an application for a rule calling on the judge of the County Court of Middlesex to show cause why he should not proceed to hear and determine an action that had been brought in his court by the present plaintiff against the present defendant, and why all proceedings under the order of the said judge, for payment of the defendant's costs by the plaintiff, should not be stayed.

The affidavit of the plaintiff's attorney stated:

1. A plaint was on the 22nd March last issued out of the said County Court under 30 & 31 Vict. c. 142, s. 2, for goods sold and delivered by the plaintiff to the defendant to be dealt with in the way of his trade.

2. That in pursuance of the said section, the defendant gave notice to the court of defence to the said action, to the effect that "a portion of the goods were never sold to him; that part payment had been made; and that he objected to the jurisdiction of the court."

3. That on the 12th April I attended the court on behalf of the plaintiff with his witnesses, and the defendant also attended the said court at the hearing, with his attorney.

4. That the plaint was called on for hearing, when I stated to the court that I attended on behalf of the plaintiff, and that the defendant and his attorney were present to defend in pursuance of the notice filed by the defendant in the said court.

5. That the learned judge then required proof of the service of the said plaint on the defendant, notwithstanding his appearance in court with his attorney, and upon my urging upon the said judge that the said proof of service was unnecessary by reason of the said notice so filed as aforesaid by the defendant and his then appearance in court by himself and his attorney, the said judge directed that the said proof was necessary, and refused to hear the said plaint without such proof, although requested so to do by myself and the attorney for the said defendant, and eventually delivered his judgment in the following words: "I decline to hear this case, as there is no proof of the service of the plaint on the defendant, and I nonsuit the plaintiff." And, on application of the defendant's attorney, he added: "The costs of the defendant to be borne by the plaintiff."

Holker, Q. C. showed cause on behalf of the County Court judge.

Nasmith, for the plaintiff, was not called upon.

KEATING, J.—I am of opinion that this rule must be made absolute. It appears that the plaintiff commenced proceedings in this County Court by serving on the defendant a notice in the form contained in schedule B to 31 & 32 Vict. c. 142. The summons was personally served on the defendant under that section, and the defendant was then at liberty to give notice to the plaintiff of his intention to defend, which in this case he actually did. In case he had not given such notice, then the

C. P.] BURKE v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. [C. P.]

plaintiff, on proof of the service of such summons, would have been entitled to judgment by default. The defendant, however, did give notice of his intention to defend, and appeared in court accordingly. I do not know, however, that the fact of his appearance is material, for he had served a notice of his intention to defend, and having served that, the plaintiff was not entitled in any case to judgment by default, on merely proving the service of notice on the defendant. I think that the fact of the defendant having given notice to defend dispensed with the necessity of proving the service of the summons, as the only object of such proof in any case is to show that the summons had come to the knowledge of the defendant. Here, as the defendant had given notice to defend, the plaintiff was bound to prove his case, and, on having done so, would have been entitled to judgment. The judge, no doubt, thought that the best mode of procedure was by proof of service, but he had no right to require it in this case, and to nonsuit the plaintiff because he did not produce it. I am of opinion that in doing so the judge was wrong; but, as he took this course solely under a mistaken impression as to his duty, I make no order as to costs.

M. SMITH, J.—I am of the same opinion. Proof of the service of the plaint is only required where no notice to defend is given by the defendant. Where no such notice has been given the plaintiff is entitled under the Act to judgment by default, on mere proof of the service of the summons. But when notice to defend has been given, "the action shall be heard in the ordinary course." I am of opinion that the judge was distinctly wrong in adopting the course he did, and that he ought to have allowed the plaintiff to proceed to prove his case.

BRETT, J. concurred.

Rule absolute.

Attorney for plaintiff, J. Angel.

Attorney for County Court Judge, Asteley and Earle.

Wednesday April 20.

BURKE v. THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY.

Negligence—Mere happening of accident, evidence of.

A train, in running from one station to another at about 300 yards distance, and at the end of which there were two stationary buffers, suddenly jolted against something, and caused injury to the plaintiff, who was in the train. As soon as the jolt had taken place, the train became stationary close to the buffers. Evidence was given that the engine driver ought to bring the train up to the buffers in a way that no jolt ought to be felt.

Held that, under the circumstances, the mere fact of this accident happening was evidence to go to the jury of negligence on the part of the company.

This was an action for negligently carrying the plaintiff, whereby he was injured. Plea, not guilty.

The case was tried before M. Smith, J., at Leeds. It was shown that the plaintiff was travelling in an ordinary passenger train of the defendants to Hull. The station "New Holland" is only about 300 or 400 yards from another station, at which people get out for Hull. At the end of this station there are two stationary buffers to prevent the trains from going any further. The plaintiff after passing New Holland station suddenly felt a great jolt, was thrown forward and much injured. It was proved that immediately after the jolt, the train came to a standstill close to the buffers. The

station-master at New Holland proved that it was the duty of the engine-driver to bring the train up at the stationary buffers, but to do so so gently that no jolt ought to be felt. The jury found for the plaintiff.

Overend, Q. C. (Mellor with him), moved pursuant to leave reserved to enter the verdict for the defendants or for a nonsuit, on the ground that there was no evidence of negligence to go to the jury. There was no evidence at all to show how the accident happened, and the facts proved were quite consistent with the idea of its being a pure accident. It is true that in some cases the mere fact of an accident happening has been held sufficient evidence of negligence as in

Scott v. The London Dock Company, 13 L. T. Rep. N.S. 148; 34 L. J. 220, Ex.;

Bird v. The Great Northern Company, 28 L. J. 3, Ex.

That, however, depends on the nature of the accident, and it is submitted that, in this case, the accident is not of a kind to be evidence in itself.

BOVILL, C. J.—I am of opinion that there should be no rule. Mr. Overend's contention is that the mere occurrence of the accident is no evidence of negligence on the part of the company, and, though that no doubt is so, the question in a case like this must depend on the circumstances. The rule was laid down in the Court of Exchequer Chamber, in *Scott v. The London Dock Company* (*ubi sup.*), "that there must be reasonable evidence of negligence; that where the thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen to those who have the management of machinery, and use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." I think that these remarks strictly apply to a case like this. Here the train arrived at the station, and had only a distance of 300 or 400 yards further to go, so that, under the circumstances, it was impossible that it could be going at great speed. The train was under the control of the company. At the end of the line there were stationary buffers, which were also under the defendants' control. According to the evidence of one witness, it was at the landing place, and according to another witness it was about 10yds. from the waiting-room, that something occurred which threw the plaintiff violently against the seat in front of him. It seemed as though the train bumped against something, and immediately after the bump the train was stationary. The question is, is that evidence from which reasonable men might infer that the accident arose from the train running against the stationary buffers? Could it have been caused in any other way? If the accident did happen in this way, then there was evidence of negligence, for it was the duty of the driver (as was proved by the station-master) to come up so as not to rebound. I think, therefore, that, according to the rule laid down in *Scott v. The London Docks Company*, there was sufficient evidence to go to the jury, and that there ought to be no rule.

KEATING, J.—I am of the same opinion. I think that the case falls within the rule laid down in *Scott v. The London Docks Company*, in which, though there was some difference of opinion among the judges, the judges unanimously laid down the rule referred to by my lord, that where a thing is under the sole care of the defendant, and the accident is one which does not happen in the ordinary course of things, and when proper care is taken, there is reasonable evidence of negligence to go to the jury. I

C. P.]

LEE v. SOUTHERN INSURANCE COMPANY.

[C. P.]

think that that is a sensible doctrine; and, acting upon it, I think that this rule ought to be refused.

M. SMITH, J.—I am of the same opinion. I will not say that an accident may not occur from which no presumption of negligence arises, but each case must be determined by its own peculiar circumstances. If the facts supported Mr. Overend's contention, that the accident is quite consistent with a misadventure, there would be no evidence; but the facts seem to me to point the other way. The train was brought to a standstill at the station. It then went on a short distance towards the stationary buffers, when it struck against something, and then stopped. It was this concussion that caused the plaintiff's injuries. Under the circumstances, I think there must be a very strong presumption that the train was driven with too great force against the stationary buffers, and if that was so, that was negligence. The remarks of Blackburn, J., in *Scott v. The London Docks Company*, apply. "Does not the nature of the accident decide whether the fact of the accident is evidence of negligence? If a ship goes down at sea, and no one can tell whether it sunk by reason of a storm, or by reason of the negligence of the crew, the evidence in that case would be equally consistent with either view. But if a ship goes out of harbour, and, after it has got a very short distance, sinks in a perfectly smooth sea, I think this would, as it has been held, be some evidence that the ship was not seaworthy." So here, the accident did not occur while the train was running, but while it was at the station, and no other train was near. I think that all the circumstances of the accident go to show that it arose from the train being brought up too suddenly, and, consequently, that there should be no rule.

BRETT, J.—It certainly is not in the ordinary course of things, that a train going this short distance should give a jerk, so as to cause injuries to the passengers. I think that the case falls within the rule laid down in *Scott v. The London Docks Company*.

Rule refused.

Attorney for the defendants, *Lingard*.

May 2 and 9.

LEE v. SOUTHERN INSURANCE COMPANY.

Insurance on freight—Suing and labouring clause—Expenses not specifically incurred.

A ship with a cargo of oil from Cameroons to Liverpool was stranded on the Welsh coast; the cargo was discharged, and the ship was afterwards got off and repaired; the cargo, after some delay, and at the expense of 70l., might have been reshipped and sent on to its destination, but the shipowner forwarded it by railway to Liverpool at a cost of 212l. 15s. 1d., and received the freight, about 600l.

Held, in an action by the owner against the insurer on freight, that the plaintiff was entitled to recover this sum of 70l., under the suing and labouring clause in the policy, being the least expense by which he could avert the loss of freight, although that specific sum was not expended.

This was an action brought to recover, under a policy of insurance effected by the plaintiffs with the defendants on freight, certain charges and expenses incurred in forwarding certain goods, in respect of which the freight was payable, to their place of destination; and by the consent of the parties and by order the following special case was stated for the opinion of the court.

The plaintiffs are insurance brokers, carrying on business in London under the style and firm of Bushbys and Lee. The defendants are an insurance company carrying on business in London.

On the 20th Nov. 1867, the plaintiffs effected with the defendants on behalf of the owners of the ship *Charles* a policy of insurance in the sum of 600l. on the freight of the said ship, the freight being valued therein at 600l., and the voyage insured being at and from and during the vessel's stay and trade at Cameroons, and thence to Liverpool. The plaintiffs effected the said policy through Messrs. John Sutton and Co., insurance brokers, of Liverpool. The policy was of the usual form, and contained the customary clause making the insurers liable for the charges incurred by the insured, if the latter should in case of loss or misfortune "sue, labour, and travel, for, in, and about the defence, safeguard, and recovery of the subject-matter of this insurance or any part thereof."

On the 26th Oct. 1867, the *Charles* duly sailed from Cameroons on the insured voyage to Liverpool with a cargo of palm oil consisting of about 500 casks weighing about half a ton each, and in the course of her voyage she encountered bad weather off the coast of Ireland, and after having sustained considerable damage was stranded on the 18th Jan. 1868, on the Welsh coast near Pwllheli, and drifted on to the beach. Attempts were made on the following day to get the vessel off by means of two tugs, but without success, the heavy surf setting her further on to the beach, and the leakage of the vessel increasing. No further attempts were made to get the vessel off until the 22nd Jan. when a steam-tug with extra hands was again engaged, but the efforts were ineffectual. On the 23rd Jan. two tugs were employed to get the vessel off, but they failed in so doing, and on the 24th there was a heavy gale and sea, which made the vessel beat upon the beach, bilging heavily, and caused her to make a considerable quantity of water.

When intelligence of the disaster which the *Charles* had met with as afore-mentioned reached Liverpool on or about the 25th Jan. 1868, a Mr. Johnson was sent by the plaintiffs to the place where the ship was stranded, with directions to take such steps as to forwarding the cargo as might appear to him advisable for the interest of all parties, after consulting with the surveyors and persons he might find there acting on behalf of the underwriters on and owners of the cargo.

Mr. Johnson accordingly proceeded to Pwllheli, and on the 27th Jan. a survey was held on the *Charles*. It was found by the surveyors that the vessel was much strained, the seams and butts were started, and the metal was falling off the bilge, and several other parts of her; and as she was making much water, the sea making a clean breach over her, they recommended, for the interests of all concerned, that the cargo should be discharged at once, and that an attempt should be made next spring tides to get her off.

The place where the vessel lay stranded as afore-said was within 500 yards of the railway station, and at low water she was high and dry on the beach, and when the tide was in, the weather was such that lighters could not safely approach.

After consultation with the surveyors, and the representatives of the underwriters on and owners of the cargo, Mr. Johnson resolved, with the assent and approval of such representatives, on behalf of the persons whom they respectively represented, to have the cargo discharged, and to forward the same by rail from Pwllheli to Liverpool. The cargo was accordingly discharged in carts while the tide was sufficiently low to allow of their reaching the ship, and being taken in such carts to the

C. P.]

LEE v. SOUTHERN INSURANCE COMPANY.

[C. P.]

railway station, was then forwarded by rail to Liverpool. The total expense of forwarding the cargo by rail to Liverpool amounted to 212*l.* 15*s.* 1*d.*

There was no direct telegraphic communication between Pwllheli and Liverpool, and it would not have been prudent to delay discharging the cargo until after communicating with Liverpool.

The entire freight in respect of the cargo on board the *Charles* amounted to 607*l.*, of which 52*l.* had been paid in advance, leaving a balance of 555*l.*, and this balance was paid to the owners of the ship by the owners of the cargo, on the delivery of the cargo to them.

On the 3rd Feb. 1868, the *Charles* was, after considerable difficulty, and after having been temporarily repaired on the beach, got off, and towed by a tug to Gimlet Rock, which is a few miles off the place where she had been stranded, and there further temporary repairs were done to her, sufficient to enable her to be towed to Carnarvon. On the 23rd Feb. she proceeded under tow to Carnarvon, where she arrived on the 25th. She was there put on the patent slip, and the damage which she had sustained was repaired; the repairs were completed on the 8th of the following April, and the ship was after such repairs thoroughly seaworthy for the completion of the voyage.

No warehouses exist at Pwllheli for the storage of goods, but there are two courses which it would have been possible to adopt had it been determined to store the oil at that place. One course would have been to store it in some twenty various places about the town; or two or three barns near the town might perhaps have been obtained for the purpose. The other course would have been to store the casks in a field near the railway station, where they might have been stacked, but it would have been necessary to have them constantly watched. The cost of warehousing in the former way would have been about 9*l.* a week. The cost of watching, if the latter course had been adopted, would have been about 1*l.* a week.

The harbour at Pwllheli, though suited for small coasting vessels, is not fitted for a vessel of the size of the *Charles*, and it would not have been possible to have reshipped the cargo on board her at Pwllheli, excepting by beaching her. This could only have been done during continuous fine weather, and a vessel coming from Carnarvon might have had to wait a very considerable time before meeting with suitable weather. Even in such weather it would have been a dangerous operation to have loaded the whole cargo whilst the ship was so beached. The only anchorage ground near Pwllheli is at a place called St. Tidswell's Roads. The anchorage there is not a very safe one, and in order to reship the cargo it must have been taken in lighters a distance of about seven miles.

It would have cost about 30*l.* to reship the cargo, if the ship had been beached. If taken in lighters to St. Tidswell's Roads the cost would have been about 70*l.*

There are warehouses at Carnarvon where the oil could have been stored. The cost of carriage to Carnarvon would have been considerably less than to Liverpool.

No estimate has been made by the plaintiffs of the cost of adopting either of the above modes of storing or reshipping the cargo, but they claimed from the defendants 152*l.* 15*s.* 1*d.*, the estimated cost of forwarding the cargo to Liverpool, if it had been sent by sea instead of by rail. The sums mentioned above have been fixed approximately only from the materials before the arbitrator, by whom this case was settled.

The defendants have paid into court sufficient to cover all claims of the plaintiffs under the said policy, except in respect of the dealings with the cargo after it was landed at Pwllheli.

The court is to be at liberty to draw all such inferences of fact as a jury would be justified in drawing.

The question for the opinion of the court is whether the defendants are liable, under the said policy, to pay to the plaintiffs the said sum of 152*l.* 15*s.* 1*d.*, or any and what portion thereof?

If the court be of opinion that the defendants are liable to pay to the plaintiffs as aforesaid the whole or any portion of the said sum of 152*l.* 15*s.* 1*d.*, then judgment shall be entered for the plaintiffs for such sum as the court may find the plaintiffs entitled to recover, together with costs of suit.

If the court shall be of opinion that the plaintiffs are not entitled to recover from the defendants any portion of the said sum of 152*l.* 15*s.* 1*d.*, then judgment shall be entered for the defendants, with costs of defence.

The plaintiffs' points of argument were: First, that the plaintiffs are entitled to recover the sum of 152*l.* 15*s.* 1*d.*, being the smallest sum for which the goods would have been forwarded to Liverpool in a reasonable manner under all the circumstances of the case; secondly, that the ship was not bound, after being repaired, to return and take on board the cargo in an open roadstead; thirdly, that a prudent uninsured owner would not have made his ship return to take on board the cargo in the St. Tidswell's Roads, under the circumstances mentioned; fourthly, that the plaintiffs are at any rate entitled to what it would have cost to reship the cargo, if the vessel had returned to take on board the cargo after being repaired.

The defendants' points were: First, that as the ship might have been repaired, and the goods have been reshipped and conveyed in the ship to their destination, the freight insured was not lost by the perils insured against; secondly, that the expenses of forwarding the goods from the place of disaster to their destination was not a charge upon the freight, as they were incurred for the benefit of the goods only. Thirdly, that in case of such a disaster the underwriters on freight are liable only for general average falling upon the freight, and for the particular charges falling upon the freight, incurred either in reshipping the goods for conveyance to their destination when the ship can be repaired for that purpose, or in forwarding the goods by other means to their destination for the purpose of earning the freight, when the ship cannot be repaired for that purpose; fourthly, that as the ship could have been repaired so as to have taken the goods to their destination, the losses arising from the delays, risks, and expenses occasioned by repairing the ship and reshipping the cargo do not constitute an average on the freight.

Cohen argued for the plaintiffs. It is admitted that if goods are severed from a ship by perils of the sea, the expenses of reshipping may be charged to underwriters on freight either on the suing and labouring clause, or on a total loss; and it was held in *Kidston v. The Empire Marine Insurance Company*, L. Rep. 1, C. P. 857; 16 L. T. Rep. 119, that if goods are forwarded by a substituted ship, the charges of forwarding may be recovered, under this clause, against the underwriters on freight. The rule is that the expenses of discharging are charges on general average; the expenses of warehousing are charges on cargo; and the expenses of reshipping are charges on freight; the case finds that 70*l.* would have been the cost of reshipping, and it follows that if that expense had been actually incurred, it would have been clearly recoverable against the insurers of freight: (*Le Cheminant v. Pearson*, 4 Taunt. 367.) It may be that the owners have spent more than they ought to have, but this is a contract of indemnity, and it does not follow that they

C. P.]

LEE v. SOUTHERN INSURANCE COMPANY.

[C. P.]

cannot recover anything from the insurers on that account: (*Cory v. Thames Ironworks and Shipbuilding Company (Limited)*, L. Rep. 3 Q. B. 181; 17 L. T. Rep. N. S. 495.) It is said in Phillips on Insurance, sect. 1451, that in the case of unavoidable delay, if a master does not retain the cargo there is no average loss on freight; but Parsons says, vol. ii. p. 155, "It is the duty of the master to transship goods, or send them on even by land carriage, if he can with reasonable endeavours."

Sir G. Honyman, Q. C. (with Watkin Williams) for the defendant.—These passages from American authors refer only to the expenses of necessary transport to a place of reshipment: (Phillips, vol. ii., s. 1442.) These expenses claimed by the plaintiffs have never been incurred; and, if they can be said to have been incurred, they were charges for the benefit of the owner of the goods and not for the purpose of earning the freight. The only consequence, if the goods had not been sent on by land, would have been some delay in receiving the freight; and that is not a charge upon the insurer of freight:

Mordy v. Jones, 4 B. & C. 394;

Philpott v. Swann, 11 C. B., N. S., 270.

In order to recover under the suing and labouring clause the charges must have been incurred in order to avert a loss which would otherwise have fallen upon the underwriter:

Great Indian Peninsular Railway Company v. Saunders, 2 B. & S. 266;

Booth v. Gair, 15 C. B., N. S., 291;

Everth v. Smith, 2 M. & S. 278.

The plaintiffs cannot recover 70*l.* for reshipping, because it has never been spent; and they cannot recover any of their claim, because the charges were not incurred in averting a loss which would otherwise have fallen on the underwriters, *i.e.*, a loss by perils of the sea.

Cohen in reply.

BOVILL, C. J.—In deciding this case the court is first called upon to draw inferences of fact. It appears that the vessel was stranded on the 18th Jan., and on the 3rd Feb. she was finally got off. Judging from the statements in the case, I come to the conclusion that she was in such a position and under such circumstances that she could have been got off and repaired, and could have carried on her cargo within reasonable time. I conclude, also, that it was necessary and proper that the cargo should be discharged for that purpose, and I conclude that she could have gone to St. Tidswell's Roads, and have been repaired. I conclude, also, that the cargo might after some delay have been reshipped, and that the vessel might have gone on to Liverpool and earned the freight. And I conclude that the freight might also have been earned at a cost of 70*l.* by carrying the cargo in lighters to St. Tidswell's Roads, and I also conclude that would have been a reasonable and proper mode of so earning it. It seems to me that upon these conclusions the plaintiff is entitled to recover from the underwriters on freight this sum of 70*l.* The course adopted was that of sending on the cargo by railway at the cost of about 212*l.*; this was done by the agent of the shipowners, the plaintiffs, and I conclude that they paid the railway company on behalf of the shipowners the cost of the carriage. The shipowners did receive the balance of the freight amounting to 555*l.*, and I consider the freight, therefore, to have been earned by the shipowners, and to have been obtained by them only through the course they adopted, and to have been received under the contract of freight. That freight was earned, and the loss of freight was saved by reason of extraordinary expenditure which

was incurred for the purpose of saving the freight, and for that only. I had some hesitation what inferences to draw from the loose and unsatisfactory statements in the case, but, after consideration, I draw these as I have stated. If the facts are so, and upon these assumptions, an expense was necessary for the purpose of earning the freight; and the whole of the expense actually incurred was not properly incurred. Upon these facts, and the conclusions I have drawn, I think 70*l.* is the proper measure of responsibility on the part of the underwriters on freight. True the plaintiffs have paid a larger sum, but that was more than the saving of the freight reasonably and properly required.

KEATING, J.—I am of the same opinion. From the facts contained in the case, I deduce the inferences which have been stated by my Lord, and upon those inferences I think the plaintiffs should in this action recover 70*l.* No doubt the freight was earned and paid in consequence of an extraordinary expenditure. Now, suppose the goods had been transhipped to lighten in the ordinary course, or reshipped in either manner suggested in the case; then no doubt the expense would properly fall on the underwriters for freight. There is certainly no case to be found which is an authority for saying that money which has not been actually spent for a particular purpose could be recovered under the suing and labouring clause in a policy on freight, but it seems to me to be immaterial here that this exact sum was not paid, because a larger sum was incurred by the course adopted, and paid by the plaintiffs. 70*l.* should measure the amount of charge which might be reasonably and fairly made against these insurers, and I think their liability should be confined to that, for Mr. Cohen has not succeeded in justifying the expenditure of the larger sum; although the cost of the 212*l.* was perhaps reasonably incurred with respect to one view of the facts, namely, that of the owners of cargo, yet it was not so with respect to the underwriters on freight. It seems to me that the plaintiffs are entitled to a verdict for 70*l.*

SMITH, J.—I am of the same opinion. From the facts I infer that, the ship having been stranded on the Welsh coast, the most reasonable course necessary to be adopted in order to save the freight would have been to land the oil and store it, whilst the ship went some distance for repairs; she ought to have been so repaired, and after she had returned to within a reasonable distance, the cargo should have been reshipped. The expense would then have been 70*l.*, to which sum the plaintiff would have been entitled from the underwriters on freight. I think now, although a different course was adopted, that the plaintiffs are entitled to that sum under the suing and labouring clause of the policy, but not to any more. It was argued for the plaintiffs that it was reasonable, under the circumstances, to send on the cargo at once; but it seems to me that in order to earn the freight there would have been no unreasonable delay in repairing the ship and returning to reship the goods. Where the goods might be reshipped in the same vessel I do not think the underwriter on freight ought to be charged with any extra cost for transshipment or carriage by land, and I think the court cannot enter into consideration of the liability for any sum beyond what would be the expenses of reshipment. On the facts here, I think the expenses of transshipment and carriage by railway cannot be recovered, but 70*l.* for reshipment was an extraordinary expense which the shipowner was bound to incur in order to earn the freight, and therefore it comes within the principle laid down in the case of *Kidston v. The Empire Marine Insurance Company*. No doubt we are giving the plaintiff

EX.] THE LORDS BAILIFFS, &C., OF ROMNEY MARSH v. THE CORPORATION OF TRINITY HOUSE. [[EX.

a sum of 70*l.*, which he did not specifically expend, but it was necessary in order to earn the freight to carry the cargo to Liverpool; and although he might have done so by reshipment, it can make no difference to the defendant's liability that he preferred to send it by railway instead. Why can it be necessary to repair and reload the ship in order to preserve the owner's right? The least expense would have been this 70*l.*, and the fact of the owner having sent the cargo on by a better and more expensive mode does not disentitle him to that sum.

BRETT, J.—I without doubt draw the inference that the plaintiff paid these expenses for the purpose of obtaining the freight insured by the defendants. If it had only been for the advantage of the owner of the goods, or for the market, he would not have taken upon himself the extra expense which he incurred, or, at all events, if it had been so, it would have been stated in the case. I think Mr. Cohen failed to make out that the distances and difficulties were so great as to justify the shipowner in sending on the goods by railway, and I think he might reasonably have adopted the less expensive plan of reshipment; for this less expense the defendants ought to be liable. The plaintiffs might have repaired the vessel, and reshipped the cargo for 70*l.*, and by the payment of that sum the loss of freight would have been saved. They went to a greater expense, but averted the loss of freight. I think the plaintiffs having been put to actual expenditure, the contract of indemnity contained in the policy requires that the underwriters should repay the amount of the least onerous mode which the plaintiffs might have adopted to avert the loss of freight.

*Judgment for plaintiffs for 70*l.**

Attorneys for plaintiffs, *Field and Co.*, for *Bateman and Co.*, Liverpool.

Attorneys for defendants, *Thomas and Hollams*.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Jan. 19 and May 11.

THE LORDS BAILIFFS AND JURATS OF ROMNEY MARSH v. THE CORPORATION OF THE TRINITY HOUSE.

Negligence—Proximate cause of damage—Wreck—Damage caused by—Duty of owner.

A vessel belonging to the defendants, through the negligence of the captain and crew, grounded on a shoal. From the state of the weather and tide at the time the necessary consequence of her so grounding was that she was driven towards the shore and ultimately struck against the plaintiffs' sea wall, doing it damage. Had the weather been moderate and the tide different the vessel, notwithstanding her striking the ground, might have been prevented from being driven against the wall:

Held (dubitante Martin, B.), that the negligence of the captain and crew was the proximate cause of the vessel's being driven against the wall, and the plaintiffs were therefore entitled to recover from the defendants as owners of the vessel, the damages so occasioned.

The defendants' vessel having been driven against the plaintiffs' wall as above described, continued to bump against the wall for some time, thus doing further damage than that occasioned by her first striking. The only way of preventing this damage would have been by immediately breaking her up. If that step had been taken a quantity of valuable property ultimately saved from the vessel would have been lost. The

time that elapsed before she was broken up and her first striking was not longer than was reasonably sufficient for the removal of the property so saved:

Held, that had the vessel in the first instance been driven by unavoidable accident against the wall, this further damage would not have been recoverable, because no duty was cast upon the owner of immediately breaking up the vessel to prevent her doing further damage, but only of using reasonable skill and diligence to prevent such further damage.

This was a case stated by order of Nisi Prius.

The first count of the declaration stated that the defendants were possessed of a ship, and navigating the same upon the seas by their mariners and servants in that behalf, and they so carelessly, negligently, and unskilfully navigated and directed the same, that the same became and was wrecked, and ran foul of, and was driven and forced, and came upon, and continued for a long time against, a certain sea wall of the plaintiffs by the side of and facing the sea, whereby the said wall was broken, damaged, and injured, and the plaintiffs thereby incurred expense in restoring and repairing the same, and making good the said damage and injury.

Second count: that during all the time thereafter mentioned, the defendants were possessed and had the control and management of a certain ship or vessel which, while in their possession, control, and management, and on the seas, had been by the force and violence of the winds and waves wrecked and forced, and driven and come upon and against, and near to, a certain sea wall of the plaintiffs, and did and was continuing and likely to continue to do great damage and injury to the said wall by being bumped, struck, knocked, and cast upon and against it and otherwise, and they could and ought, by reasonable and due and proper care, skill, and diligence, to have stopped and hindered and prevented the said ship or vessel from doing and continuing to do the said further damage and injury to the said wall as aforesaid, yet the defendants, well knowing the premises, did not use reasonable and due and proper care, skill, and diligence to stop, hinder, and prevent the said ship or vessel from doing and continuing to do the said damage and injury to the said wall, and by reason of the defendants' carelessness and neglect in that behalf the said ship or vessel continued to do and did do great damage and injury to the said wall by being bumped, struck, and knocked and cast upon and against it, and the plaintiffs thereby were put to and incurred expense in restoring and repairing the same, and making good the said damage and injury.

Pleas: 1. Not guilty. 2. To the first count, that the defendants were not possessed of the said ship, nor were they navigating the same as in the said count alleged. 3. To the second count, that they were not possessed nor had they the control or management of the said ship, nor was the same, while in their possession, control, or management, forced or driven, nor did the same come upon, against or near to the said sea wall, nor could or might the defendants by reasonable or due or proper care, skill, or diligence have stopped, hindered, or prevented the said ship from doing or continuing to do the said damage and injury in the said count mentioned, or any part thereof.

The facts of the case were as follows:

The plaintiffs were the owners of the Dymchurch Wall, which is three to four miles in length, and was built for the protection of the Romney Marsh from the inroads of the sea, and is repaired and maintained by and at the expense of the plaintiffs. The defendants were the owners of a pilot cutter of 52 tons, called the *Queen*, which, at the time of the happening of the events after mentioned, was in charge of a captain and crew who were the servants

EX.] THE LORDS BAILIFFS, &C. OF ROMNEY MARSH v. THE CORPORATION OF TRINITY HOUSE. [EX.]

of the defendants. On the evening of the 30th Nov. 1867, the defendants' said cutter, the *Queen*, was off the Kentish coast on her way from the Dungeness Roads to Dover, and then through the negligence of the said captain and crew struck the ground on a shoal of mud, about three quarters of a mile out from the Dymchurch Wall.

At the time when the said cutter so struck the ground the weather was very bad; it was blowing hard, and there was a flood tide, and in consequence thereof the captain and crew after she so struck as aforesaid, lost all control over her, and she gradually drifted towards the shore, and at last was driven against the Dymchurch Wall. If the weather had been moderate, and the state of the tide different, the cutter, notwithstanding her striking the ground, might have been kept from being driven against the said wall, but in the then state of the weather and tide after the said cutter so struck the ground as aforesaid, the captain and crew could not have prevented her being driven against the said wall. After the cutter struck the ground, and before she was driven against the Dymchurch wall, some of the crew escaped in a boat, and one of them in endeavouring to get into the boat was drowned. The captain and the rest of the crew were rescued from the cutter just before she struck upon the wall by means of a rope thrown from the shore. It was necessary in order to save their lives, for the captain and the crew to leave the cutter when they did. During the night of the 30th Nov. the cutter remained on the wall a wreck, and with no person in possession of her, but on the following day, the defendants, by their servants, resumed possession of the cutter, and immediately applied themselves to saving her sails, rigging, and stores. The defendants also immediately secured the cutter by anchors to the wall, so as to prevent the cutter doing more damage than was inevitable, as long as she remained on the wall. On the 4th Dec. 1867, the cutter was surveyed by the defendants' surveyor, and it was found impossible to repair her, and she was ordered to be sold, and accordingly she was sold by public auction on the 9th Dec., and by the 13th Dec. she was broken up. No claim was made in the action for damage which occurred after the 9th Dec. Considerable damage was done to the Dymchurch wall by the cutter being driven against the wall, and further damage was done to the wall by the cutter bumping against it every tide until she was sold.

After the cutter was driven against the wall there was no possible means of getting her off, or preventing the further damage being done to the wall every tide, except by breaking her up. The cutter might have been broken up by defendants' servants by the 5th Dec., and if she had been so broken up the damage done to the wall between the 5th and 9th would not have occurred (and such damage though slight was appreciable); but if the cutter had been broken up by the 5th a considerable amount of property saved from the cutter would have been lost; and the servants of the defendants acted prudently in the interest of the defendants in taking the steps they did, which led to the cutter being sold on the 9th and broken up on the 13th, and not before, as the time which elapsed between the time of the cutter striking the said wall and the said 9th Dec. was not longer than was reasonably necessary for the removal from the cutter of the property so saved. The question for the court was whether the defendants were liable for all or any part of the damage done to the Dymchurch wall, as above stated.

Honyman, Q. C., with him *Biron*, for the plaintiffs. —The question as to the first count will be whether the damage was the natural and proximate result of

the negligence of the defendants' servants in letting the cutter get on shore. I submit that it was. With respect to the second count, the principle of law is this:—If, by unavoidable accident, a vessel is wrecked, and the owner chooses to abandon it altogether, he is no longer responsible for any damage that may arise; but, if he chooses to resume possession, or retain his property in it, he has no right to leave it in a position where it is damaging to his neighbour's property. He cited

Turner v. Walker, L. Rep. 1 Q. B. 641; 14 L. T. Rep. N. S. 660; L. Rep. 2 Q. B. 301; 16 L. T. Rep. N. S. 234;
Matthews v. The Discount Corporation, L. Rep. 4 C. P. 228;
White v. Crisp, 10 Ex. 312;
Brown v. Mallett, 5 C. B. 599;
Vivien v. The Mersey Dock Company, L. Rep. 5 C. P. 19; 21 L. T. Rep. N. S. 362;
Philpott v. Swann, 11 C. B., N. S., 270.

Pollock, Q. C., with him *Dixon*, for the defendants. Upon the second count it is clear that there is no cause of action. It cannot be that I am bound to destroy my property at once because it is doing damage to another, having been brought into that situation by the violence of the winds and waves, without negligence on my part. If a stranger lets my horse loose, and he gets on my neighbour's ground and is doing damage, can I be bound to shoot him, if that is the only way of immediately preventing him from doing further mischief? Then, with regard to the first count, the damage is too remote. Can the ship being dashed against the wall be said to be the natural and proximate result of the captain's negligence? *In jure non remota causa sed proxima spectatur*. Here the proximate cause was the violence of the winds and waves. He cited

King v. Watts, 2 Esp. 674;
Brown v. Mallett, 5 C. B. 599;
White v. Crisp, 10 Ex.;
Puffendorf, Lib. 2, c. 6, s. 8;
Scott v. Shepherd, 1 Sm. L. C. 417;
Livie v. Jansen, 12 East, 648, 653;
Ionides v. The Universal Marine Insurance Company, 14 C. B., N. S., 259, 286.

Honyman, in reply, cited

Dent v. Smith, L. Rep. 4 Q. B. 414; 20 L. T. Rep. N. S. 868;
Lee v. Riley, 18 C. B., N. S., 722; 12 L. T. Rep. N. S. 388;
Vicars v. Wilcox, 2 Sm. L. C. 499.

KELLY, C. B. — As to the second count, we are all of opinion that the plaintiff is not entitled to judgment. The count alleges that the vessel continued in the control and under the management of the defendants after she was wrecked and driven against the sea wall, and that the defendants might, by due skill and care, have prevented her from continuing to be struck against the wall, but that they did not use due skill and care to do so. We do not think that, under the circumstances, the plaintiffs can contend that there was any negligence in not immediately breaking up the ship. If there had been any want of due care, such, for example, as not getting her off and away from the wall, if that had been possible, and so preventing continuance of damage, it would have been a different thing. But, under the circumstances, it would seem the only means would have been by immediately destroying her. There was valuable property on board, which could not be saved otherwise than by taking it out of the ship. The case resolves itself, therefore, into the question whether the defendants were bound then and there to destroy the vessel and sacrifice the property? It must be assumed, for the purpose of this count, that, without blame to anybody or by any negligence, but by the force of the winds and

EX.] VINES AND WIFE v. LONDON, BRIGHTON, &C., RAILWAY CO. BRIDGES v GARRETT. [EX. CH.

waves, and by unavoidable accident, the ship was placed in this position. That being so, there was no duty that I can see but to exercise reasonable care and skill in removing the vessel. As to the first count, the case is one of some nicety, and the court will take time to consider.

Cur. adv. vult.

May 11.—The judgment of the court (Kelly, C.B., Martin and Pigott, B.B.) was delivered by KELLY, C.B. —The question in this case is whether the injury to the plaintiffs' wall was so caused by the negligence of the defendants as to make the defendants liable within the rule of law applicable to such cases. The defendants' vessel, by the negligence of the captain and crew, grounded upon a shoal or sand bank within three-quarters of a mile of the wall of the plaintiffs, the immediate effect of which was that the vessel became unmanageable, and beyond the control of the crew; and as at the time a high wind was blowing, and the tide flowing towards the shore, the vessel was driven and carried with great violence against the wall, and so effected the injury in question. The rule of law is that the negligence to render the defendants liable must be the *causa causans*, or the proximate cause of the injury, and not merely a *sine quâ non*. I think that it was so in the present case. The immediate effect of the negligence was to put the vessel into such a condition that it must necessarily and inevitably be impelled in whatever direction the wind and tide were giving at that moment to the sea, and this was directly upon the plaintiffs' wall. The case therefore appears to me to be the same as if the ship had been lying at anchor with the tide flowing rapidly towards a rock, and the defendants had by some negligence broken the chain and set free the ship, in consequence of which it had at once and immediately been carried by the tide with great force and violence against the rock, and had become a wreck. Would not the wreck of the ship have been caused by the negligence which broke the chain? I think that it would, and that such a case and the case before the court are the same; that the negligence of the crew, the servants of the defendants, was thus the immediate cause of the ship being driven against the wall of the plaintiffs, and that the plaintiffs are therefore entitled to recover. My brother Pigott concurs in this judgment, and my brother Martin, though entertaining some doubt upon the case, does not dissent.

Judgment for plaintiffs.

Attorneys for plaintiffs, Austen De Gex and Co.

Jan. 28 and May 11.

VINES AND WIFE v. THE LONDON, BRIGHTON, AND SOUTH-COAST RAILWAY COMPANY.

Writ of inquiry—Taxation of costs—Good jury.

The defendants in an action let judgment go by default, and the damages were assessed under a writ of inquiry. The master upon taxation allowed the plaintiff twelve guineas for the costs of a good jury:

Held, following Vickery v. The Brighton Railway Company (sup. 270), that the master was correct.

In this case the action was to recover against the defendants in respect of injuries sustained by plaintiffs while travelling on defendants' railway. The defendants suffered judgment by default, and a writ of inquiry to assess the damages was executed before the Secondary of London and a good jury. Upon taxation of costs the master allowed the plaintiff a guinea each for the good jury. A rule had been obtained to review the taxation with respect to

the allowance of the good jury and the amount paid to them.

Channell showed cause.

Lopes, Q. C., and Joyce, supported the rule.

The arguments employed and authorities cited were almost identical with those in the case of *Vickery v. The London, Brighton, and South-Coast Railway Company (sup. 270)*.

Cur. adv. vult.

May 11th.—The judgment of the court (Kelly, C. B., Martin, B., and Pigott, B.) was delivered as follows:—In this case a rule has been obtained to review the taxation of costs on the ground that the master has allowed fees to two counsel and also the payment of twelve guineas for a good jury upon the trial under the writ of inquiry after judgment by default. The objection to the costs of two counsel was abandoned during the argument, and we are of opinion that the rule must be discharged, and the taxation of costs by the master sustained with respect to the twelve guineas allowed for a good jury. We find that for forty-five years past it has been the practice to allow the payment in question wherever a good jury has been summoned under a judge's order before the Secondary in the City of London. The practice has been somewhat different in Middlesex, where half a guinea only has been paid when the jurymen constituting the good jury were selected only from the better classes of tradesmen; but a guinea has been paid when the jurymen were chosen from the lists of special jurors. Looking to the reasonableness as well as the antiquity of the former practice, and thinking it not inconsistent in principle with that which has prevailed in Middlesex, we think it ought to be followed and upheld as well in Middlesex as in London. My brother Martin, indeed, is disposed to doubt whether we have any power to sanction or allow this payment, which he thinks is in effect to levy a tax upon a class of the people, except under authority of Parliament, or by virtue of immemorial usage; but, after fully considering the cases which have been decided upon this subject, and the elaborate and unanimous judgment of the Court of Common Pleas in the case of *Vickery v. The London, Brighton, and South Coast Railway Company*, L. Rep. 5 C. P. 165, we feel bound to adopt and to follow that decision, and to hold that the taxation of costs by the master was correct. We are therefore of opinion that this rule must be discharged.

Rule discharged.

Attorneys for plaintiff, Houghton and Wragg.

Attorneys for defendants, Baxter, Rose, Norton, and Co.

EXCHEQUER CHAMBER.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Monday, May 16.

ERROR FROM THE COMMON PLEAS.

(Before COCKBURN, C.J., KELLY, C.B., CHANNELL, B., BLACKBURN, MELLOR, and LUSH, JJ., and CLEASBY, B.)

BRIDGES v. GARRETT.

Principal and agent—Copyhold fine—Crossed cheque—Payment.

The steward of plaintiff's manor, in which defendant had purchased copyhold land, appointed defendant's attorney as deputy steward to take defendant's admission: the attorney took the admission, but did not receive at the time the fine which was necessary to com-

EX. CH.]

BRIDGES v. GARRETT.

[EX. CH.]

plete the enrolment; afterwards the defendant paid his attorney a cheque, crossed at the request of the latter, for an amount including steward's and attorney's fees besides the fine. This cheque was duly honoured by the defendant, but the attorney's account being overdrawn, the amount was stopped by his bankers:

Held, in an action for the fine (reversing the judgment of the majority of the C. P.), that there was some evidence under the circumstances to justify a jury in finding this was payment to the lord.

This was an appeal from the decision of the majority of the Court of Common Pleas (Bovill, C.J., and M. Smith, J.), by which a rule to set aside a verdict for the defendant, and to enter a verdict of 78*l.* 15*s.* for the plaintiff, was made absolute. Byles, J., before whom the case was tried, dissented from the judgment of the rest of the court. In the appeal case, leave was reserved to the court to draw inferences of fact.

The facts and correspondence are fully stated in the report of the case before the Common Pleas, 21 L. T. Rep. 141; L. Rep. 4 C. P. 580.

Denman, Q.C. (with him *Cohen*), argued for the defendant, the appellant. The court below differed only on the sufficiency of the form of the payment by the defendant under the circumstances. The majority held that this payment, which was by means of a crossed cheque for an amount including other sums due to Craig, the defendant's attorney, who also was acting as deputy steward to the plaintiff, the lord of the manor, did not discharge the defendant's debt to the plaintiff, and that there was no evidence of any authority from the lord to Craig to accept payment in this form. The two judges in effect decided that payment by this cheque was not payment in cash. [COCKBURN, C.J.—A cheque is not always cash, at all events when it is dishonoured; but in this case it was met by the drawer. The question seems rather to be whether Craig was not *functus officio* when he received the cheque.] Upon that point the judgment below is silent, and the letters of the 8th June and 10th July are evidence that the authority had been continued by Mills. [KELLY, C.B.—Are we at liberty to draw inferences of fact, so as practically to reconsider the verdict?] It was only intended that the court should draw inferences consistent with the verdict; the jury found everything in the defendant's favour.

Catterall v. Hindle, L. Rep. 2 C. P. 368;

Williams v. Evans, L. Rep. 1 C. P. 352.

Garth, Q.C. (with him *J. Digby*), for the plaintiff. First. Craig was appointed only to take the admission, a mere ministerial act, and he could not have been deputed by Mills to accept the fine, which would have been a trust:

Parker v. Kett, 1 Ld. Raym. 658;

Gilbert on Tenures, 414, 5th edit.

Perkins' Profitable Book;

Shop. Touch. 239.

Secondly. Assuming it possible, and that Craig had authority to receive the fine upon admission, there is no evidence that such authority was continued until the actual payment by defendant:

Viney v. Chaplin, 27 L. J. 434, Ch.;

Lord St. Leonard's Handy Book, 42.

Lastly. This payment could not discharge the defendant's debt. If a man appoint another as agent to receive money, the agent must take it in what he can pay over to the principal; here the crossed cheque was for an amount including steward's fees and attorney's fees, besides the fine due to the plaintiff:

Vandeleur v. Blagrove, 17 L. J. 45, Ch.;

Story on Agency, ss. 98 and 181;

Sykes v. Giles, 5 M. & W. 645;

Barker v. Greenwood, 2 Y. & C. Ex. 419.

Denman was not heard in reply.

COCKBURN, C.J.—I think there was evidence in this case upon which the jury might find a verdict for the defendant. There are three questions, and perhaps four, which we have to consider. First, whether Craig, who was appointed deputy steward for that particular occasion in order to take the admission, was also authorised to receive payment of the fine which the defendant was bound to pay before his admission could be perfected. There seems to be no doubt that Mills, as steward, was entitled to receive the fine, and I think that in appointing Craig as his deputy, he gave him authority to do everything incidental to that office. Then, was this appointment intended to continue until the work was completed, or until its revocation? This is a question of fact, to be determined from all the circumstances, and there was certainly some evidence that it was so intended to continue. A question then arises whether the money was paid to Craig in the character of deputy steward, or to him as the defendant's solicitor, to be paid over to the plaintiff. There is evidence to be found from the facts and correspondence that Craig received the money in his former capacity. The last question is whether the form of payment, a crossed cheque for an amount including two other sums for the steward's and the attorney's fees, was such as to render the payment invalid, so far as the defendant's liability to the plaintiff is concerned. I do not think that it was. I agree that payment to an agent by a bill would not discharge a debtor, but if a debt be paid by a cheque, the payment is as good as if it were made in money; and it is not injured by the cheque being crossed. It was here paid into Craig's bank, and the bankers did not appropriate it, but they paid over the cash to Craig's account. The cheque, in fact, was cash, and the payment as it was made was just the same as if the defendant had handed over the 78*l.* 15*s.* to Craig, and he had placed it in the bank to his own account, and forwarded his cheque for the amount to Mills. If Craig was entitled to receive the money, I think this payment was a sufficient discharge of the defendant's debt. All the others are questions of fact, and although I should not have been surprised if the decision had been the other way, I cannot say that there was no evidence to go to the jury upon the facts as they found them. Whatever was the proper verdict, the only question for us is whether the jury had any reason to find as they did. We ought, therefore, to reverse the decision of the court below.

BLACKBURN, J.—I agree that there was ample evidence to justify this matter being left to a jury; and I should have thought that if the payment had been made to Craig by the defendant at the time of the admission the verdict would have been right; but I doubt whether as the payment took place so long afterwards the verdict can be said to have been in accordance with the weight of the evidence. At all events, the jury might reasonably have found the other way; but as the leave is reserved and the case is stated, the verdict must stand, unless we can say it is distinctly a wrong verdict. The majority of the court below thought that the payment here was insufficient, because it was made by crossed cheque; but I think they did not notice the distinction which exists between the payment to an agent and that to a mere clerk or servant, the difference, in fact, between trusting in the honesty or in the solvency of the person who receives the money. When a creditor merely confides in the honesty and not the solvency of a person whom he authorises to receive money—as, for instance, when a banker sends his clerk to obtain payment of a bill—and that person deposes another to receive the

NISI PRIUS.] PARTRIDGE v. PRICE. *Ex parte* HOPKINS ; *Re* GOODBEHERE AND GAINÉ. [BANK.

money for him, then the deputy could have no authority to accept as payment anything but the very sum of money in cash which he has to pay over ; but if a person be authorised to receive payment not in order to hand over the sum in specie, but only a sum equivalent to that he receives, then the case is different—the money would go into his general assets, and payment by the debtor would take place as soon as he paid the money to the agent. The cause of the appointment in this case was to make the agent liable, not to make him pay over the exact sum in specie. This is, of course, putting out of the question a matter of account between the parties. In the present case it seems to me that the payment was as complete as if the defendant had paid the amount directly into Craig's account. I agree with my brother Byles, and I think the judgment of the majority of the court below should be reversed.

The rest of the court concurred.

Judgment reversed.

Attorneys for the plaintiff, *Ward, Mills, and Witham.*

Attorneys for the defendant, *Monckton and Monckton.*

NISI PRIUS.

Reported by JOHN ROSE, Esq., Barrister-at-law.

COURT OF COMMON PLEAS.

Saturday, May 14.

(Before BYLES, J.)

PARTRIDGE v. PRICE AND ANOTHER.

Power of judge to amend—Misjoinder of defendants.

John Price carried on business under the name of John Price and Co. His nephew, Arthur John Price, was his manager, at a salary, but was not a partner, nor had any interest in the business. The plaintiff in his dealings with the firm generally transacted business with the nephew, and consequently joined him as co-defendant with his uncle in an action for goods sold and delivered to the firm.

The court amended the declaration by striking out the nephew's name on terms.

Action for goods sold and delivered.

John Price and Arthur John Price were joined as defendants.

Lumley Smith for the plaintiff.

L. M. Aspland for the defendant.

It was proved that John Price carried on business under the trade name of John Price and Co., and that Arthur John Price, his nephew, had formerly been his manager at a salary, but was not in partnership with his uncle, nor had any interest in the business. Nevertheless, as the plaintiff when dealing with the firm had generally transacted business through Arthur John Price, he regarded him as a partner, and made him a joint defendant in this action.

On *Aspland* saying that the misjoinder entitled him to a verdict for the defendants, the learned judge expressed his intention of amending the declaration by striking out the name of Arthur John Price.

Aspland objected to such amendment, citing *Wickens v. Steel*, 2 O. B., N. S., 498.

BYLES, J.—My impression is that I have no discretion in the matter. His Lordship referred to the Common Law Procedure Act 185, s. 87,

which is as follows: "It shall and may be lawful for the court or a judge in the case of the joinder of too many defendants in any action on contract at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the court or judge by whom such amendment is made shall think proper; and in case it shall appear on the trial of any action on contract that there has been a misjoinder of defendants, such misjoinder may be amended as a variance at the trial in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the court or judge, or other presiding officer by whom such amendment is made shall think proper."

Aspland cited *Vanderbyl v. McKenna*, L. Rep. 3 C. P. 252; and *Knowles v. Lister*, 17 L. T. Rep. N. S. 618, contending that the last-mentioned case was precisely in point. There, where a defendant who was not liable was joined with another who was, with a view of testing the liability of the former, *Bovill*, C. J. refused to amend by striking out the name of the defendant who was not liable without the consent of the counsel for the defendant who was actually liable:

BYLES, J. retired to consult Willes, J. upon the point, and on returning into court said: We are both of opinion that by the Common Law Procedure Act it is clear that I ought to amend by striking out the name of Arthur John Price; but this I shall do on the terms that the plaintiff shall pay all such extra costs as have been caused by the misjoinder. Declaration amended accordingly, and

Verdict for plaintiff against John Price only.

Attorneys for the plaintiff, *Sawbridge and Co.*

Attorney for the defendant, *Fraser, Gray's-inn.*

COURT OF BANKRUPTCY.

Reported by A. A. DORIA, Esq., Barrister-at-Law.

Tuesday, April 26.

(Before the CHIEF JUDGE.)

Ex parte HOPKINS ; *Re* GOODBEHERE AND GAINÉ.

Petition for liquidation—Adjudication of bankruptcy—Transfer of proceedings—Proofs—Reswearing of.

Where at the first meeting held under a petition for liquidation pursuant to the 125th section of the B. A. 1869, the creditors resolved upon a bankruptcy, and a petition for adjudication was accordingly presented, the affidavits of debt made by the creditors under the petition for liquidation need not be resworn for the purposes of proofs under the bankruptcy.

The proper course is to transfer the proceedings under the petition for liquidation to the petition for adjudication, whereby all the proceedings will be consolidated.

Bund moved *ex parte* on behalf of the petitioning creditors that the affidavits of debt and the proxies made by the creditors for the purpose of enabling them to vote at the first meeting of the creditors under a petition for liquidation by arrangement pursuant to the 125th section of the Bankruptcy Act 1869, and delivered to the chairman at such meeting, might be available as proofs under the bankruptcy and form part of the proceedings thereunder, under the following circumstances:—

On the 12th Feb. 1870, the debtor filed his petition under the liquidation clauses of the Act. At the first meeting one hundred and thirty creditors has made affidavits of their debts, and one hundred

BANK.]

Ex parte B. ; Re Sir W. Russell.

[BANK.]

and fifteen had appointed proxies to represent them at the meeting. The creditors declined to proceed under the petition, and resolved upon a bankruptcy. A petition was accordingly presented on the 11th April 1870, and adjudication made thereunder, and it was considered desirable in order to avoid expense on account of the large number of creditors that the affidavits and proxies filed under the petition for liquidation might be considered as proofs under the bankruptcy without being resworn.

Hackwood, solicitor, appeared for the debtor, and referred to the proceedings in a petition for arrangement under the 211th section of the Consolidation Act 1849, which had been adjourned into open court, and to which the present case might be assimilated.

The CHIEF JUDGE.—It seems very desirable, in order to avoid the expenses attending the making fresh proofs under the bankruptcy that this should be done. But I think that the trustee under the liquidation should be appointed the trustee under the bankruptcy. He may then consider the proofs that have been made, and which are upon the proceedings under the liquidation, and test their accuracy. I do not see that any inconvenience can result from this course to any of the parties interested. I think, therefore, that these proofs need not be resworn. The better course will be to transfer the proceedings under the petition for liquidation to the proceedings under the bankruptcy. In this way the affidavits of proof under the petition for liquidation will be annexed to and become part of the proceedings under the bankruptcy. Of course the trustee will see, as it is his duty to do, that no proofs are improperly placed upon the proceedings.

The following is the form of the order: "Whereas motion was this day made to the court by the petitioning creditors in this matter that the proofs of debts and proxies delivered to Alfred M. Hopkins as the duly appointed chairman at the first and second meetings of creditors duly held under a petition for liquidation by arrangement or composition with creditors filed by the said G. T. Goodbehere and G. F. Gaine, on the 12th Feb. 1870, and duly filed with the resolutions passed at such meetings might be considered as proceedings under the adjudication of bankruptcy of the said G. F. Goodbehere and G. F. Gaine, made the 11th April 1870, and that this court would make such further or other order as the circumstances of the case might require. Now upon reading the proceedings under the said bankruptcy, and also the proceedings under the petition for liquidation by arrangement, filed by the said G. T. Goodbehere and G. T. Gaine on the 12th Feb. last, and it appearing thereby that the adjudication of bankruptcy was obtained in pursuance of a resolution to that effect passed by the creditors at the second general meeting held under the said petition, and upon reading the affidavits of A. O. Bayley, this day filed, and upon hearing Mr. Bund, of counsel for the said petitioning creditors, and Mr. Hackwood, solicitor for the above named G. T. Goodbehere, this court doth order that the proceedings under the petition for liquidation be transferred from the office for registration of arrangement proceedings to the London Court of Bankruptcy, in Basinghall-street, and be filed in order of date with the proceedings in bankruptcy in this matter, and that all affidavits of creditors made and proxies given under the said petition for liquidation, and filed with the proceedings thereunder, be deemed to be and received as affidavits of debt, and proxies made and given by the several creditors respectively under the bankruptcy pro-

ceedings. And this court doth further order that the costs of the said petitioning creditors, and of the said G. T. Goodbehere of and incident to this application, be paid out of the estate of the said bankrupts."

Solicitors for the petitioning creditor, *Matthews and Matthews*.

Solicitors for the debtor, *Linklaters, Hackwood, and Addison*.

Friday, May 6, 1870.

Ex parte B. ; Re Sir W. Russell.

(Before the CHIEF JUDGE.)

Petition for liquidation—Adjournment of—Proof—May be taken off file—When.

Where the creditors at the first meeting, under a petition for liquidation pursuant to sect. 125 of the Bankruptcy Act 1869, only voted an adjournment, a proof which had been inadvertently admitted, and in respect of which the creditor had voted for the adjournment, may be taken off the file, under circumstances showing that the party in whose name the proof was made as the principal was only an agent in the matter.

This was an application to take a proof off the file, which had been placed thereon under the following circumstances:—Sir W. Russell had presented a petition for liquidation under the 125th sect. of the Bankruptcy Act 1869, and the first meeting was held on the 7th April. On that day B. tendered a proof for 9000*l.*, in respect of certain bills of exchange drawn by C. upon and accepted by the debtor. The proof was admitted and filed by the chairman, and the meeting was then adjourned to the 28th, B. voting for the adjournment. B. again attended on the 28th, and proposed to take his proof off the file upon the ground that the bills in respect of which the proof was made were in his possession as agent only for C., in whose favour they were drawn, and that consequently his proof was informal, and was inadvertently admitted. The chairman, however, felt a difficulty in permitting the proof to be withdrawn, and the matter was referred to Mr. Keene, the registrar, who doubted whether this could be done, and wished it to be mentioned to the court for its direction as a guide for the future.

Van Sandau (solicitor) now applied on behalf of B. that the proof might be taken off the file of proceedings upon the ground that it was placed there by mistake. Nothing was done at the meeting but voting for an adjournment. No injury could result to the creditors from the withdrawing of the proof, inasmuch as upon a question of adjournment the vote of the majority only was taken without reference to value. He contended moreover that no substantial resolution was passed, and until that had been done the proofs ought not to be filed. That was clear from the 282nd General Order of Jan. 1870. The meeting was not to be regarded as complete until the final adjournment had taken place, and the first meeting stood further adjourned to the 26th May. Until the resolution was complete, any creditor was by the 273rd General Order at liberty to withdraw his proof and retire from the meeting.

Linklater (solicitor) appeared for the trustees. The proof was placed upon the file within the three days specified in the 282nd rule. If all the circumstances attending the proof had been known at the time it would not have been admitted. [The CHIEF JUDGE.—You admit that the proof influenced the meeting.] Yes. At the meeting nothing was done but to vote the adjournment. No resolution was passed. [The CHIEF JUDGE.—In voting an adjourn-

C. CAS. R.]

REG. v. DAY AND COX.

[C. CAS. R.]

ment you only count numbers.] That is so, and absent creditors are not bound. But there was an absolute majority in number without reckoning this creditor.

The CHIEF JUDGE.—You must give me some reason why you ask to have the proof taken off the file.

Van Sandau.—The contention is, that until the resolution is passed, the proofs should not be placed upon the file, and in this case no substantive resolution was come to. Moreover the proof was made by B. in his own name as principal upon bills which were in his own possession only as agent for C., in whose favour they were drawn and accepted.

The CHIEF JUDGE.—I think that under the circumstances the proof may be withdrawn, provided it did not influence the majority.

Proof withdrawn.

Solicitors for the creditor, *Van Sandau and Cumming.*

Solicitors for the trustees, *Linklaters, Hackwood, and Addison.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 30.

(Before BOVILL, C. J., WILLES, J., BYLES, J., HANNEN, J., and CLEASBY, B.)

REG. v. DAY AND COX.

Practice—Abandoning counts—Indictment.

The first count of the indictment charged prisoners under the 9 Geo. 4, c. 69, s. 2, with being found on land, at night armed with a gun for the purpose of taking game, by A. and B., who had lawful authority to apprehend them, and that A. and B., being about to apprehend them, the prisoners with a weapon assaulted and wounded A. and B.

The second count charged an unlawful wounding.

The third and fourth counts charged a common assault.

At the close of the prosecution the counsel for the prosecution abandoned the last three counts, and elected to stand on the first count.

The jury returned a verdict of guilty of night poaching and a common assault.

Upon a question raised whether the prisoners could be convicted of a common assault upon the first count :

This court held that the prosecuting counsel having withdrawn the counts for common assault from the jury, the question ought not to be entertained.

Case reserved for the opinion of the Court for the Consideration of Crown Cases Reserved by the Right Honourable the Earl of Chichester, chairman.

At the General Quarter Sessions holden at Lewes, in and for the eastern division of the County of Sussex, on Tuesday, the 4th Jan. 1870, George Day and Thomas Cox were tried on the following indictment.

First count.

Sussex, to wit. 9 Geo. 4, c. 69, s. 2.—The jurors for our Lady the Queen upon their oath present that at the time of the committing of the assault hereinafter mentioned, to wit, on 10th Dec. in the year of our Lord 1869, in the night time, to wit, about the hour of eleven in the night of the same day, George Cox and Thomas Day were unlawfully in certain land, to wit, a certain wood called "Downe Copse," in the occupation of one Frederick Smith, situate at the parish of Barcombe in the county of Sussex, armed with a gun, for the purpose of then and by night as aforesaid, unlawfully taking and destroying game, and that they the said George Cox and the said Thomas Day, then so being in the said land or wood called "Downe Copse" as aforesaid, by night as aforesaid, armed with the said gun for the pur-

pose aforesaid, were found by one Joseph Packham, a servant of the said Frederick Smith, and by one Charles Osborn, a person assisting the said Joseph Packham, the said Joseph Packham and the said Charles Osborn having lawful authority to seize and apprehend the said George Cox and the said Thomas Day. And the jurors further present that they the said Joseph Packham and the said Charles Osborn being then about to seize and apprehend the said Thomas Day for the offence aforesaid, they the said Joseph Packham and the said Charles Osborn having lawful authority so to do, they the said George Cox and the said Thomas Day with a knife or some other offensive weapon which they the said George Cox and the said Thomas Day held in their hands did then unlawfully assault, wound, or offer violence towards the said Joseph Packham and the said Charles Osborn against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

Second count, unlawful wounding :

And the jurors aforesaid, upon their oath aforesaid, do further present that one Thomas Day, on the 10th Dec. 1869, did unlawfully and maliciously wound and inflict grievous bodily harm upon one Charles Osborn, with intent in so doing thereby then to resist and prevent the lawful apprehension of himself the said Thomas Day against the peace of our Lady the Queen, her crown and dignity, and against the form of the statute in such case made and provided.

Third count, common assault :

And the jurors aforesaid, upon their oath aforesaid, do further present that the said George Cox and the said Thomas Day, on the 10th Dec. 1869, did make an assault in and upon one Charles Osborn, and him the said Charles Osborn did beat, wound, and illtreat, and other wrongs to the said Charles Osborn, then did, to the great damage of the said Charles Osborn, against the form of the statute in such case made and provided.

Fourth count, common assault :

And the jurors aforesaid, upon their oath aforesaid, do further present that the said George Cox and the said Thomas Day on the 10th Dec. 1869, in and upon one Joseph Packham did make an assault, and him the said Joseph Packham did then beat, wound, and illtreat, and other wrongs to the said Joseph Packham, did, to the great damage of the said Joseph Packham, against the form of the statute in such case made and provided.

The following was the evidence :

B. H. Hunt, solicitor, knows the property of Mr. Smith in Barcombe ; the wood is a part of what he purchased.

Charles Osborn, gamekeeper to Mr. Selater, of Newick-park, which adjoins Mr. Smith's property,

Was out with J. Packham and Martin 10th Dec. at night ; Martin is in Smith's employ. I heard firearms about half-past eleven o'clock. I was about a quarter mile from Downe Copse-wood, Mr. Smith's, where the report came from. We made the best of our way to the place. When in the ride we heard some one in the underwood. We stood still, then Day came out, I seized him and said, "Hollo, my man, what are you up to here ? Something fell on my toes, which I believe to have been a gun. Day tried to get away. We had a dreadful struggle for five or ten minutes, and then I felt an open knife in his hand. I took hold of the blade ; I then seized him by the right wrist and called to Martin to assist, and told him about the knife. Cox then cried out to Day, "Kill the b——." Just at that moment I felt my hand cut by Day. Martin went back to help Packham, and then came to me and we tied Day's hands. I took a cock pheasant quite warm out of Day's pocket. On the road we had another struggle. Day had said, "Now, mate, let's have another try." Police-constable Dive and I went next morning to place where I first took hold of Day and found gun now produced.

Cross-examined :

We heard the men walking in the wood after we had got about 300 yards down the ride. It was a very dark night. I held his necktie with my left hand. I produce what I had in my hand. I struck him with this after he cut me with the knife. I hit him about the head twice. I was alone. We were both down. He first cut his necktie. I believe the knife was found shut at the same place as the gun next morning.

Joseph Packham, assistant gamekeeper to Mr. F. Smith :

On the 10th Dec. was out with Osborn and Martin on Mr. Selater's land, and about half-past eleven we heard firearms in Down Copse, and went in that direction and found Day and Cox. I took hold of Cox and tried to throw him down. I stepped into a ditch and fell. Cox had hold of my hair and tried to throw my head back in the ditch. I called Martin, and he came to my help. We struggled for five or ten minutes. Cox had a stick in his hand while we were struggling. Cox said "If you get up, you b—— I'll kill you."

C. CAS. R.]

REG. v. DAY AND COX.

[C. CAS. R.]

I had another struggle, and then I called to Martin again, and we then tied his hands. Martin then went to assist Osborn. Going along towards my house we had another struggle.

Cross-examined :

We had been out about half an hour before we heard the gun. When Cox said he'd kill me I had my life preserver.

James Martin, assistant gamekeeper to Mr. Sclater :

Was out with others. When we had been a few minutes in the wood, these two men came up. I assisted Packham and helped to hold Cox down. We were struggling near a quarter of an hour, and then Cox was quite still. Osborn called out for help, and said my man's got his knife. I went and assisted Osborn, and then went back again to help Packham. I heard him say he'd kill Cox. I tied his hands and afterwards Day's. After we were in the road we had another bit of a struggle.

Edward Dive, P.C. :

On the 11th Dec. was called to gamekeeper's house (Mr. Smith's gamekeeper) and received two prisoners. I searched both; found nothing on Day; on Cox a knife, some shot, and gun caps. About eleven same morning I found the gun loaded, now produced, four hats, and a cap, and a bludgeon. I also found this knife shut up just where the struggle took place.

After the evidence for the prosecution was closed, upon the application of the counsel for the prisoners, the last three counts were, with the consent of the court, abandoned, and the counsel for the prosecution elected to stand on the first count.

I directed the jury, on application of the counsel for the prosecution, that they might find the prisoners guilty of a common assault under the first count.

The verdict of the jury was "guilty of night poaching and a common assault," and, in answer to a question put by me, the jury said "they were of opinion the knife was not used intentionally."

Upon this finding, the counsel for the prisoners contended that such a verdict amounted to one of acquittal, and I and some of my colleagues having some doubts whether my direction was right in point of law, and whether, upon such finding, the prisoners could, under the circumstances, be convicted of a common assault, ask the opinion of the Court for Consideration of Crown Cases Reserved upon it.

If the Court shall be of opinion that the prisoners might, under the above circumstances, be convicted of a common assault upon the first count of the indictment, then sentence will be passed upon the prisoners; but if, on the other hand, the Court shall be of a contrary opinion, then a verdict of not guilty will be entered accordingly.

The prisoners were liberated on their own recognisances to appear to receive judgment when called upon.

CHICHESTER, Chairman of Quarter Sessions.

No counsel appeared to argue for the prisoners.

Willoughby for the prosecution. The first count of the indictment was framed upon the 9 Geo. 4, c. 69, s. 2, which enacts that where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein-mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross bow, firearms,

stick, club, or any other offensive weapon whatsoever, towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first second, or any other offence, be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner. Upon the first count the prisoner may be convicted of a common assault. It is not material that the assault should be committed with a weapon. If a person uses his fists only to commit the assault, he may be convicted under the above section. The word "assault" is in the indictment, and *Reg. v. Taylor*, 11 Cox Crim. Cas. 261; L. Rep. 1 C. C. R. 194, shows that upon an indictment for unlawfully and maliciously wounding or inflicting grievous bodily harm a verdict for a common assault may be returned. In *Reg. v. Yeadon*, 9 Cox Cr. Cas. 91; L. & C. 81, upon an indictment containing counts for inflicting grievous bodily harm, and unlawfully and maliciously cutting and stabbing and unlawfully occasioning actual bodily harm, it was held that verdict of guilty of a common assault might be returned. [WILLES, J.—At the trial the count for common assault was abandoned. How, then, can the prosecution ask for a conviction now for a common assault?] The attention of the court at the trial was drawn to the decisions, upon the authority of which it is contended that the prisoner may be convicted of a common assault on the first count. [WILLES, J.—*Reg. v. Taylor* is tenable on the ground that the second count, in that case occasioning actual bodily harm, was a good count at common law.]

BOVILL, C. J.—There is much difficulty in dealing with this case in consequence of the counsel for the prosecution electing at the trial to abandon the counts for common assault. After that course had been adopted it can scarcely be considered that the prisoner had a full opportunity afforded to him of presenting his entire defence to the jury. There is this further difficulty. The jury have found the prisoner guilty of night poaching and a common assault, and it would also appear on the record that he was acquitted of a common assault. We therefore think the conviction ought not to stand. It is unnecessary to say whether the prisoner might or might not be convicted of a common assault upon the first count.

WILLES, J.—The decision proceeds only on the ground of the course adopted at the trial in electing to abandon the charge of common assault. As to the question whether the prisoner could properly be convicted of a common assault upon the first count, I think that he could not. The abandoning the count for common assault was calculated to throw the prisoner off his guard, and prevent him being fully heard against it.

BYLES, J.—I also agree that the conviction cannot be sustained on the grounds stated by my learned brothers.

HANNEN, J.—The counsel for the prosecution having deliberately abandoned the count for common assault, I think this conviction ought not to stand.

CLEASBY, B. concurred.

Conviction quashed

CHAN.] *Re THE GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT (LIMITED).* [CHAN.]**Equity Courts.****COURT OF APPEAL IN CHANCERY.**Reported by T. BROOKSBANK and E. STEWART ROCHE, Esqrs.,
Barristers-at-Law*Feb. 19 and 26.*

(Before Lord Justice GIFFARD.)

*Re THE GENERAL COMPANY FOR THE PROMOTION OF
LAND CREDIT (LIMITED);**Ex parte THE INTERNATIONAL LAND CREDIT
COMPANY;**Ex parte EOS AND OTHERS.**int stock company—Registration under Companies' Act 1862—Registered office in England—All shareholders foreigners—All business and management abroad—Jurisdiction to wind-up—Shares transferable by delivery.**In order that a company may be one carrying on business within the meaning of the Companies' Act 1862, it must at the outset contemplate some description of management, and some business in this country, although in substance all its operations may be abroad.**If a company incorporated under that Act does not carry on business here at all, that is a reason why proceedings may be taken in this country in order to bring it to an end.**And when a company had its whole management, board of directors, shareholders, business, property, and assets exclusively abroad, but was registered under the Act of 1862, its memorandum of association providing that its registered office should be in England, and its articles empowering its directors to appoint a manager here, it was**Held (reversing the decision of Malins, V.C.), that the company was one within the meaning of the Companies' Act 1862, and could, on the circumstances justifying such an order arising, be wound-up by this court.**The memorandum of association of a company intended to be registered under the Act of 1862 may be signed exclusively by foreigners resident abroad, but they thereby contract to make themselves liable to the laws of England, and the Companies' Acts in particular. And a petition to wind-up such a company may be presented by a foreigner resident abroad.**The articles (cl. 14) authorised the directors to issue in respect of every share, on which one-half of the nominal amount had been paid, a scrip certificate to become transferable by delivery:**Held, that whether this provision was ultra vires on the Act or not, it would only render the articles void pro tanto, and not invalidate them altogether.**This case came before the court upon two appeal petitions against an order of Malins, V.C., dismissing petitions which had been presented by creditors and shareholders, praying that the General Company for the Promotion of Land Credit (Limited), might be wound-up by the court.**The circumstances were as follows:—**memorandum of association, so far as it is necessary to state it, was to the following effect:**The name of the company is the General Company for the promotion of Land Credit (Limited).**The registered office of the company is to be situated in England.**The objects for which the company is established are—**(a) To procure the capital for any company in any country, but particularly in the States of the German Confederation, formed for the purpose of carrying into effect any object based on land, such as companies formed for the purposes of agriculture, land credit, mortgages, and guarantees of or on real estate, and to issue the capital of such companies,**and to subscribe for, purchase and dispose of, the shares, bonds, and securities of these companies, &c., &c.**(b) To receive moneys on deposit, account current, or otherwise, with or without allowance of interest, and to receive on deposit title-deeds and other securities.**(c) To enter into treaty, act or unite with, assist, amalgamate, buy up, or absorb, any other company, either English or foreign, having for its object land or real estate.**(d) To act as managers or direct the management of State domains, of the property and estates of communes, corporations, foundations, or private persons . . . with power of advancing at a discount all or part of the accruing rents, royalties, or incomes. To advance money on, or purchase any such estates or properties, and to make resales thereof in every country where such resale is legally permitted.**The liability of the members is limited.**The nominal capital of the company is 5,000,000l. sterling, or 125,000,000f., divided into 500,000 shares of 10l., or 250f. each.**This memorandum was signed by seven persons, all of whom were apparently foreigners, but one of them resided in England.**Articles of association were registered at the same time, and the following were the clauses which it is important here to state:**Clause 6.—Any person having signed the memorandum of association or any application for shares in such form as the directors may determine, shall be deemed to have accepted the number of shares allotted to him in pursuance of such memorandum or application, and to have adhered to these presents.**Clause 7.—The company may, at the period of the subscription, receive such amount by way of deposit as they think fit, and may also from time to time make such calls upon the members in respect of all moneys unpaid on the shares as they may think fit, provided that the holders of shares of the first issue shall not be liable to pay more than 50l. per cent. on the nominal amount of their shares before the 1st Jan. 1873. The shares are "nominative" up to the period of delivery of the scrip certificates mentioned in clause 14.**Clause 14.—The directors may issue to every holder of any share, of whatever amount, on which one-half of the nominal amount has been paid, a scrip certificate to bearer in respect of such share, certifying that the holder of such certificate is the owner of the share, and that 50 per cent. of the nominal amount of such share has been paid.**Clause 16.—The company may commence and carry on business when shares to the amount of 2,000,000l. sterling have been subscribed for, and the deposits thereon paid.**Clause 21.—Every share in respect of which a scrip certificate in conformity with article 14 has been issued, can be transferred by mere delivery of such certificate.**Clause 23.—No person shall be registered as a transferee of a nominative share without the sanction of the board of directors previously given by resolution, provided that the registration of a transfer in the books of the company shall be prima facie evidence of such sanction having been given.**Clause 24.—Every instrument of transfer of a nominative share shall be presented to the company accompanied with the certificate of the share to be transferred, and such evidence as they may require to prove the title to the transferee. Upon such a certificate and evidence being produced, and the sanction of the board of directors being given, the company shall register the transferee as a member, and when registered, the instrument of transfer shall be deposited with and kept by the company.**Clause 39.—The first ordinary general meeting of the company shall be held in the course of the first six months of the year 1867, at a time and place on the continent of Europe, or at London, to be appointed by the directors. With that exception the ordinary general meetings shall be held once in every year, at such time and place as may be appointed by the directors.**Clause 67.—The management of the affairs of the company is confided to a director-delegate, with whom is associated a committee of management.**Various other clauses then defined the position, duties, and powers of the director-delegate, who was to be nominated for seven years, and to have the whole management of the company under the Board of Directors, of which he was to be chairman, and M. André Langrand Dumonceau was appointed to the office; seven directors, all apparently foreigners, were appointed likewise for seven years. Clause 128 provided that notices of dividends should be advertised in the *London Gazette* as well as in newspapers of several principal continental cities; the books were to be kept in such country and at such place as the directors should determine; that duplicates, copies, and extracts, so as to comply with the Companies' Act 1862, should be kept at*

CHAN.] *Re THE GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT (LIMITED).* [CHAN.]

the registered office; that in any country where the law might so permit the company might appear and defend in legal proceedings by its chairman or a special delegate; the company was authorised to refer all differences to arbitration, in accordance with the Railway Companies' Arbitration Act; and in the event of a dissolution of the company, liquidators should be nominated in conformity with the Companies' Act 1862, or any other statute then in force. The company's registered office was in Westminster, and for some years the provisions of the Companies' Act 1862 were strictly observed. From the returns made in 1868 it appeared that 3,000,000*l.* of capital had been subscribed and paid up, 1,000,000*l.* of which (representing 100,000 shares) were taken by an Edouard Mercier, on behalf of the International Land Credit Company, Brussels. Almost all the other shares were shares to bearer. The company carried on its business for a while, but all its subscribers and other shareholders were residing on the Continent; its whole business was abroad; its directors held their meetings at Brussels; its property consisted of shares in foreign companies and of lands in foreign countries, and it had no assets in England. Two petitions praying for its compulsory winding-up were presented—the one by the International Land Credit Company, the other by a Mons. Bos and others, creditors. It was not denied that the company had ceased to carry on business for more than a year, and that it was wholly unable to pay its debts; but the petitions were resisted, both before the Vice-Chancellor and on the appeal, on the ground that the Act of 1862 had no application to a company which was purely and entirely foreign. The learned Vice-Chancellor, adopting this view, dismissed both petitions, and both petitioners now appealed.

Fry, Q. C., and Hill supported the appeal of the International Company, and

Glasse, Q. C., and Waller that of Mons. Bos. They contended that under the Companies' Act this court had complete jurisdiction, the company having been registered in England and having its registered office here.

Bond Coxe, for creditors, supported the petitions.

Karslake, Q. C., and Locock Webb, for the company, consented to the winding-up order.

Sir Roundell Palmer, Q. C., Cotton, Q. C., and Kekewich, for shareholders, resisted the appeals, and argued (1) that as the company was altogether foreign there was no jurisdiction to make the order, but (2) if there was such jurisdiction the order was not *ex debito justitiæ*, but within the discretion of the court, and that it would be far more convenient to leave the foreign courts to deal with it. But the provision that shares should be issued to bearer was wholly illegal, and the introduction of that provision vitiated the whole of the articles.

The authorities referred to were

Re The Madrid and Valencia Railway Company
3 De G. & Sm. 127; on appeal 2 Mac. & G. 1

Peel's case, L. Rep. 2 Ch. App. 674; 16 L. T. Rep. N. S. 780;

Re The Factage Parisien, 11 L. T. Rep. N. S. 500, 556;

Re The Peruvian Railways Company, L. Rep. 2 Ch. App. 617;

Re The Commercial Bank of India, L. Rep. 6 Eq. 517;

Re The Natal, &c., Company, 1 H. & M. 639;

Re The Northumberland and Durham District Banking Company, 2 De G. & J. 357;

Oakes v. Turquand, L. Rep. 2 Eng. & Ir. App. 325; 16 L. T. Rep. N. S. 808;

Lindley on Partnership, 2nd edit. 1429;
The Companies' Act, 1862, ss. 6, 16, 18, 23;
The Companies' Act, 1867, s. 27;
The Companies' Seals Act 1864.

Without calling for a reply,

Lord Justice GIFFARD said:—I have listened to the arguments in opposition to this petition, and I have paid every attention I could to the judgment delivered by the Vice-Chancellor, but I confess that I cannot concur in those arguments, nor can I concur in that judgment. If I did, I think there would be great danger of gross injustice being done; whereas, on the other hand, if, as seems to be suggested, the winding-up order will not be operative abroad, at least no injustice can be done. If it will be operative abroad I think there will be an opportunity of the creditors getting payment according to the contract which was really entered into with them.

Now, who are the petitioners? I will take the first petition, simply because the order I propose to make will be on the first petition. The petitioners are a company, and they aver, and it is not contradicted, that there is owing to them nearly half a million of money, that they have served notice on the company, and the company have not paid them, and it is proved in evidence that they hold in this country capital amounting to something like a million. But it is said that this court cannot make the order to wind-up this company, first, because there are shares in the company transferable to bearer, and, secondly, because it so happens that the persons, property, management, and directorship of the company are abroad.

First of all, whether these shares are so transferable to bearer that the persons who hold them are not members of the company is not a matter upon which I think it the least essential for me in the present state of the case to give any opinion. Either those persons are members of the company, and ought to be on the register, or they are not members of the company, and then that portion of the articles is *ultra vires*; but it would not invalidate the partnership altogether, or render the company not a company, but would simply lead to this, that that portion of the articles *pro tanto* would be null and void.

Then with respect to the persons, property, management, and directorship of the company being abroad, we will see presently what the terms of the Act of Parliament are; but this I do not at all hesitate to say, that, in order that a company may be a company carrying on business within the meaning of this Act of Parliament, it must be a company which, at the outset, contemplates some description of management in this country, and some description of carrying on business in this country, although, in substance, all its operations may be abroad. I can see no reason why foreigners should not be persons to sign the memorandum of association. Just observe what the origin of this Act of Parliament was. When first joint stock companies were started, they were found unwieldy associations, and it was found, on the one hand, that they could not readily take proceedings, and, on the other hand, that proceedings could not readily be taken against them. In consequence of that a great number of Acts were passed, more or less imperfect, but the object was really to clothe an ordinary partnership with something in the shape of a corporate capacity, in order, on the one hand, that they might sue, and, on the other hand, that they might be sued. This is the whole history of these Acts relating to joint stock companies. The last Act of Parliament bearing upon the subject is the Act of 1862, and if we attend to its provisions I

[CHAN.] *Re THE GENERAL COMPANY FOR THE PROMOTION OF LAND CREDIT (LIMITED).* [CHAN.]

think we shall see plainly that any persons, if they contemplate a company which, according to the articles of association, may be managed, and may be carried on here, and may have a directorship here, they may lawfully sign that memorandum, and lawfully go through those forms which are necessary in order to have the company incorporated. Of course when a company of that description is started, no one can tell whether it will take in this country, or whether it will take in some other country—no one can tell how many persons resident in this country will become shareholders—no one can tell whether the chief part of the business of this company may be carried on here, or may be carried on elsewhere. But if it is lawful for persons to start a company of this description, when once the company is started it is an incorporation, and if it does not carry on business here, the fact that it does not carry on business here is a reason why persons may take proceedings here with a view of bringing that company to an end. All the clauses that are material are these, the 6th, the 11th, the 16th, the 18th, and the 23rd, and they amount to this: That a number of persons may agree together, if they so think fit, to form a corporation; and if the thing which is contemplated by the articles is a thing which is a company within the meaning of the Act, I cannot possibly see why foreigners should not as well sign the memorandum of association as any other persons; and, therefore, the thing to be considered is this: Looking at this memorandum of association, and looking at these articles, did, or did not, the memorandum of association—did, or did not, the articles—contemplate such a thing as is mentioned in this Act, or, in other words, is it within the contemplation of these two documents that there should be a real management of the company carrying on business, and having the seat of its business here in this country?

Now let us turn to the memorandum. [His Lordship stated the effect of that instrument.] It is quite clear that it is a company which in its nature might be entirely carried on within the limits of this country if the parties so contemplated. It contemplated operations here, and it contemplated operations abroad also, and no doubt the great majority of companies that have been formed here do contemplate operations abroad. Then we come to the articles of association. [His Lordship read or referred to the 6th, 7th, and 14th clauses, saying as to the last of these:] I do not intend to express any opinion upon it; as I said before, if it is altogether *ultra vires* on the Act; it does not make the whole thing void, but it would be void *pro tanto*. On the other hand, if it is to be considered as a clause allowable under the Act, it would follow that, although you transferred shares to bearer, you who happen to be on the list of shareholders do not get rid of your liability unless you take care that some other person is put there in your place. [His Lordship then read or referred to the 16th, 23rd, 24th, and 39th, and said:] Then we come to the clauses relating to the directors, and I think they commence with No. 67. True it is, all the directors, with the exception of one gentleman, who, I think, is said to be a foreigner resident in London, were persons who are described as residing abroad, and, for aught I know, would have been likely to reside abroad; but if we go through these provisions we shall see that there are express provisions for delegating the management to particular persons, and express provisions which might so be acted upon as that, with the utmost facility, you could have a substantial management in this country. These clauses I do not think it necessary to read through; but it is quite clear that if there had been a large business here, and a large body of shareholders here, or anything of that description,

although there was a fixed board of directors abroad appointed for seven years, these directors could have delegated their powers to anyone (there is express provision to that effect) for the purpose of management; and, assuming that there had been business here, and a body of shareholders here, and a management here, as there might have been consistently with these articles, there would have been, unquestionably, a company carrying on business distinctly within the meaning of the Act.

Then there is the 128th clause, which provides for advertisements of dividends; the 149th, which has reference to defences to legal proceedings in any country; and the 150th clause giving power to the company to refer matters to arbitration consistently with the Railway Companies' Arbitration Act.

What we have is this: True it is that the memorandum of association was signed entirely by foreigners, and if it had contemplated originally that there should be no management here, if it had contemplated originally that there should be no business here, I can understand the application of the arguments which have been addressed to me. But this is a company which contemplated a management here and a business here, and it was a company which was incorporated here according to the forms prescribed by the law of this country, and I must add that every shareholder who became a member of this company contracted to make himself liable to the laws of this country as laid down, amongst other things, in this Act of 1862.

That being so, the petitioners whom we have here are persons who, as I have stated, are creditors to the amount of nearly half a million of money, and who hold in this concern capital amounting to a million. We have the company appearing, and the company raises no objection. We have shareholders, I believe to a very large amount, appearing, and saying the company ought not to be wound-up. But what I asked was this; first of all, if it be proved that this is a corporation within the meaning of this Act of Parliament, and if it be proved, and I must assume it to be proved, that there is no other corporation of the same name carried on elsewhere, for there is no evidence that there is any other corporation,—what practical remedy have these creditors except by getting the order to wind-up? Their debt is proved. I cannot take it that their debt is a foreign debt, and it matters not to me whether it is a foreign debt or not, but their debt is not disputed, neither is it disputed that these petitioners are entitled to shares to the amount which I have stated.

But it is said that in my discretion, assuming the matter to be within the Act, I am not to make the order because there must be a difficulty in working it out. But the question is this: every one of the persons who contracted to be members of this company contracted to make himself liable to the particular law enacted by that Act of 1862. But besides that, it is said that, although I make this order, recourse will probably have to be made to the foreign courts. But, according to all the principles of international law, the foreign courts will recognise this company as having originally started as an English corporation, and the foreign courts will recognise this winding-up, and will aid in carrying out any direction that may be given under this winding-up. And, besides that, I can see no difficulty whatever, because the main object, as far as I can see, of winding-up this company will not be for the purpose of making and enforcing calls, but will be for the purpose of realising its property, and I can see no reason why this company's property should not be realised abroad in the hands of the liquidators just as easily as it could be realised abroad under the direction of the courts there.

CHAN.]

SAMSON v. SAMSON; LARKINS v. SAMSON.

[CHAN.]

That being so, my opinion is that there would be clearly a denial of justice if the order to wind-up was withheld. It is neither more nor less than the mode of execution which in reality this court gives to a creditor against a company unable to pay its debts. It has been said in more cases than one that, where a creditor presents a petition, the order to wind-up is due to him *ex debito justitiæ*. I do not say that that would apply in every case; but in this case most undoubtedly I think the creditor is entitled to the order to wind-up, and I think that the greatest injustice would be done if that order was refused, and I have no doubt that in some shape or other it can be worked out. Therefore the course which I propose to adopt is this, to make a winding-up order on both of the petitions. I should say with respect to the second petition, although it is filed by a foreigner it makes no difference in the world. It is a substantial sum of money, and there being no evidence whatever as to what the remedy abroad may or may not be, and there being no evidence whatever as to the difficulty of acting on the order abroad, or as to whether those persons could get their money abroad, I cannot suppose for one moment that gentlemen to whom thousands of pounds are owing would have come to this court merely for the purpose of getting an order which would not be effective, and I have no doubt that for many purposes this order will be effective abroad.

Discharge the Vice-Chancellor's order, and make an order for winding-up upon both petitions. The costs of the company and the petitioners out of the estate, the appellant adding his costs of the appeal to his costs in the court below.

Solicitors for the petitioners, *Baxter, Rose, and Norton; Holmes; J. R. Bailey.*

Solicitors for the parties opposing the appeal, *Freshfields.*

Saturday, March 12.

(Before Lord Justice GIFFARD.)

SAMSON v. SAMSON.

LARKINS v. SAMSON.

Practice—Fund in court—Payment out—Lapse of years—Personal representative—Beneficiaries—Evidence—Costs.

Where a fund has been for many years standing in court without any application being made respecting it, the court will not order it to be paid to the personal representative of the person to whose account it is standing, without strict proof who are the persons beneficially interested in it. It is not enough to prove the legal title of the personal representative, and to show that there are persons beneficially interested in the fund. But when in such a case application is made for payment out of court of a fund, which is successful only as to part of it, the costs of all parties to the application will be ordered to be paid out of the whole fund.

This was an appeal from a decision of the Master of the Rolls with respect to the payment out of court of a sum of 489*l.* 6*s.* 10*d.*, which was standing to the credit of the above causes.

The suit of *Samson v. Samson* was for the administration of the estate of one John Jones. The suit of *Larkins v. Samson* was supplemental to it. The decree in *Samson v. Samson* was made on the 23rd Feb. 1775, and by it various accounts were directed to be taken, among which was an account of the debts of John Jones. One of the creditors of John Jones was a person named Thomas Hodgson, and by the Master's report it was found that the sum of 288*l.* was due to him from the estate of John Jones. A sum of money to answer that debt was

carried over in these suits to the separate account of Thomas Hodgson, and this sum remaining unclaimed, ultimately, by accumulations of interest, increased to 489*l.* 6*s.* 10*d.*

Thomas Hodgson by his will, dated the 17th July 1782, bequeathed the residue of his personal estate to one Richard Burleigh absolutely. Thomas Hodgson died on the 26th Jan. 1786, and his will was proved by the executors thereby appointed, of whom Richard Burleigh was one. Richard Burleigh died in Jan. 1798, having by his will given the residue of his personal estate to David Locke and William Locke, upon certain trusts, subject to which he gave it to David Locke and William Locke, equally between them, share and share alike. William Locke died in July 1825, and David Locke in June 1840. All the trusts created by the will of Richard Burleigh of the residue of his personal estate prior to those in favour of David Locke and William Locke determined. David Locke and William Locke both died intestate. Administration to the estate of Thomas Hodgson and Richard Burleigh was granted to one Anne Locke, and she presented a petition in these suits, praying for payment of the 489*l.* 6*s.* 10*d.* to her as administratrix *de bonis non* of Thomas Hodgson. Some other persons, who made out by strict evidence that they were some of the next of kin of David Locke and William Locke, joined in the petition. It was also proved that the petitioners and the persons on whom the petition was served would be the sole next of kin of David Locke and William Locke if some persons who were specified were dead, as to whom, however, the evidence did not prove that they were dead. When the petition came before the Master of the Rolls his Lordship adjourned it into chambers, and in the course of the proceedings there advertisements of the usual kind were inserted in the *London Gazette* and other newspapers calling upon the next of kin of David Locke and William Locke to come in and prove their claims within a time limited. No person, however, came in within the time fixed. The petition went again before the Master of the Rolls, and was heard by him, and he then made an order that the costs of all parties to the petition, and of the investigation of title upon the adjournment into chambers, and consequent thereon, including any costs, charges, and expenses properly incurred by Anne Locke as administratrix, and in endeavouring to ascertain the persons entitled to the fund, should be paid out of the sum of 305*l.* 16*s.* 8*d.*, being five-eighths of the whole fund, as to which five-eighths the petitioners and the respondents to the petition had strictly proved their beneficial interest, and that (subject to the payment of legacy duty) the residue of the 305*l.* 16*s.* 8*d.* should be paid to Anne Locke as the administratrix of Thomas Hodgson.

From this order an appeal was presented by the petitioners and respondents together.

Before the appeal came on to be heard, further evidence was adduced, the result of which was that the beneficial title of the appellants was strictly proved as to two-thirds of the whole fund.

Jessel, Q.C., Wickens, and J. M. Solomon, on behalf of the appellants, contended that the court would not require such strict evidence of title as it would in a case where it was administering a fund. In these suits the court was administering the estate of John Jones, not that of Thos. Hodgson, who was only one of the creditors of Jones, to whose separate account this fund happened to have been paid. The fund ought to be paid to the administratrix, leaving her to distribute it among the persons entitled to it, there being sufficient evidence to satisfy the court that there was a reasonably certain equitable title behind the legal title. At all events, all the costs ought to be paid out of the whole fund, as

CHAN.]

CHICHESTER v. THE MARQUIS OF DONEGALL.

[CHAN.]

the investigation which had taken place was for the benefit of all the persons entitled, whoever they might be. They cited :

Skeffington v. Budd, 9 Cl. & Fin. 219 ;
Loy v. Duckett, Cr. & Ph. 305 ;
Ex parte Ram, 3 My. & Cr. 25 ;
Orrok v. Binney, Jac. 523.

Lord Justice GIFFARD said that he should be inclined to hold the rule of the court tightly in cases of this kind, rather than to relax it. If the administrator took on himself to investigate the beneficial title at all, he ought to make his investigation complete. But all the costs, including those of the appeal, must be paid out of the whole fund, and, subject to that, two-thirds of the fund would be paid out to Anne Locke as administratrix of Thos. Hodgson. The residue must remain in court, but liberty to apply would be reserved.

Solicitor : Solomon.

Friday, March 18.

(Before Lord Justice GIFFARD.)

CHICHESTER v. THE MARQUIS OF DONEGALL.

Practice—Production of documents—Mortgagee—Right to refuse production—Indenture of settlement—Sealing up part thereof.

By an indenture of settlement certain estates were limited to such uses as father and son should jointly appoint, and in default of appointment, then to the use of the father for life, and, after various intervening limitations, then to the use of C. for life, with remainder to the use of his sons successively in tail male, with divers remainders over. In exercise of the joint power of appointment, the father and son executed a mortgage of the estates, and the settlement, with other title-deeds, were delivered over to the mortgagees. After this C. filed a bill against the father (the son then being dead) the mortgagees and other persons interested in the property, to obtain discovery of the contents of the settlement in order to ascertain his own interest. The bill contained a prayer that C. might be at liberty to redeem the mortgage. The mortgagees, by their answer, insisted that they were not bound to produce any of the deeds in their possession, or to disclose their contents until they had been paid their mortgage debt and costs. C. took out a summons for production of the settlement, though he had never tendered to the mortgagees what was due to them. James, V.C. made an order that the mortgagees should produce the settlement, but with liberty for them to seal it up except such parts thereof as, according to an affidavit to be made by them, related to the parcels and other limitations in favour of the plaintiff.

On appeal, it was

Held, that as there was no question as to the validity of the mortgage-deed, and as the mortgagees were willing to be redeemed by the plaintiff, he was not entitled to have the settlement produced without redeeming the mortgages.

But, *semble*, that if he had been entitled to production of the settlement he would have been entitled to see the whole of it.

This was an appeal by mortgagees, defendants to this suit, from an order made by James, V.C., that they should produce to the plaintiff a certain indenture of resettlement which was in their possession as one of the title-deeds to the mortgaged property, the plaintiffs having made no tender to them of their mortgage-debt and costs.

The plaintiff in the suit was Mr. G. A. H. Chichester ; the defendants were the Marquis of Donegall, the trustees of the property, and the mortgagees. According to the statements in the bill

certain estates were by the indenture of resettlement in question, which was dated the 23rd July 1851, limited to such uses as the Marquis of Donegall and his eldest son, the Earl of Belfast (who before the institution of this suit had died unmarried), should jointly appoint, and in default of such appointment, then to the use of the Marquis of Donegall for life, with remainder to the Earl of Belfast for life, with remainder to his first and other sons successively in tail male, and, other intervening estates, to the use of the plaintiff for life, with remainder to his first and other sons successively in tail male, with divers remainders over.

The bill also stated that the Marquis and the Earl had, by an indenture, dated the 5th May 1852, appointed the estates comprised in the re-settlement to one Robert Hildyard, by way of mortgage. His representatives were defendants to this suit. The bill prayed that the plaintiff might be at liberty to redeem the mortgages, and that the Marquis and the mortgagees might be compelled to produce the indenture of re-settlement and the other title deeds to the plaintiff. The mortgagees put in an answer in which they admitted that the re-settlement was in their possession, but insisted that they were not bound to produce any of the deeds relating to the mortgaged property, or to disclose their contents, until they were paid their principal, interest, and costs. The plaintiff, not having made to the mortgagees any tender of what was due to them, took out a summons for production of the indenture of re-settlement. Vice Chancellor James made this order :—" This court doth order that the applicant, his solicitors, and agents, be at liberty at all reasonable times, upon giving reasonable notice, to inspect, at the office of the defendants' solicitors, the indenture of the 23rd July, 1851, admitted by the defendants in their answer to be in their possession, custody, or power, and to take copies, &c., &c., but previously to the said inspection the said defendants are to be at liberty to seal up the said indenture, except such parts thereof as, according to an affidavit to be made by them, relate to the parcels and the limitations in favour of the plaintiff."

From this order the present appeal was brought.

Amphlett, Q. C. and Montagu Cookson, for the appellants, contended that the order of the Vice-Chancellor was opposed to the ordinary rule of the court, that a mortgagee could not be called upon to produce his title-deeds till he was paid what was due to him. The power under which the mortgage in this case was made overrode all the limitations of the settlement, and the plaintiff's title was, therefore, entirely subject to that of the mortgagees. They cited

Balls v. Margrave, 4 Beav. 119 ;
Lady Shaftesbury v. Arrowsmith, 4 Ves. 66 ;
Kennedy v. Green, 6 Sim 6 ;
Latimer v. Neate, 4 Cl. & Fin. 570 ;
Re Mark's Trust-deed, L. Rep. 1 Ch. App. 429 ; 4 L. T. Rep. N. S. 37, 318 ;
Crisp v. Platel, 8 Beav. 62 ;
Jones v. Jones, Kay App. 6 ;
Browne v. Lockhart, 10 Sim. 420 ;
Dendy v. Cross, 11 Beav. 91 ;
Gill v. Eyton, 7 Beav. 155 ;
Patch v. Ward, L. Rep. 1 Eq. 436 ; 13 L. T. Rep. N. S. 406 ;
Addison v. Walker, 4 Y. & C. 447 ;
Wigram on Discovery.

C. R. Freeling, for the plaintiff, urged that there were very special circumstances in this case. The ultimate limitations of the equity of redemption formed no part of the title of the mortgagees. The case was the same as if a mortgagor, when making the mortgage, had settled the equity of redemption, and the settlement had got into the

[CHAN.]

PEEK v. EARL SPENCER.

[CHAN.]

hands of the mortgagee. He could have been compelled to produce it, as it would have been no part of his title. At any rate, the order of the Vice-Chancellor, limited as it was, could do no possible harm to the mortgagees. He cited

Glover v. Hall, 2 Phil. 484.

Amphlett, Q. C. was heard in reply.

Lord Justice GIFFARD said:—No doubt the rule is of very considerable importance which protects mortgagees from producing their title-deeds, and the question in this case really is whether the circumstances are such as to show that it is an exception to that rule. The bill is the ordinary bill filed for the purposes of redemption; the mortgagees put in their answer and admit the defendant's title to redeem, but say that they will not show him the title-deeds. The answer of the plaintiff to that is this: the plaintiff says there was a settlement executed—father tenant for life, son tenant for life, with remainder to his issue in tail—under which he is entitled, and that settlement contained a power in the father and son to sell or mortgage, and subject to that a settlement was made. I do not think it possible to put the case higher than if it had been the case of an original mortgage, and there had been contained in that original mortgage an equity of redemption vested in several persons all claiming through the mortgagor. Can there be any ground on which that is to form an exception to the rule? I take the rule of the court (by which I am bound) to be, rightly or wrongly, that if a mortgagor executes a mortgage and hands over the title-deeds, he cannot see those title-deeds after the mortgage becomes absolute, without paying to the mortgagee his principal, interest, and costs. Of course, if that is so as to the mortgagor, the same thing would apply to his devisee. If a mortgagee by a different instrument settles his estate, the same thing would apply to a person claiming through him, and I cannot hold that the parties claiming under that settlement stand in any better position than if there had been an actual deed effecting the mortgage. That being so, I can see no reason why the ordinary rule of the court should be departed from; and certainly if there is any reason for showing anything, I cannot see why you should stop short of showing the whole; because it is in fact a title-deed of the mortgagee, and it applies in every part and parcel of it to the mortgagee's title. If there were anything like a title paramount, or anything like a collateral right, or any other matter of that sort, then I could understand that this might be an exception to the rule; but to my mind all those parties are mortgagees, and I take the rule to be as between mortgagor and mortgagee, that the right time for redemption being passed, and the mortgage not being impugned, if the plaintiff wants to see the mortgage-deeds he must pay the principal, interest, and costs, or go on to get his redemption decree, and subsequently a right to redeem.

The result will be, that the order of the Vice-Chancellor will be discharged. On technical grounds I do not think there is anything to be said. The appellants must have their costs in the court below, but there will be no costs of the appeal.

Solicitors for the appellants, *Cookson, Wainwright, and Co.*

Solicitor for the respondent, *Charles Appleyard.*

PEEK v. EARL SPENCER.

Practice—Amendment of bill—Adding new plaintiff—Making new case—Evidence taken de bene esse—To what extent it could be used.

In Dec. 1866 P. filed a bill against the Lord of the Manor of W. The bill was on behalf of P. and all the freehold and copyhold tenants of the manor, its object being to have their rights declared in respect of the common of the manor, and to restrain the lord from doing anything in derogation of those rights. The plaintiff alleged himself to be both a freehold and a copyhold tenant of the manor. The defendant filed his answer in Aug. 1868, and he thereby denied that the plaintiff was a freehold tenant of the manor. He also alleged that, according to the custom of the manor, no copyhold tenant was entitled to common rights, unless he held a certain quantity of land; and he denied that the plaintiff held land of sufficient quantity to be entitled to those rights. In Feb. 1870 the suit not having been heard, the plaintiff obtained from the Master of the Rolls leave to amend his bill by adding H. as co-plaintiff with himself, H. being alleged to be the holder of land formerly copyhold of the manor, but which had been enfranchised, the bill containing an allegation that the enfranchisement according to the custom of the manor left untouched the common rights attached to the land so enfranchised. The case made by the plaintiff in support of this amendment, was that the rights of the enfranchised copyholders could not be protected in this suit unless the amendment were made. In pursuance of the leave thus obtained the bill was amended, and it then became a suit by P. and H., on behalf of themselves and all other persons who, being owners of lands and tenements, freehold or copyhold, or formerly copyhold of the manor of W., were respectively entitled to the commonable and other rights thereafter mentioned. Upon appeal it was held that the amendment was irregular, as the effect of it was to introduce a new plaintiff with an entirely new case.

And, *semble*, that this would have been equally so if the new plaintiff had been merely another copyhold tenant of the manor.

The name of the new plaintiff was accordingly ordered to be struck out.

It appeared that evidence *de bene esse* had been taken in the suit on the part of the defendant.

Semble, that this evidence could not have been used in the suit as amended.

This was an appeal by the defendant from an order made by the Master of the Rolls, giving the plaintiff liberty to amend his bill in this suit, and the notice of appeal motion asked also that the amendments which had been made in pursuance of the leave given by the Master of the Rolls might be ordered to be struck out.

The bill was filed on the 1st Dec. 1866. The plaintiff was Mr. Henry Wm. Peek, and he sued "on behalf of himself, and all other the freehold and copyhold tenants of the manor of Wimbledon," the object of the suit being to have the rights of the plaintiff and the persons on whose behalf he sued declared with respect to a common of the manor called Wimbledon Common, and to restrain the defendant, the lord of the manor, from doing anything to interfere with those rights.

The plaintiff alleged his title thus: The plaintiff, H. W. Peek, is seised in fee of a freehold house and other freehold hereditaments holden of the lord of the said manor, and is a freehold tenant of the said manor. He is also a copyhold tenant of the said manor, and has been duly admitted and now holds to him and his heirs, at the will of the lord, and according to the custom of the manor, certain

CHAN.]

PEEK v. EARL SPENCER.

[CHAN.]

hereditaments, consisting of two cottages and garden.

There was an allegation that the tenants were entitled to various specified rights in relation to Wimbledon Common, and there was this allegation: "The court rolls also contain entries showing, and it is the fact, that the tenants of copyhold lands which had been enfranchised were entitled to all the rights, privileges, and customs which belonged to the tenants of such copyhold lands before they were enfranchised."

On the 13th Aug. 1868, the defendant filed his answer, and thereby denied that the plaintiff was a freehold tenant of the manor. He admitted that the plaintiff was, in fact, a copyhold tenant of the manor, but he said that according to the custom of the manor, those copyhold tenants only who held at least a "virgate" of land (i.e., about fifteen acres) were entitled to common rights, and he asserted that the plaintiff's holding was less than a "virgate."

The plaintiff, on the 25th Jan. 1870, took out a summons, asking that he might be at liberty to amend his bill by adding the name of the Rev. Edward Huntingford, as co-plaintiff with himself, and otherwise, as he might be advised. In support of this application an affidavit was made by the plaintiff and his solicitor, Mr. Robert Hunter, the material portions of which were as follows: "The time within which an order of course could be obtained to amend the plaintiff's bill was extended by successive orders made in chambers until the 19th Aug. 1869, when an order of course to amend on payment of 20s. costs to the defendant was obtained. The time within which the bill could be amended under the order of the 19th Aug. 1869, has been enlarged by successive orders made in chambers, and expires on the 1st Feb. 1870. The plaintiff has been advised to amend his bill by adding or substituting words to the description of the class on whose behalf this suit is instituted, so as to include therein, as well all persons who, being owners of land formerly copyhold of the manor of Wimbledon (but now enfranchised), are entitled to the commonable and other rights claimed by the bill, as the freehold and copyhold tenants of the said manor entitled to such commonable rights, and by adding the name of the Rev. Edward Huntingford, clerk, as a co-plaintiff with the plaintiff in this suit, and by making sundry other amendments in the bill. The plaintiff is advised that there is a large class of enfranchised copyholders of the manor who are entitled equally with the present copyhold tenants thereof to the rights claimed by him in this suit, and that, unless such amendments as aforesaid are made in the bill, such rights, so far as they are vested in the said enfranchised copyholders cannot be protected in this suit, or without another suit being instituted on behalf of the said enfranchised copyholders, a course the adoption of which would occasion great additional expense. The said Edward Huntingford is an owner of land formerly copyhold of the manor, but now enfranchised, and the plaintiff is advised that the concurrence of the said Edward Huntingford as such co-plaintiff as aforesaid is necessary for the complete and perfect representation of the class of persons entitled to the rights claimed by the plaintiff in this suit. The said Edward Huntingford has consented in writing to be a co-plaintiff." This summons was heard by the Master of the Rolls on the 23rd Feb. 1870, and his Lordship made this order—"That the plaintiff be at liberty to amend his bill by adding the name of the Rev. Edward Huntingford, clerk, as a co-plaintiff with himself in this cause, and otherwise as he may be advised." It was ordered also that the plaintiff should pay the costs of the adjournment into court. The plaintiff,

in pursuance of this order, amended his bill. The material amendments were these:—Henry William Peek and the Rev. Edward Huntingford were made co-plaintiffs, and they sued "on behalf of themselves and all other persons who, being owners of lands and tenements, freehold or copyhold, or formerly copyhold, of the manor of Wimbledon, are respectively entitled to the commonable and other rights hereinafter mentioned, except the defendant hereto," and the bill alleged that E. Huntingford was seised of certain freehold land and hereditaments, now of freehold tenure, but formerly copyhold of the manor. There was also some alteration made in the prayer.

It should be mentioned that on the 13th Feb. 1867 an order was made, on the application of the defendant, for the examination of witnesses *de bene esse*, and under that order the examination of some witnesses was taken.

Jessel, Q.C. and C. T. Simpson, for the appellant, contended that by the amendment the nature of the suit was entirely changed, and to allow this was contrary to the practice of the court. The question was not a mere question of costs, for if the plaintiffs had to institute a new suit they would lose the benefit of certain material admissions which had been made by the defendant in this suit. Also, in the suit as amended the evidence which had been taken *de bene esse* could not be used. They also argued that the amendments which had been actually made were not such as were authorised by the order of the Master of the Rolls, though they admitted that his Lordship intended to authorise such amendments. They cited

Milligan v. Mitchell, 1 My. & Cr. 433.

Joshua Williams, Q.C. and Whateley, on behalf of the plaintiffs, contended that the course which had been taken by the Master of the Rolls was authorised by the case of *Maughan v. Blake*, L. Rep. 3 Ch. App. 1; 17 L. T. Rep. N. S. 278. [GIFFARD, L. J.—The new plaintiff then sued in respect of the same debt. No new subject matter was added.] The rights of the enfranchised copyholder were the same as those of an ordinary copyholder. [GIFFARD, L. J.—Even if another copyholder were added as plaintiff, his title would be a distinct one.]

Without calling for a reply,

Lord Justice GIFFARD said that when the plaintiff filed his bill in Dec. 1866, he was aware of the existence of enfranchised copyholds. Then in Aug. 1868, his title was as clearly as possible put in issue by the defendant's answer, and yet he did not make this application for leave to amend until Feb. 1870, and the only case which he made by his affidavit in support of the application for leave to amend was in truth that his suit was defective for want of parties. That was all it amounted to. It would not be just to the defendant to allow a new plaintiff to be here introduced with an entirely new title. The cases of the two plaintiffs were entirely distinct; the one might well fail while the other might succeed. Mr. Huntingford's name must be struck out, but the plaintiff could still make any other amendments which he might be advised. The order of the Master of the Rolls as to costs would remain undisturbed, and the costs of the appeal would be costs in the cause. The defendant must give an undertaking not to object to the suit for want of parties, because no enfranchised copyholder was made a party to the suit. His Lordship thought that the evidence already taken *de bene esse* could not have been used in the suit if the name of the new plaintiff had remained.

Solicitors for the plaintiffs, *Fawcett, Horne, and Hunter*.

Solicitors for the defendant, *Frere, Cholmeley, Forster, and Co.*

CHAN.]

MOSTYN v. MOSTYN; *Ex parte* BARRY—ORRELL v. BUSCH.

[CHAN.]

March 19 and 21.

(Before Lord Justice GIFFARD.)

MOSTYN v. MOSTYN; *Ex parte* BARRY.

Counsel and client—Fees—Proof against estate of client—Conveyancing business—Payment by client to solicitor—Part payment by solicitor to counsel—Moral obligation—Implied promise—Legal debt—Solicitor—Agent.

As a general rule part payment of a debt raises in law an implied promise to pay the balance. But part payment will not change what is originally a mere moral obligation into a legal debt.

A solicitor is not an agent for his client to the extent of having authority to pledge his client's credit to counsel in respect of the payment of fees.

It is, therefore, necessary in order that counsel should be able to recover fees from a client that the client should have made an express promise to pay them, as nothing beyond a moral obligation arises from the mere existence of the relation of counsel and client.

If a solicitor retains counsel on behalf of his client, and pays him part of his fees, afterwards receiving the whole of them from the client, and counsel has no legal right to recover the balance due to him from the client. Nor would the counsel have any such right against the client if the solicitor had received from the client only that part which he had paid to the counsel.

This was an appeal by Mr. W. W. Barry, a Chancery barrister, from an order of James, V.C. refusing to admit a claim made by Mr. Barry against the estate of the Hon. T. E. M. L. Mostyn, which was being administered in this suit, to prove for the sum of 44*l.* 10*s.* 6*d.*

This sum was the balance of fees due to Mr. Barry in respect of some conveyancing business in which he was employed on behalf of Mr. Mostyn from 1857 to 1860. Mr. Barry was instructed in the ordinary way by Mr. Westmacott, who was Mr. Mostyn's solicitor, and fees amounting to 69*l.* 10*s.* 6*d.* thus became due to him. 250*l.* was paid by Mr. Westmacott on account, but the balance remained unpaid at the time of Mr. Westmacott's death. The whole amount of fees was included in a settlement of account afterwards made between the executors of Mr. Mostyn and the executors of Mr. Westmacott. Mr. Barry, in an affidavit which he made in support of his claim, said as follows:

I shall be prepared on the hearing for adjudication of my claim to establish the legality of the debt on three independent grounds. (1.) That a moral obligation moved by a previous request, as is the relation between counsel and client, is sufficient consideration according to law to support a promise to pay, and that part payment is an implied promise to pay the remainder of the debt. (2.) That part payment is an admission or acknowledgment of debt on any account, so that the question of liability can no longer be disputed. (3.) That a counsel may enter into an actual contract with his client, and that part payment constitutes a contract by implication of law.

W. W. Barry appeared in person in support of his claim, and in addition to the arguments contained in his affidavit, urged that a solicitor was an agent for his client, and, like any other agent, could make a contract binding on his client. He referred to the following authorities:—

Lampleigh v. Braithwaite, 1 Sm. L. C. 139; *Hobart*, 105;

Cripps v. Davis, 12 M. & W. 159;

Kennedy v. Broun, 13 C. B., N. S., 677;

Marsh v. Rainsford, 2 Leon. 111;

Pulling on Attorneys, pp. 85, 102;

Caldwell v. Ball, 1 T. R. 205;

Doe v. Hale, 15 Q. B. 171;

Peacock v. Harris, 10 East, 104;

Hoggins v. Gordon, 3 Q. B. 466;

Hobart v. Butler, 9 Ir. Com. Law, 157;

Mingay v. Hammond, Cro. Jac. 482;

Marsh v. Kavenford, Cro. Eliz. 59;

Bateman v. Pinder, 3 Q. B. 574;

Waters v. Tompkins, 2 Cr. M. & R. 723;

Egan v. Guardians of Kensington Union, 3 Q. B. 935;

Virany v. Warne, 4 Esp. 47;

Burroughes v. Clarke, 1 Dowl. P. C. 48;

Grove v. Cox, 1 Taunt. 165;

Sinclair v. Great Eastern Railway Company, 21

L. T. Rep. N. S. 752;

Russell on Arbitrators.

Jones Bateman, for the plaintiff, and

Law, for defendants, to the suit, were not called upon.

Lord Justice GIFFARD said that the facts of the case really raised a very narrow proposition, which was enough to dispose of the case. Mr. Barry was employed by a solicitor in the ordinary way, and he had no direct communication with the principal, and the principal had paid the counsel's fees to the solicitor. It was enough for the actual decision of this case to say that when counsel was employed in the ordinary way by a solicitor, and the client had paid the counsel's fees to the solicitor, the counsel could not recover the fees from the client. But even if there had been no payment by the client to the solicitor, his Lordship would have come to the same conclusion. It had been very properly admitted in the argument that whether the business were litigious or not, the claim of counsel against his client amounted to nothing more than a moral obligation, and that the counsel could not maintain an action for his fees unless there had been an express promise by the client to pay them. But it was argued that part payment by the solicitor raised an implied promise to pay the balance. His Lordship, however, had no hesitation in saying that a solicitor had no general authority to pledge his client's credit to counsel, and, that being so, a mere part payment was not enough to convert a moral obligation into a legal debt. The judgment in the case of *Kennedy v. Broun* was most accurate in reasoning and sound in law, and afforded a landmark in cases of this kind. Applications like the present had never been successful, and, speaking for himself, his Lordship hoped that he should never see the day when counsel would be able to recover his fees in an application of this kind. The appeal must be dismissed with costs.

Solicitors, A. Rawlinson and Darley.

Tuesday, March 29.

(Before Lord Justice GIFFARD.)

ORRELL v. BUSCH.

Practice—Transfer of cause from one branch of the court to another—Concurrent suits—Right of plaintiff to select his court—Costs of motion to transfer.

A suit having been instituted in one branch of the court in relation to a particular subject-matter, a person who, being aware of the institution of that suit, files a bill relating to the same subject matter in a different branch of the court, will be ordered to pay the costs of a motion to transfer the second suit to the branch of the court in which the first suit was instituted.

In a case where such an order for transfer was made, it was also ordered that the persons whose conduct had necessitated a transfer should pay any extra fees to counsel occasioned by the transfer.

This was an original motion to transfer the suit

CHAN.]

SYMES v. HUGHES.

SYMES v. HUGHES.

[ROLLS.

of *Orrell v. Busch* from the court of James, V. C., in which it had been instituted, to the court of Stuart, V. C., in which another suit of *Busch v. Jervis*, relating to the same matter, had been previously instituted. The motion also asked that the plaintiffs in *Orrell v. Busch* might pay the costs of and incident to the motion.

The bill in *Busch v. Jervis* was filed on the 11th Feb. 1870. The object of the suit was the administration of the trusts of the will of John Orrell, deceased, and the prayer of the bill also asked that, if necessary, new trustees of the will might be appointed. The plaintiff, Gustavé Busch, and two of the defendants, George Langworthy Jervis, and James Potter, had been appointed trustees of the will by an order made in lunacy on the 7th May 1869. Robert Orrell, the other defendant, was the first tenant for life under the will, and the bill contained an allegation that the previously acting trustees had made overpayments to him. It also alleged that questions had arisen between Busch and Jervis and Potter, the other trustees, and that consequently it was necessary to have the trusts administered by the court.

Before any step had been taken in this suit, the bill in *Orrell v. Busch* was filed on the 19th March 1870, by Robert Orrell and his two infant children, he being named as their next friend. The children were entitled to an interest in the trust property, subject to their father's life estate. All the three trustees were made defendants, as were also some other beneficiaries.

This bill stated the fact that the suit of *Busch v. Jervis* had been already instituted, and mentioned what was the relief asked therein. It contained an allegation that Busch would not act in harmony with the other trustees, and prayed that he might be removed and another trustee appointed in his place, and that he might be in the mean time restrained from receiving any part of the trust estate, and that a receiver might be appointed; and also that he might be restrained by injunction from prosecuting the suit of *Busch v. Jervis*. On the same day on which the bill in *Orrell v. Busch* was filed, notice of motion was given for the 24th March for an injunction and a receiver in the terms of the prayer of the bill. On the 24th March this motion was ordered by James, V.C. to stand over until the next motion day. On the 25th March Busch gave notice of the original motion to transfer.

Fry, Q. C. and *W. F. Robinson*, on behalf of the motion, urged that the second suit, if a proper one at all, should have been instituted in the same court as the first suit which related to the same matter, and of the existence of which the plaintiffs in the second suit were fully aware when they filed their bill. Under these circumstances, the plaintiffs in the second suit ought to pay the costs of this motion. They cited

The Merchant Banking Company v. Maud, 15 W. R. 992

Little, Q. C. and *A. G. Marten*, for the plaintiffs in *Orrell v. Busch*, relied upon the right which the General Orders of the court gave to a plaintiff to choose his own court. Moreover, in this case one of the objects of the second suit was to put an end to the prosecution of the first, and in addition to this the second suit sought a relief much more extensive than that which was sought for by the first. Stuart, V.C. had in no practical way any seisin of the matter, as no step whatever had been taken in his court. If the transfer took place it would lead to additional expense, as other leading counsel would have to be retained upon the motion for an injunction and receiver pending in the suit of *Orrell v. Busch*.

Without calling for a reply.

Lord Justice GIFFARD said that it was plain in this case that the plaintiffs in the second suit were fully aware of the institution of the first suit in another branch of the court, and that the same facts were to a considerable extent involved in both suits. The system of racing for decrees was a very inconvenient and unseemly system; and it ought not to be encouraged. No doubt under the General Orders, a plaintiff had the right of selecting his own court; but it was not intended that a plaintiff knowing that a suit had been commenced in one branch of the court should file a bill in a different branch of the court, as to the same matter. This application being for a transfer must be granted; but as no hard and fast rule as to the costs in a case of this kind had been yet laid down, his Lordship should in the present case leave the Vice-Chancellor to deal with the costs of the motion when he dealt with the merits of the case. But, for the future, his Lordship would lay down an invariable rule, that where a person who knew of a suit having been instituted in one branch of the court chose to institute another suit as to the same matter in a different branch of the court, that person must pay all the costs occasioned by a motion to transfer the second suit to the court in which the first suit was instituted, and if any additional fees to counsel should have to be incurred in this case they must be paid by the person whose conduct had made the transfer necessary.

Solicitors: *Sharpe, Parker, and Co.*; *Chester and Urquhart*; *J. Elliott Fox*.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

March 7 and 9.

SYMES v. HUGHES.

SYMES v. HUGHES.

Parol trust—Statute of Frauds—Fraud upon creditors—Illegal purpose—Bankruptcy Act 1861, s. 110—Arrangement with creditors.

A. executed a voluntary assignment of certain leasehold property, with the view of defeating his creditors, to B. upon a parol trust for himself (A.). B. died, and A. applied to B.'s representative to reassign the property, which he refused to do, whereupon A. filed a bill to compel him to reassign the property:

Held, that the illegal purpose with which A. had executed the assignment having failed, did not preclude him from obtaining relief.

A., soon after the execution of the voluntary assignment, was adjudicated bankrupt, but an arrangement was made under sect. 110 of the Bankruptcy Act 1861, by which it was agreed that all proceedings under the bankruptcy should be stayed, and his property given up to him upon condition that in the event of the bill for a reassignment being successful he should pay a certain composition to his creditors:

Held, that the arrangement was valid under sect. 110 of the Bankruptcy Act 1861, notwithstanding the fact that it did not provide for the entire distribution of the bankrupt's estate among his creditors.

On the 1st May 1866 the plaintiff, who was entitled to a leasehold house and land at Abergavenny, subject to a mortgage, assigned the same to a Mrs. Maddox upon a parol trust for himself. The assignment was made with the view of defeating a creditor who had recovered judgment against the plaintiff; it was expressed to be made in consideration of 170*l.*, and a receipt for

ROLLS.]

Re ANGLO-ROMANO WATER COMPANY; Ex parte WRIGHT.

[ROLLS.]

that amount was endorsed on the deed and signed by the plaintiff, but no money was really paid, and the plaintiff was not indebted to Mrs. Maddox, who, it was proved, frequently asserted that she was only a trustee for the plaintiff.

Mrs. Maddox died in Jan. 1866, having in the previous month assigned the property to the defendant, who was her son-in-law. This assignment contained a covenant by the defendant to provide Mrs. Maddox with board and lodging during her life.

The defendant having refused to reassign the property to the plaintiff, he instituted the first of the above suits praying that it might be declared that the defendant was a trustee of the property for the plaintiff, and that he might be ordered as such trustee to reassign it to him.

On the 9th Jan., 1868, the plaintiff was adjudicated a bankrupt. At a meeting of his creditors held a few days afterwards, the plaintiff proposed that the proceedings in bankruptcy should be stayed upon these conditions: that all his property should by deed be revested in him, and that he should by the deed covenant to prosecute the first of the above suits, and, if successful in it, to pay a composition of 2s. 6d. in the pound to his creditors. This proposal, which was accepted at the meeting by the requisite majority, was duly confirmed at a second meeting of creditors, held in the following month, and soon afterwards a deed embodying the terms of the proposal was executed, and the plaintiff obtained his order of discharge. The second of the above suits was occasioned by the bankruptcy. It stated the circumstances of the bankruptcy and arrangement, and prayed that the first suit might be carried on as if the plaintiff had never become bankrupt.

Southgate, Q. C., and *Freeling*, for the plaintiff, contended that the present suits being for the benefit of the plaintiff's creditors could not be resisted on the ground of the plaintiff's intention to defeat his creditors.

Haynes (Sir *Richard Baggallay, Q. C.*, with him) contended that the illegal purpose with which the assignment was made rendered it impossible for the court to assist the plaintiff. He cited

Duke of Bedford v. Coke, 2 Ves. Sen. 116;

Curtis v. Perry, 6 Ves. 747;

Taylor v. Chester, 21 L. T. Rep. N. S. 359;

L. Rep. 4 Q. B. 309.

He also contended that the arrangement was invalid under the 110th section of the Bankruptcy Act 1861, as it did not provide for the entire distribution of the plaintiff's estate amongst his creditors. On this point he cited

Drew v. Collins, 6 Ex. 670.

Southgate, Q. C. was heard in reply on the question of illegal intention. He cited

Platamore v. Staple, Coop. 250;

Birch v. Blagrove, Ambl. 264;

Davies v. Otty, 35 Beav. 280.

Lord ROMILLY, after stating the facts of the case, said that as the plaintiff was now in effect suing on behalf of his creditors, the illegal purpose for which he had executed the assignment had failed, and that being so, there was nothing to prevent the court from assisting him. As to the objection that the arrangement between the plaintiff and his creditors was invalid under the 110th section of the Bankruptcy Act 1861, his Lordship was of opinion that that section should be construed liberally, and that the arrangement was valid. There must, therefore, be an order in the terms of the prayer of the bill.

Solicitors for the plaintiff, *Bridges, Sawtell, Heywood, and Ram*.

Solicitor for the defendant, *R. J. Child*, for *Sayce, Abergavenny*.

Saturday, March 19.

Re ANGLO-ROMANO WATER COMPANY;

Ex parte WRIGHT.

Company—Winding-up under supervision—Liquidator—Rights of contributory—Passing accounts.

The A. company resolved to wind-up, and to confirm an agreement for the transfer of its assets and liabilities to the M. Company, in consideration of certain shares in the M. Company which were to be transferred to the shareholders of the A. company.

W., a shareholder in the A. company, accepted shares in the M. Company under this agreement, and gave up his certificate of shares in the A. Company, and the liquidator removed his name from the list of contributories of the A. Company, which was being wound-up under the supervision of the court:

Held, that W. was still a contributory of the A. Company, and as such was entitled to call upon the liquidator to pass his accounts.

Adjourned summons.

The above company was formed and registered in 1865 under the Companies Act 1862, with the object of supplying the city of Rome with water; but the company met with great difficulty in carrying its object into effect, in consequence of its having a foreign domicile, and the great majority of its shareholders being Englishmen.

In Dec. 1867, accordingly, resolutions were passed to wind-up the company under supervision, and to confirm an agreement which had been provisionally entered into with an Italian company called the Acqua Marcia (afterwards the Acqua Pia) Company, for the transfer of the assets and liabilities of the Anglo-Romano Water Company to the Acqua Marcia Company, in consideration of certain shares in the latter company, which were to be handed over to the liquidator of the Anglo-Romano Water Company, and, after payment of the expenses of liquidation, were to be transferred to the shareholders in proportion to the number of shares held by them in the English company.

The resolutions passed in Dec. 1867, were confirmed at a meeting held on the 18th Jan. 1868. On the 25th of the same month a supervision order was made, and calls were afterwards made on English shareholders.

Mr. William Wright, a former shareholder in the Anglo-Romano Water Company, who had paid up his calls in full and had had the proportion of shares in the Acqua Marcia Company to which he was entitled under the agreement transferred to him, and whose name had been removed from the list of contributories of the Anglo-Romano Water Company, took out the present summons that the liquidator might be ordered to bring in and pass his accounts of receipts and payments within one week from service on him of the order to do so.

The liquidator resisted the application on the ground that Wright, having accepted the shares in the Acqua-Marcia Company instead of those which he had held in the Anglo-Romano Company, and having had his name removed from the list was no longer a contributory of the company.

Jessel, Q. C. and *J. N. Higgins*, in support of the summons, contended that the liquidator had no authority, without the sanction of the court, to make any compromise with a contributory or to remove his name from the list. After the supervision order was made the liquidator could only pass his accounts in the judge's chambers, and any contributory was entitled to an order to pass the accounts. Moreover, if there should be any surplus of the proceeds of the Italian shares after payment of the expenses of the liquidation, Wright would be entitled to a share of

ROLLS.] *Re SMITH, KNIGHT, AND CO. (LIMITED); BATTIE'S CASE—BARLOW v. BAILEY.* [V.C. S.]

it; and he was, therefore, entitled to the order asked for.

Sir Richard Baggallay, Q. C. and Langley, for the liquidator contended that even if there was jurisdiction under the Companies Act 1862, to compel the rendering of accounts by the liquidator in the case of a voluntary winding-up under supervision, there ought to be a special ground for doing so; and moreover, that Wright, having ceased to be a contributory, had no interest in the matter and was not entitled to the order asked for.

Lord ROMILLY.—I have always considered it to be the rule that every contributory is entitled to call upon the liquidator to pass his accounts at reasonable intervals, provided that the application is made *bonâ fide*, and not for purposes of vexation. It is true that Mr. Wright gave up his certificate of shares in the Anglo-Romano Company, and accepted shares in the Acqua Marcia Company instead, but he is nevertheless still a contributory of the former company, and as such is entitled to call upon the liquidator to pass his accounts. There may be a surplus after payment of the expenses of liquidation, and as he never relinquished his right to share in such surplus he will be entitled to do so. I will not now decide whether the liquidator will be required to vouch his accounts or not; that will depend on the nature of them.

Solicitors for Mr. Wright, *Mercer and Mercer.*

Solicitors for the liquidator, *Flux, Argles, and Rawlins.*

Monday, March 21.

Re SMITH, KNIGHT, AND CO. (LIMITED);

BATTIE'S CASE.

Company—Contributory—Transfer of shares to escape liability—False description of transferee—Directors with no power to reject transferee.

A., by a deed of transfer purported in consideration of 195l. to transfer certain shares in a company, which was soon afterwards ordered to be wound-up, to B., who was described in the transfer as of F. in the county of Cumberland, gentleman. The transfer was duly registered, and B.'s name was inserted on the register. The liquidator nearly four years afterwards discovered that B. at the date of the transfer was A.'s coachman, and resided with his master in Sussex, that his description in the transfer and that of the attesting witness were false, and that no consideration had been given for the shares.

The directors had no power under the articles of association to reject any transferee.

On an application by the liquidator to have B.'s name removed from the list of contributories and A.'s fixed thereon in his stead:

Held, that as the directors had no power to refuse a transferee, and as the transfer was out and out, the application must be refused, but, under the circumstances, without costs.

Adjourned summons.

This was an application by the liquidator of the above company, which was being wound-up, that the name of one Battie might be removed from the list of contributories, and that the name of Mr. Breach might be fixed thereon in his stead.

The circumstances of the case were as follows:—

In May 1866, Mr. Breach, who was then the registered owner of seventy shares in the company, executed a deed by which he purported, in consideration of 195l., to transfer sixty-five of the shares to Battie, who was the coachman of the trans-

feror, and the transfer was duly registered. In the transfer deed Battie was described as of Faugh, near Brampton, in the county of Cumberland, gentleman; and the attesting witness, Charlotte Giles, was described as of the County Hotel, Carlisle.

In Nov. 1866 the winding-up commenced.

In Feb. last the liquidator's suspicions were raised by a letter, which he found addressed by Breach to the secretary of the company. On making inquiries he discovered that Battie was Breach's coachman, and that he resided at St. Clement's, near Burwash, in the county of Sussex (Breach's residence), and not at the place described in the transfer, and that Charlotte Giles, the attesting witness, was a schoolmistress from Windsor, who was on a visit at St. Clement's at the date of the execution of the transfer.

No consideration was really given for the transfer, but the nominal consideration, 195l., was about the market price of the shares without a guarantee to register. Breach had attempted to sell the shares, but had been unable to find a purchaser who would guarantee registration.

The directors had, under the articles of association, power to reject a transfer only in the event of the transferor being indebted to the company, or refusing to produce the certificate of title to the shares to be transferred: (See *Re Smith, Knight, Co., Weston's case*, 19 L. T. Rep. N.S. 337; L. Rep. 4 Ch. 20.)

Sir Richard Baggallay, Q. C. and Lindley for the liquidator, contended that the transfer was a fraud upon the company on account of the nominal consideration, and the false description of the transferee and the attesting witness, and also that it was not an out an out transfer, and that for these reasons it was void. They cited

Re Imperial Mercantile Credit Association, Williams's case, L. Rep. 9 Eq. 225n.

Jessel, Q. C. and Caldecott, for Breach, were not called upon.

Lord ROMILLY said that if the directors had had power to reject a transferee the transaction would have been a fraud upon the company, and he should have set it aside; but inasmuch as they had no such power, they were obliged to register the transfer, and as, on the evidence, his Lordship was of opinion that the transfer was out and out, he could not set it aside. The application must, therefore, be refused, but under the circumstances no costs would be given to Breach.

Solicitors for the liquidator, *Ashurst, Morris, and Co.*

Solicitor for Breach, *Mayhew.*

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

BARLOW v. BAILEY.

Thursday, May 12.

Practice—Nuisance—Application for leave to inspect works to ascertain the cause of refused.

A nuisance must be proved by something altogether external.

Where, therefore, the plaintiffs, after filing a bill to restrain the defendants from manufacturing certain chemical preparations causing a nuisance, applied for leave to inspect the defendants' works for the purpose of ascertaining in what manner the nuisance was occasioned, the court refused the application.

This was a motion on behalf of the plaintiffs in

V.C. S.]

Re NATIONAL PROVINCIAL LIFE ASSURANCE SOCIETY.

[V.C.M.]

the above suit, for an injunction to restrain the defendants from manufacturing certain chemical products, and for liberty to inspect the defendants' works and premises at all reasonable times without notice. The facts were shortly these:—

The plaintiffs were the owners of the Bilston Mills, at Sedgley, in the county of Stafford. The defendants, under the name of the Galen Chemical Company, manufactured salts of ammonia, upon premises situated within fifty yards of the plaintiffs' mills. The plaintiffs' case was that the defendants' manufactory constituted a nuisance. They alleged that the defendants, besides ammoniacal, used other chemical preparations, the particulars of which they were unable to ascertain, and they charged that they ought to be allowed to inspect the defendants' works and premises for the purposes of discovery.

The plaintiffs prayed for an injunction in the usual form, but did not ask for liberty to inspect the defendants' premises.

Dickinson, Q.C. and Cracknall, in support of the motion, submitted that as the nuisance was the result of certain chemical preparations used by the defendants, the exact products of which the plaintiffs were unable to ascertain or particularise without inspection, they were entitled to an order for that purpose. If this were permitted, some plan might be arrived at for avoiding the nuisance and staying the litigation. The mere fact that the plaintiffs had not prayed for leave to inspect the defendant's premises could not be urged as a sufficient reason for refusing the application. They cited

Ennor v. Barwell, 1 De G. F. & J. 529; 3 L. T. Rep. N. S. 170; 4 Ib. 597.

North, contra, contended that as the order asked for formed no part of the relief prayed by the bill, the court had no jurisdiction to make it. Even if the court had jurisdiction, an inspection was not at all necessary to the plaintiff's case. If a nuisance existed, it was sufficient that it was externally apparent without internal evidence as to its exact source.

The VICE CHANCELLOR.—There is no necessity for a plaintiff to pray by his bill for liberty to inspect a defendant's works for the purpose of ascertaining in what manner a nuisance which he seeks to restrain is occasioned, if such inspection will assist him in showing his right to relief. Discovery is granted in various forms, without being prayed for, where the purposes of justice require it; for instance, in the production of documents. I can see no difference between inspecting a defendant's books and papers and inspecting his premises if the object with which it is done is necessary to the justice of the case. Before granting such relief, however, the court always considers whether it would be justified by the nature of the case in interfering with the defendant's property. In the present case there is nothing to warrant such an interference. The plaintiffs seek for an inspection with a view of showing that there is a nuisance, but a nuisance must be proved by something altogether external, and if there is a nuisance at all, it must be one which, although the cause of its existence is internal, it is itself externally apparent. The application, therefore, must be refused, but without costs.

Solicitors for the plaintiffs, *Field, Roscoe, Field, and Francis*, for *T. Leviter Smith*, Birmingham.

Solicitors for the defendants, *Bower and Cotton*.

V.C. MALINS' COURT.

Reported by G. T. EDWARDS and G. I. F. COOK, Esqrs.,
Barristers-at-Law.

—
Jan. 21 and 28.

Re NATIONAL PROVINCIAL LIFE ASSURANCE SOCIETY.

Novation of contract—Transfer of business—Assurance office—Policy of assurance—Annuity—Winding-up.

F., the holder of a life policy effected in the N. office, having knowledge that the N. office had transferred its business to the B. office, and that the B. office subsequently transferred its business to the A. office, paid the premiums on the policy from 1858 until the dropping of the life in 1869 to the A. office.

Held, that there was a novation of the contract, and that the N. office was released from liability on the policy.

K. held an annuity granted by the N. office in 1854, in consideration of a sum of money then paid. *K.* had notice of the transfer of the business of the N. office to the B. office, and of the transfer of the business of the B. office to the A. office, and received his annuity from the A. office for thirteen years.

Held, on the authority of the Family Endowment Society (*L. Rep.* 5 Ch. 118; 21 *L. T. Rep.* N. S. 775), that there had been no novation of the contract, and the N. office retained its liability to meet the annuity.

In this case two petitions for the winding-up of the National Provincial Life Assurance Society were heard together. This society was incorporated under the 7 & 8 Vict. c. 110 (Joint Stock Companies Registration Act), and was registered on the 18th July 1851. In Aug. 1856 the society transferred its business and assets, and purported to transfer its liabilities to an association which was provisionally, but never completely, registered as a joint-stock company, called the Bank of London and National Provincial Insurance Association; from that time the society ceased to carry on business. In Oct. 1858 the National Provincial Assurance Association transferred its business and assets to the Albert Life Assurance Company, the Albert taking upon itself the liabilities of the association, and from that time the association ceased to carry on business.

The Albert Life Assurance Company carried on business until Aug. 1869, when it stopped payment, and on the 17th Sept. 1869 it was ordered to be wound-up by the court.

The first petition was presented by William Fleming, the holder of a policy of the society for 1000*l.*, on the life of Christopher George Carroll, effected by Carroll in Oct. 1855, and assigned to Fleming in Feb. 1856. The policy was on the terms of participation in profits, and the premiums (25*l.* 10*s.* 10*d.*) were payable half yearly to the directors of the society for the time being, at the office of the society, and the policy contained the usual proviso that the capital, stock, funds, and corporate property of the society should alone be charged and liable under it, and the shareholders should not be personally liable. Fleming knew, though it did not appear that he received formal notice of the successive transfers of business from the society to the association and from the association to the Albert Company, and he paid the premiums on the policy to the association in 1857 and 1858, and to the Albert Company from 1858 until the death of Carroll, in June 1869. The receipts for the premiums given by the association and the Albert Company referred to the policy but did not mention the name of the society.

V.C. M.]

Re NATIONAL PROVINCIAL LIFE ASSURANCE SOCIETY.

[V.C. M.]

The Albert Company, for two or three years after the transfer to it of the business of the association, was in the habit of issuing a special form of receipt for premiums on policies effected either with the society or with the association, in which the premium was expressed to be received for the renewal of policy in the Bank of London and National Provincial Insurance Association, and it was further stated that the liability of the Bank of London and National Provincial Insurance Association, by reason of the death of the assured under such policy, had been taken by the Albert Life Assurance Company, subject to the payment to them of all premiums and moneys now or hereafter to become due and payable under the same policy. Fleming had lost his receipts for 1859 and 1860, but he stated that he did not remember having received any receipts in the above form, and that he felt certain that he should have rejected any such receipt, as he always looked to the society as liable to him under the policy. In cross-examination he admitted that if the Albert Company had not become insolvent he should not have thought of applying to the society, and that he looked to the Albert Company as responsible. A bonus on the policy was declared by the Albert Company in 1863, and was added to the amount assured in the books of the company, but it did not appear that Fleming had notice of it.

In June 1869 Fleming sent in his claim on the policy to the Albert Company; on the 15th July the secretary of the Albert wrote to say that the company admitted the claim (subject to a claim for reduction of the amount, in consequence of an error as to the age of the assured), and that the money would be payable on the 11th Oct.; on the 8th Oct. Fleming's solicitor wrote to the secretary to inquire whether payment would be made on the 11th, and received a reply that all payments were suspended for the present. On the 8th Nov. he presented his petition to wind-up the society.

The second petition was presented by William Kettle, the holder of an annuity granted by the society in 1854, in consideration of 400*l.* then paid to the society. Kettle received his annuity from the society until 1859, from the association in 1857 and 1858, and from the Albert company from 1858 until it stopped payment. Before presenting this petition he presented a petition to wind-up the association, but that petition was dismissed by Vice-Chancellor James.

Glasse, Q. C., and Wickens, for Fleming, contended that this case was analogous to and covered by the *Family Endowment Society*, L. Rep. 5 Ch. 118; 21 L. T. Rep. N. S. 485, on app. 775, where it was held that a transferor company was liable to an annuitant receiving his annuity from a transferee company.

Willcock, Q. C., and Cottrell, upon Kettle's petition, also relied upon the *Family Endowment Society* (*sup.*).

Pearson, Q. C., and Higgins, for the official liquidators of the Albert Company, and Cotton, Q. C., and Rodwell, for shareholders in the National Provincial Life Assurance Society, opposed the petitions on the ground that the petitioners, by respectively paying the premiums on the policy to and receiving the annuity from the Insurance Association and the Albert Company, had released the society from liability under its contracts with them. With regard to Fleming's petition, he had accepted the Albert Company as his debtor in the policy in substitution for the society. They cited

Kearns v. Leaf, 1 H. & M., 681;

Bishop v. Scott, 7 L. T. Rep. N. S. 570;

Re Medical Invalid and General Life Assurance Society, V.C. J. 18 Dec., 1869;

Re Catholic Publishing and Bookselling Company
2 De G. J. & S. 116;

Evans v. Coventry, 8 De. G. M. & G. 835;

Re Smith, Knight, and Co., Ex parte Gibson, L. R. 4 Ch. 662; 20 L. T. Rep. N. S. 835.

Glasse, Q. C., in reply.

In the course of the argument the Vice-Chancellor intimated his opinion that Kettle's case could not be distinguished from the case of the *Family Endowment Society* (*sup.*), and the opposition to an order on that petition was not pressed.

The VICE-CHANCELLOR stated the facts, and proceeded:—Before I go any further, I may say that this is perfectly clear—that, although this is an office which had discontinued its business before this petition was presented for a period of thirteen years, although Mr. Kettle, an annuitant, holding an annuity granted in 1854, had from 1856 ceased to receive his annuity from this office, I am bound, by the authority of Vice-Chancellor James, confirmed by the Court of Appeal, in the case of the *Family Endowment Society*, to say that this being identically the same case as that of the *Family Endowment Society* upon Mr. Kettle's petition, there must be the usual order to wind-up, and that indeed is a point which for some time has not been disputed. The only point upon which I have heard the argument, and which I have now to decide, is whether I must also make the order upon Mr. Fleming's petition, or whether that petition should be ordered to stand over, or whether I should make no order upon it, or whether I should send Mr. Fleming's claim into chambers to be adjudicated upon as a debt. That is what I have now to decide. Now, with regard to Mr. Fleming's case, I am bound to say, after the argument I have heard, that I think there is a remarkable difference between the position of a person who is the grantee of an annuity, which Mr. Kettle is, and a person who is the holder of a policy of assurance. In the case of an annuitant, the grantors, the insurance office, once for all receive the consideration. The consideration for Mr. Kettle's annuity was paid to the National Provincial Assurance Society, and they undertook the payment of the annuity; and although he has subsequently received his annuity from the Albert, it might well be, as James, V.C., and the Lord Chancellor and the Lord Justice considered, that he was at liberty to treat the Albert merely as the agent of the original grantors to pay the annuity. But when I look at the position of a policy-holder it appears to me to be very different. In this case Mr. Carroll originally insured his life in 1855, and the policy was assigned to Mr. Fleming so early as Feb. 1856, more than thirteen years, therefore, before the Albert stopped payment, and for all purposes, Mr. Fleming must be treated as if he had originally effected the policy. It is not denied that Mr. Fleming received notice in the year 1856 that the original office in which the assurance was effected intended to discontinue their business, and it is not attempted to be denied that he was perfectly aware that they had ceased to carry on their business as an assurance office, and that they had handed the business over to the Bank of London Association; nor is it attempted to be denied that when the Bank of London Association in their turn gave up in 1858, he had notice that the business was handed over by them to the Albert. From that time downward Mr. Fleming has looked to the Albert only; to them he has paid his premiums; he has taken receipts from them; and if he had been determined to keep alive the liability of the National Provincial Society, when he was told in 1856 that that society—which was not an old-established office that had obtained a great reputation or great stability, and

V.C. M.] *Re* INTERNATIONAL LIFE ASSURANCE SOCIETY AND HERCULES ASSURANCE CO. [V.C. M.]

in which he had paid at the utmost two premiums—was about to discontinue business and hand over its business to another office, I think upon every principle of justice and common sense he was bound to say, "I do not acquiesce in this, I do not like the office to which you are going to hand me over, I will not go to the Bank of London Association." And in the same manner in 1858, he might have said to the Bank of London Association, "I will not go over to the Albert. You must before you transfer your business settle with me. You must give me a policy in another substantial office that I shall be satisfied with. I must be satisfied that the premium will be the same, and, providing I get a substantial office, it is perfectly immaterial to me what that substantial office is." It has been argued that it would be absurd to apply to such a case as this the doctrine of this court, that if a person stands by and sees a particular thing done, or allows persons to act upon the belief that a particular state of things exists, while he knows it does not exist, he is thereby bound; but I am of a contrary opinion. I think it is quite proper that such a principle should be applied to such a case as this. Mr. Fleming knew in 1856 that the persons composing the National Provincial Assurance Society were about to alter their position; he knew that they were going to act upon the assumption that when they got the policyholders to go to the other office and pay their premiums, they would thereupon give up business, and cease to be liable for the consequences of having carried on the business. If he did not intend to acquiesce it was his duty to say so. But he did not take that course. Without a word of objection, without remonstrance, he paid his premiums for thirteen years to another office; and does not justice require that he should be considered as having, although not possibly by express contract, yet by silence, acquiescence, and conduct, adopted such a course as binds him to adopt the new office, and to relinquish the liability of the old one? In my opinion, decidedly it does. If this case were *res integra*, if there had been no decision of the Court of Appeal, I should, with entire satisfaction to my own mind, have come to the conclusion upon this transaction that it would be most inequitable to allow Mr. Fleming to resort to the old office after he has for so many years paid his premiums to, and taken receipts from, the new office. The form of receipt issued by the Albert, twelve years ago, if he received it in that form, told him that it was a premium on the renewed policy of the Bank of London, and National Provincial Life Assurance Association, and that their liability under the policy had been taken by the Albert Company subject to the payment to the Albert of the premiums hereafter to become due. Even if he did not receive that form of receipt, I am of opinion that he has had notice of the fact as distinctly as if he had received the receipt in that form. I believe, however, although it is not proved, that he must have received it, because it is proved that it is the form in which they issued all their receipts. I said, in the course of the argument, that though it could not have occurred to Mr. Fleming's mind, as a mercantile man, that having adopted this course of conduct for so many years, having clearly shewn by a correspondence after the life dropped that he looked only to the Albert, and that after the winding-up order was made he still looked to the Albert, he could still retain the liability of the original office. It is perfectly clear that this suggestion of applying to the old office was not a suggestion of his own mind, but the suggestion of some legal mind conversant with these matters. No doubt the petition was presented in consequence of the decision in the case

of the *Family Endowment Society (sup.)*; but it raises a very material question whether the position of a policy-holder is precisely the same as that of an annuitant. I am of opinion that it is not the same; and, therefore, unless I am bound by the decision of the Court of Appeal, I should certainly, as I have already said, come to the conclusion unhesitatingly that there is in this case no violation of contract, and that Mr. Fleming is bound to resort to the assets of the Albert Company only. I feel, however, great reluctance in deciding that point, as I should do in my own judgment, in consequence of the decision of the Court of Appeal. If I make an order upon Mr. Fleming's petition I shall be deciding that he has established to my satisfaction, and that I am bound by the Court of Appeal to hold, that he is a creditor of this company; but I am certainly not inclined to do so; nor am I inclined finally to conclude a question of so much importance in this stage of the proceedings. As it is a matter of so vast importance, not only in this particular case, but in hundreds of insurance cases which I am afraid will come before this court, I will give every facility for taking the opinion of the Court of Appeal upon the question whether Mr. Fleming is or is not a creditor of this company. The order to wind-up having been made upon the other petition he will come in as a creditor of the company, and in that form I think the question ought to be adjudicated upon. That being so, I shall make the order to wind-up on Mr. Kettle's petition only; Mr. Fleming may then at the proper time bring in his claim as a debt. After what I have said, I should refuse it as a debt, and I should not put him to the trouble of coming here again, but I will give him every facility for going at once to the Court of Appeal. The only remaining question is to the costs of the petition. I should certainly desire that Mr. Fleming should have the costs, and I should wish that he should have them by consent.

The respondents not objecting, the costs of the petition were made costs in the winding-up.

Solicitors: Mackenzie, Trinder and Co.; Deane and Chubb; Lewis, Munns, and Co.; Paine and Layton.

Jan. 22, 24, and 29.

Re INTERNATIONAL LIFE ASSURANCE SOCIETY AND HERCULES ASSURANCE COMPANY; *Ex parte* BLOOD.

Novation of contract—Policy of assurance—Transfer of business.

B. held a policy of the I. assurance society on the life of J., effected in 1841. In 1868 the I. assurance society transferred its business, assets, and liabilities to the H. insurance company, and B. was informed by a circular letter that the I. society was dissolved, and its business and assets transferred to the H. company, and that he was entitled to have his policy exchanged for a new one, or an endorsement made thereon, on the part of the company, guaranteeing its due fulfilment. In Oct. 1868 B. paid the premiums then due on the policy to the H. company, at the same time forwarding his policy to the office of that company, and it was returned to him with a memorandum endorsed upon it to the effect that the funds and property of the H. company were liable for payment of the amount assured provided that future premiums were duly paid. J. died in Nov. 1868, and B. sent in his claim to the H. company:

Held, that there had been a novation of the contract, and that the I. society were discharged from liability.

This was a summons adjourned from chambers, by Joseph Blood, the holder of a policy for 700*l.* on the

V.C. M.] *Re* INTERNATIONAL LIFE ASSURANCE SOCIETY AND HERCULES ASSURANCE CO. [V.C. M.]

life of William Jones, effected with the International Life Assurance Society, and the summons asked for liberty for Blood to prove his claim on the policy against the International Life Assurance Society and the Hercules Insurance Company (Limited), or one of them, both those companies being in course of winding-up, the former by, and the latter under the supervision of the court.

The policy in question was effected by William Jones on his own life, on the 14th Sept. 1841, under a half yearly premium of 20*l.* 18*s.* 7*d.*, and was assigned by Jones to Blood, who was a solicitor, on the 12th Oct. 1867. At that time bonuses to the amount of 166*l.* 19*s.* had been added to the policy.

In July 1868 the International Life Assurance Society transferred its business and assets to the Hercules Insurance Company, and on the 31st Aug. the chairman of the International sent to Jones, who immediately forwarded to Blood the following letter:

I beg to announce to you that the above society having been dissolved, its business and assets have been transferred to the Hercules Insurance Company, Limited. In so doing the directors of the International have carefully protected the interests of their policy-holders. The Hercules was established in 1803, with a capital of half-a-million. Its present income, which is fast increasing, is already £10,000 per annum, while its realised assets are proportionately large.

In compliance with the terms stipulated on behalf of the policy-holders, you are entitled to have your policy exchanged for a new one, or an endorsement made therein, on the part of the Hercules, guaranteeing its due fulfilment. These terms the directors are now prepared to carry into effect, on your forwarding your policy to the head office of the Hercules, No. 25, Cornhill, London, to which company your future premiums will be payable.

In Oct. 1868 Blood paid the premium which became due in Sept. to the Hercules Company, and took the following receipt, signed by the manager and secretary:

HERCULES INSURANCE COMPANY (LIMITED):
To which has been transferred the business of the International Life Assurance Society.

Receipt No. 59,093.

Policy No. 1330.

20*l.* 18*s.* 7*d.*

Received this 6th Oct. 1868, of Mr. William Jones, the sum of 20*l.* 18*s.* 7*d.*, being the premium for six months, ending the 9th March 1869, for the assurance of the sum of 700*l.* upon the life of himself, agreeably with the terms of a policy of assurance granted 14th Sept. 1841, numbered as above.

At the same time Blood sent the policy to the office of the Hercules Company, and the following memorandum, dated the 7th Oct. 1868, was endorsed upon it, and signed by two directors of the Hercules:

Memorandum. It is hereby declared that, subject to the proviso hereunder stated, the funds and property of the Hercules Insurance Company (Limited), as provided for in the articles of association of the said company, shall be liable for the due payment of the sum of 700*l.* assured by the within policy with the International Life Assurance Society, to the person or persons legally entitled to receive the same.

Provided always, that the future premiums, payable in respect of the said policy, be duly paid to the said Hercules Insurance Company Limited, at the times and in the manner set forth in the said policy.

Jones died on the 10th Nov. 1868, and Blood thereupon sent in his claim on the policy to the Hercules, whose secretary on the 4th Dec. wrote to him, acknowledging the receipt of the claim, and stating that it would be submitted in due course to the directors. On the 30th Dec. 1868 and the 3rd Feb. 1869 he again applied to the Hercules, and on the latter day was told by the secretary that his claim was "All right." On the 15th Feb. he called at the office of the Hercules, but found the doors closed, the company having in the mean time passed resolutions for a voluntary winding-up.

In Dec. 1868 a petition to wind-up the International Society was dismissed, but on the 19th Feb. 1869 the society was ordered to be wound-up by the court; and on the 23rd Feb. the voluntary

winding-up of the Hercules was ordered to be continued under the supervision of the court.

This summons was taken out in April 1869. The applicant, in his first affidavit in support of the application, did not verify the letter of the 31st Aug. 1868; but on the 28th Jan. 1870, after the case had been opened, he filed an affidavit (which was admitted by consent) verifying the letter, and stating that in accepting the endorsement on the policy he intended simply to obtain a guarantee from the Hercules, and not to release the International from their liability.

Osborne, Q. C., and Chitty, in support of the summons, contended that the original liability of the International Society had not been released, inasmuch as the acceptance of a new security did not of necessity discharge the original debtor. Mr. Blood was not bound either to discharge the International, or to object to the transfer of its business. If the transfer were *ultra vires* on the part of the International, he would acquire no right as against the Hercules. They referred to

Harris v. Farwell, 15 Beav. 31;

Re Era Assurance Society, 2 J. & H. 400.

Glasse, Q. C. and Higgins, for the official liquidator of the International, maintained that there had been a complete novation of the contract. The transfer was not *ultra vires* as in the case of the *Era Assurance Society* (*sup.*). They cited:

Re The Family Endowment Society, L. Rep. 5 Ch. 118; 21 L. T. Rep. N. S. 775.

Phear, for the representatives of the creditors of the International, took the same line of argument.

Cotton, Q. C. and E. Ford, for the liquidator of the Hercules, admitted the liability of that company.

Osborne, Q. C. in reply.

The VICE-CHANCELLOR stated the facts of the case, and continued: I do not wonder that Mr. Blood makes every attempt to make all these parties liable to him; I should very much rejoice to see it done. But what I have to consider is whether upon the whole transaction I must attribute to him the intention—and it is a question of fact in all these cases, what was the intention at the time—to let off one debtor and take another; or an intention merely to acquire a guarantee and an additional liability of a new party, retaining that of the old one. Now I had yesterday in the case of the *National Provincial Life Assurance Society* (*supra*), to consider the general question, what intention ought to be attributed by the court to a person, as to accepting a policy in one office in lieu of the policy of another; or, in other words, as I then expressed myself, whether, when he has a policy in office A., and has notice from A. that A. is about to discontinue business, and hand that business over to office B., and knowing all these circumstances he continues from year to year (and in the case yesterday it was no less than thirteen years) paying premiums to office B., the court ought not to consider that there was an intention to release the original office, and accept the liability of the substituted office. Here we have not that length of time. There it was a payment of premiums for thirteen years; here it is payment of one premium only; and if it had rested on the payment of that premium only, I think I should have had very considerable difficulty in arriving at the conclusion that there had been novation which bound Mr. Blood. But in order to put himself in a situation of having a legal demand against the Hercules, he actually sends the policy for indorsement, as he was invited to do. I am of opinion, apart

V.C. M.]

Re BRACKENBURY'S TRUST.

[V.C. J.]

from the circumstance of the contents of the letter of the 31st Aug., which I shall advert to, that after the communication made to him that the International was about to dissolve or had dissolved, and the tender made to him of the liability of the Hercules, his paying the premiums to the Hercules, and taking the indorsement from them is conclusive that he acceded to the proposal to accept the Hercules and let off the International altogether. Then it was very much pressed upon me, that although that might have been the effect of the transaction by itself, if no correspondence had taken place, the terms of this letter written by the chairman of the International, dated the 31st Aug. 1868, being the only communication made to Mr. Blood of the intended transfer, are such that he is entitled to treat this, not as a novation, but as a guarantee. Now the letter is in these terms:—[The Vice-Chancellor read the first two paragraphs of the letter, and continued:] I do not doubt that if he believed these statements, and I suppose he did believe them, that the Hercules had a clear income of 10,000*l.*, and that it was rapidly increasing, and that they had an abundant capital, he must have thought that there was something rotten in the state of the International, or they would not be giving up their business; and that he should do well to accept the one instead of the other. Now comes the passage in which it is said that no substitution or novation is intended, but guarantee. No doubt the next paragraph is not very accurately expressed: "In compliance with the terms stipulated on behalf of the policy holders, you are entitled to have your policy exchanged for a new one;" in which case there could have been no question but that that was a novation, "or" (and no doubt this is the alternative) "an indorsement made thereon on the part of the Hercules guaranteeing its due fulfilment." No doubt the words there are "guaranteeing its due fulfilment," but I cannot take a single expression in the letter, I must take the whole letter; and looking at the whole together, what conclusion must I come to? It begins by an announcement that the International have dissolved their business, and handed over all the assets. The contract of the policy is, not that the individual shareholders should be liable, but that the assets of the company should be liable, therefore he is told that all that they contracted to be liable out of is to be handed over to a new company, and when he is told that he may have a substituted policy, or an indorsement on the old one, I am of opinion that it means the same thing, that whether the liability of the Hercules is shown by a new policy, or whether it is shown by an indorsement upon the old policy, it means a substitution of one for the other, a complete novation of contract, and it does not, as has been contended, mean merely guarantee. In my opinion, he was bound, as a reasonable man, so to understand it. How, in point of fact, does he understand it? That is best shown by his conduct. If he thought he had got the guarantee only, is it possible to believe that when the life dropped, if he thought he had two parties liable to him, he would not have given notice to both? His whole conduct, from the time the life dropped, on the 12th Nov., and from a time much earlier than that, from the time of receiving the letter of the 31st Aug., to the 15th Feb. 1869, when he went to the office of the Hercules, and was surprised to find a padlock on the door—everything shows that it never entered his mind that he had a guarantee. He had a substitution of the liability of one office for that of the other, and he never thought he had anything more. I am clearly of opinion that it was a mere afterthought on his part to treat it as a guarantee, and that I think is conclusively shown by the fact that, in his affidavit in support of this claim, filed on the 29th April last,

he attached so little importance to the terms of this letter that he did not verify it; and it is not until the affidavit filed this morning, which I could not have received but by consent, that he ventures to come forward and treat it as a guarantee. I am of opinion that that view of the case entirely fails. I must, therefore, regard the whole transaction as showing to my mind most conclusively that Mr. Blood intended deliberately, at the time of the option being tendered to him, to accept the liability of the Hercules, not as an additional liability, but as a substituted liability; and his taking that indorsement on the policy conclusively shows, in my opinion, that he finally and for ever abandoned the liability of the International. Therefore, on that ground, I must dismiss the summons so far as he seeks to be admitted as a creditor of the International. So far as he seeks to be a creditor of the Hercules no opposition has been offered; therefore, such a creditor he must be admitted to be. I am clearly of opinion also, that the summons is ill founded so far as he seeks to be admitted as a creditor on both. I can only therefore, at present, admit him as a creditor of the Hercules. He may, possibly, though I do not encourage him in a litigation full of difficulties, have a case upon the misrepresentation contained in that letter, which induced him to enter into the contract; but I cannot deal with that on the present summons; all I can do is to dismiss the summons, as far as he seeks to be admitted as a creditor of the International, and accede to it so far as he seeks to be admitted as a creditor of the Hercules. As to the costs I do not think it is a case for making the applicant pay the costs, but I cannot give him any costs except by consent. The official liquidators will have their costs out of the respective estates; and as to the creditors' representative, as he had liberty to appear, he will have his costs on this occasion; but it must be understood in future that in all cases where the interests of the creditors and of the contributories are identical, the creditors' representative, if he appears, will get no costs.

Solicitors, *Hendricks; J. Tucker; Barnard and Co.; Merriman and Co.*

V. C. JAMES'S COURT.

Reported by the Hon. ROBERT BUTLER, Barrister-at-Law.

Saturday, April 23.

Re BRACKENBURY'S TRUST.

Trust fund bequeathed to single trustee—Appointment of additional trustees—Costs.

Where a testatrix bequeathed a fund to a single trustee in trust for A. for life, with remainder over, on the petition of the parties interested in remainder, the Court allowed additional trustees to be appointed; the costs to be paid by the petitioners.

This was a petition by the parties interested in remainder in a certain legacy for the purpose of having two persons appointed trustees, in addition to the existing trustee, who was the sole trustee under the will of the testatrix.

It appeared that Elizabeth Fisher Brackenbury, by her will bequeathed the sum of 1000*l.* unto Charles Mitchell Nesbitt, upon trust to pay the income to William Brackenbury for life, and after his death in trust for her two nephews, Henry Downes and — Young, who were also appointed her executors and residuary legatees. Downes and Young (the petitioners) requested William Brackenbury to concur with them in the appointment of proper persons to be trustees of this legacy, in addition to Nesbitt, but he refused to concur in the appointment, and required the petitioners, as the

V.C. J.]

REES v. BRAIDLEY—REG. v. LIVESEY AND OTHERS.

[Q. B.]

executors of the will, to pay the legacy of 1000*l.* to Nesbitt, as the sole trustee. This the petitioners were unwilling to do, considering it to be inexpedient to pay the legacy to a sole trustee, and therefore this petition was presented for the purpose of having two persons appointed trustees of the legacy of 1000*l.*, and that the costs of all parties might be paid out of the *corpus* of the legacy.

C. T. Simpson appeared for the petitioners, and submitted that the trustees should be appointed, and that the costs should be paid out of the *corpus* of the legacy. He cited *Grant v. Grant*, 34 L. J. 641, Ch.; 12 L. T. Rep. N. S. 721, in which case a testator having bequeathed a large fund to a single trustee the court, at the instance of the tenant for life of the fund, appointed an additional trustee, the costs to come out of the *corpus* of the trust property.

North, for the respondents.—This case differs from *Grant v. Grant*. In that case the trust fund was 30,000*l.*, in the present it is only 1000*l.*; there the trustee was entitled beneficially after the life interest of the *cestui que trust*, in this case the trustee has no beneficial interest. If the petitioners want to have other trustees appointed in addition to the one appointed by the testatrix, they should pay the costs.

The VICE-CHANCELLOR was of opinion that as the petitioners were not satisfied with the directions of the testatrix who appointed only one trustee, new trustees, to be approved of by the respondent, might be appointed, but that the costs must be paid by the petitioners.

Solicitors for the petitioners, *Johnston and Jackson*.

Solicitors for the respondents, *Norris, Allen and Carter*,

Thursday, May 26.

REES v. BRAIDLEY.

Practice—Service of copy of bill—Defendants out of jurisdiction.

Where defendants were resident out of the jurisdiction of the court, substituted service of the copy of the bill was allowed to be made on their solicitor, who was employed by them in a suit that was still pending relative to the same subject-matter.

This was a motion for leave to substitute service of copy of bill upon a solicitor, who was the solicitor to the same defendants in another suit, arising out of the same subject-matter, and also upon the receiver appointed by the court in the suit of *Braidley v. Braidley*.

The defendants, Henry, Joseph, and John Braidley, were resident out of the jurisdiction in Australia, and Messrs. Baily, Shaw, Smith, and Baily, were their solicitors in the suit of *Braidley v. Braidley*, which was still pending; and they were also their solicitors in the suit of *Rose v. Braidley*, both of which suits related to the same subject-matter as the present suit. On the 12th Feb., 1870, the court appointed Robert Reid receiver of the property in the suit of *Braidley v. Braidley*.

On the 6th May, 1870, the plaintiff wrote to Messrs. Baily and Company to say that he had filed a bill of foreclosure against the above-named defendants, and asked them to give an undertaking to appear for the defendants.

It was now proposed to effect service of the bill upon Messrs. Baily and Co. and Robert Reid (the receiver), the defendants being resident out of the jurisdiction.

Holmes appeared in support of the motion.

The VICE-CHANCELLOR was of opinion that, as

Messrs. Baily and Company were the solicitors to the three defendants in a suit which was still pending relative to the same subject-matter, substituted service of the bill might be made upon them, the defendants being out of the jurisdiction of the court, and also upon the receiver in the cause of *Braidley v. Braidley*.

Copy of the order for substituted service to be served with the copy bill.

Solicitor, *W. H. Rees*.

Common Law Courts.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Wednesday, May 4.

REG. v. LIVESEY AND OTHERS.

Levelling, &c., streets not being highways—11 & 12 Vict. c. 63 (*Public Health Act*), s. 69—26 & 27 Vict. c. 70, s. 10, subsections 1 and 3.

By sect. 69 of the *Public Health Act* 1848 (11 & 12 Vict. c. 63), "in case any present or future street not being a highway" (which is construed by a subsequent Act to mean any highway repairable by the inhabitants at large), "be not sewered, levelled, &c., to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, &c., require them to sewer, level, &c., the same, &c., and if such notice be not complied with, the said local board may, if they think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default according to the frontage of their respective premises, and in such proportion as shall be settled by their surveyor, or in case of dispute by arbitration."

By the 26 & 27 Vict. c. 70 (enabling the Public Works Loan Commissioners to lend, and local boards in certain counties to borrow money for the purpose of providing work for the unemployed manufacturing classes), sect. 10, sect. 69 of the *Public Health Act* 1848, and sect. 38 of the *Local Government Act* 1858, are incorporated. By sub-sect. 1 of sect. 10 it is enacted that "the notice required to be given, prior to the execution of such works by the local board, may be in the form prescribed by the *Local Government Amendment Act* 1861;" and by sub-sect. 3, "any person to whom such notice as aforesaid has been given may, before the expiration of the period limited for the execution of the works, object to the execution of the works in the manner specified," &c., and, "in default of giving the notice lastly required it shall not be competent for such person to question the validity of any rate or charge made by the local board, for defraying or securing the expenses incurred by them in executing such works, except on the ground that the same have not been executed in conformity with the plan, section, specification, or estimates thereof."

Held (*Mellor J.*, dissentiente), that an owner on whom notice to level, &c., under the said Acts, had been served, and, who had not given notice of objection, was estopped from shewing that the street in question was a highway repairable by the inhabitants at large.

Special case stated for the opinion of the Court of Queen's Bench by the court of quarter sessions of the county of Lancaster, upon an appeal against an order made by justices in petty sessions at Over

Q. B.]

REG. v. LIVESLEY AND OTHERS.

[Q. B.]

Darwen, on the 20th May 1869, for the appellants to pay to the respondents the sum of 55*l.* 19*s.* 1*d.* for paving, sewerage, &c., a road within the township of Over Darwen, in the county of Lancaster, called Tack-row Back, and 13*l.* 14*s.* 10*d.* for the respondents' costs of proceedings before the justices. The court of quarter sessions confirmed the said order.

1. The appellants are the owners or occupiers of land fronting, adjoining, or abutting upon a street called Tack-row Back, situate within the district of the local board of health of Over Darwen.

2. The respondents are the local board of health.

3. The respondents in or about the month of Dec. 1863, and after the passing of the Public Works (Manufacturing District) Act 1863, prepared a list in writing of work required to be executed in the said district, in exercise, *inter alia*, of the powers contained in sect. 69 of the Public Health Acts 1848 and 1858, including in the said lists the paving, &c., of Tack-row Back aforesaid. The respondents duly submitted the same to the public works loan commissioners, together with proper plans, specifications, and estimate in that behalf. The said commissioners duly approved the same, and out of the money at their disposal granted a loan to the respondents upon security, according to the said Act, of 34,000*l.* for the purposes aforesaid.

4. Upon such grant being made, the notice required to be given prior to the execution of the said works was given in the form prescribed by the Local Government Amendment Act 1861, or to the like effect by the respondents to the appellants, and was served by being delivered at the place of residence or business of the appellants.

5. Specifications and estimates of the said works duly certified by the surveyor of the respondents were deposited for inspection, with the plans and sections, in the manner required by the Local Government Act 1858, and Amendment Act 1861, and the said estimate showed the proposed apportionment of the expenses of the said works in respect of the properties of the different persons affected thereby.

6. No objection was made by the appellants to the execution of the said works in the manner in the said specification and estimates specified, or to the proposed apportionment of the said expenses, and no notice in writing was at any time given by the appellants to the respondents of any matters being objected to in the premises.

7. The appellants did not execute the said works within the time limited in the said notice, and upon such default the said works were executed by the respondents in conformity with the plans, sections, and specifications, and at a cost within the amount of the said estimates thereof.

8. Demand of repayment of the expenditure so incurred by the board was duly made, but the appellants not paying the same, the respondents duly instituted proceedings before the justices for recovery thereof, and obtained the order appealed against.

9. The appellants contend that they are not liable to pay any portion of the said expenses, or of the costs of the said proceedings before the justices at Over Darwen, on the ground that the said street is a highway repairable by the inhabitants at large.

10. The appellants, at the proceedings before the justices, and also on the hearing of the said appeal, proposed to call evidence to show that the said street or highway, called Tack-row Back, was a highway repairable by the inhabitants at large.

11. The justices below and the quarter sessions respectively decided that such evidence was inadmissible upon the ground that under the 10th section of the said "Public Works (Manufacturing Districts) Act 1863," it was not competent to the appellants to question the validity of the charge by the respondents for defraying the expenses in

by them in executing the said works as aforesaid, except on the ground that the same had not been executed in conformity with the plans, sections, specifications, or estimates thereof.

The question for the opinion of the court is whether such evidence was properly rejected.

Leresche and Watson for the respondents.—The evidence was properly rejected. By the 26 & 27 Vict. c. 70, Public Works (Manufacturing Districts) Act 1863, the Commissioners of the Treasury are empowered to place certain sums of money at the disposal of the Public Works Loan Commissioners to be advanced by way of loan to (amongst other public bodies) local boards under the Local Government Act 1858, for the purpose of enabling them to provide work in certain counties for the unemployed manufacturing and labouring classes. By the 11 & 12 Vict. c. 63 (Public Health Act 1848), s. 69, where any street not being a highway (which term by the 15 & 16 Vict. c. 42, s. 13, is construed to mean any highway repairable by the inhabitants at large) is not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board, the board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, &c., require them to sewer, &c., the same within a time specified in the notice; and if the notice be not complied with the local board may execute the works mentioned or referred to therein; and the expense incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by their surveyor, or in case of dispute as shall be settled by arbitration in the manner provided by the Act; and such expense may be recovered from the last-mentioned owner in a summary manner, or the same may be declared by order of the board to be private improvement expenses, and be recoverable as such in manner by the Act provided. The above section, and also sect. 38 of the 21 & 22 Vict. c. 98 (Local Government Act 1858), are included in sect. 10 of the 26 & 27 Vict. c. 70, which by sub-section 1 enacts that the notice to be given prior to the execution of such works by the local board or local authority may be in the form prescribed by the Local Government Act 1861 (24 & 25 Vict. c. 61), or to the like effect, and shall be served as therein provided. By sub-section 2 specification and estimates of the works certified by the surveyor of the local board or local authority shall be deposited for inspection with the plan and sections in the manner required by the Local Government Act (1858) Amendment Act 1861; and when the works affect the property of more than one person, the estimates shall show the proposed apportionment of the expenditure of the works in respect of such proportions. By sub-section 3 any person to whom such notice as aforesaid has been given may, before the expiration of the period limited thereby for the execution of the works mentioned therein, object to the execution of such works in the manner specified, and to the proposed apportionment of the expenses of executing the same, and may give notice in writing within the period aforesaid, to the local board or local authority of the matter objected to. In default of giving the notice lastly required, it shall not be competent for such person to question the validity of any rate or charge made by the local board or local authority for defraying or securing the expenses incurred by them in executing such works, except on the ground that the same have not been executed in conformity with the plan, section, specification, or estimates thereof; and by sub-section 4, in case of notice of objection as aforesaid, the local board or local authority

Q. B.]

ALLEN (app.) v. THOMPSON (resp.)

[Q. B.]

may thereupon require that the several matters objected to shall be referred to arbitration in the manner prescribed by the Public Health Act 1848, before they proceed to execute the works in question. The effect of sub-sect. 3 of sect. 10 of the 26 & 27 Vict. c. 70, coupled with the other enactments, is that the respondents having permitted the local board to incur this debt to the Public Works Loan Commissioners without objection, are now estopped from setting up that the street in question was a highway repairable by the inhabitants at large. [BLACKBURN, J.—It is desirable, if possible, to give effect to sub-sect. 3, but it seems very difficult to do so. In dealing with a highway repairable by the inhabitants at large, under sect. 69 of the Public Health Act 1848, the local board seem to have acted *ultra vires*.] It is contended that under sub-sect. 10 the notice of objection should nevertheless have been given in order that the local board might not be misled as to the money to be borrowed, and for which they are responsible. The notice might have been in these or similar words: "I object to you charging me with the proposed expenses relating to this street, because it is one repairable by the inhabitants at large." Had this been done, the local board might have taken the means for securing themselves provided by sub-sect. 4.

Holker, Q. C., for the appellants.—It was incumbent upon the local board, before exercising their borrowing powers, to ascertain the legality of the proposed mode of expenditure, and whatever may have been the intention of the Legislature it is clear that the notice required under sub-sect. 3 cannot extend to the present case. The local board are bound by the language of the enactment, and to extend its signification in the manner contended for the court must add to instead of construing the words employed. It is clear that the question as to whether a street be or be not repairable by the inhabitants at large, is one which cannot be made the subject of arbitration. *Bailey v. Wilkinson*, 33 L. J. 161, M. C., and *Parkinson (app.) v. The Mayor, &c., of Blackburn (resps.)*, 33 L. J. 119, show that even when the local board perform works within their jurisdiction they cannot recover the expenses if the notice to the owners be imperfect.

BLACKBURN, J.—In this case we have to put an interpretation upon a most obscure Act of Parliament, and the question for us is whether the terms of the enactment in question can be extended so as to enable us to carry out the intention of the Legislature. Undoubtedly sect. 69 of the Public Health Act 1848, has reference only to streets which are not "highways," which term by a subsequent Act is interpreted to mean streets repairable by the inhabitants at large; but we must see how far this is affected by the subsequent enactment. By sub-sect. 3 of sect. 10 of 26 and 27 Vict. c. 70, in default of giving notice of objection to the execution of the proposed works, it is not competent to the owner to question the validity of the rate or charge made by the local board for defraying or securing the expenses incurred in their execution, "except upon the ground that the same have not been executed in conformity with the plan, section, specification, or estimates thereof." The question then is how far these words operate to extend the range of objections necessary to be made by an owner desiring to protect himself from charges proposed to be made upon his property; and I have arrived at the conclusion that although under sect. 69 of the Public Health Act 1848 standing alone, it would not be incumbent upon him to object when the local board give notice of their intention to execute works entirely beyond their jurisdiction, yet nevertheless

where he does not so object, the words of sub-sect. 3 must be taken as restricting his powers of questioning the validity of the rate or charges to be made only in the cases therein specified; and that the justices were, therefore, right in excluding evidence that the street in question was a highway repairable by the inhabitants at large.

MELLOR, J.—Upon this question I am unable to arrive at the same conclusion with the other members of the court. It is clear that the Public Health and Local Government Acts authorised local boards to execute these sort of works, and to charge the owners only in streets not being highways, that is not repairable by the inhabitants at large. Such being the law up to the passing of the 26 & 27 Vict. c. 70, the question is how far that Act operates to alter or extend the liabilities of owners, and unless it does so, it is manifest that there is nothing to justify the decision at which the justices have arrived. Now by sect. 3 of the latter Act, "such loans may be made for the purposes of any permanent works which the local board obtaining the loan is authorised to execute under the powers of the Local Government Act 1858" (which by implication must extend to the Public Health Act 1848) "or this Act, or (as the case may be), which the local or other authority obtaining the loan is authorised to execute under the powers of any local Act, or this Act, or otherwise," and it seems to me that the true construction of this is that the last Act must be taken as incorporating the previous Acts as they stand, and not in any way departing from or adding to the existing law. This further appears from sect. 10 of the same Act, which, with respect to works to be executed by virtue thereof under sect. 69 of the Public Health Act 1848, and the Local Government Act 1858, provides that "the notice required to be given prior to the execution of such works by the local board or local authority may be in the form prescribed by "The Local Government Amendment Act 1861, or to the like effect;" and then comes sub-sect. 3, under which "any person to whom such notice as aforesaid has been given," &c., "may object to the execution of the works in the manner specified, and the proposed apportionment of the expenses of executing the same." It seems to me, therefore, that we cannot affirm the decision of the justices without importing into the case some other form of notice essentially different from that prescribed by the earlier and adopted by the latest of these Acts, and that if the intention of the Legislature were that contended for, they have not used the necessary words for carrying it into effect.

HANNEN, J.—It is with the greatest difficulty that I have been enabled to arrive at a conclusion upon this question; but I nevertheless think for the reasons given by my brother Blackburn that the justices were right in rejecting the proposed evidence.

Judgment for the respondents.

Saturday, May 7.

ALLEN (app.) v. THOMPSON (resp.)

Game—Using snares on Sunday—1 & 2 Will. 4 c. 82, s. 3.

The 3rd section of 1 & 2 Will. 4, c. 82, enacts that "if any person whatever shall kill or take any game, or use any dog, gun, net, or other engine or instrument, for the purpose of killing or taking any game on a Sunday or Christmas Day, such person shall, on conviction thereof," be liable to a penalty.

On Saturday, the 14th Aug. last, the appellant, who had an excise license for killing game, was seen setting

Q. B.]

ALLEN (app.) v. THOMPSON (resp.).

[Q. B.]

snared on land over which he had the right of sporting. There was no evidence to show that he was there on Sunday the 15th, but the respondent went to the place on that day, saw fifty or sixty snares set ready to catch grouse, and found dead grouse caught in two snares.

Upon an information laid against the appellant under the above-mentioned section, charging that he, "on the 15th Aug. (being Sunday) . . . did . . . unlawfully use certain engines or instruments, to wit, snares for the purposes of taking game," the justices convicted and fined him:

Held, that the justices were right in so doing.

Case stated by justices of the North Riding of Yorkshire under 20 & 21 Vict. c. 43.

An information was laid by the respondent, under 1 & 2 Will. 4, c. 32, s. 3, charging that the appellant on the 15th day of August (being Sunday), at the township of Bainbridge, in the said North Riding, did then and there unlawfully use certain engines or instruments, to wit snares, for the purpose of then and there killing game, to wit grouse, in an allotment there situate, in the occupation of Christopher Percival.

At the hearing it was proved on the part of the respondent and found as a fact that the appellant was setting snares on the 13th and 14th days of August, in an allotment or pasture, in the township of Bainbridge. There was no evidence to show that the appellant was there on the 15th August, but the respondent went into the allotment on that day and saw fifty or sixty snares set ready to catch grouse, and found two dead grouse caught in the two snares.

It was contended on the part of the appellant that the setting of the snares on the 13th and 14th of Aug., and not going on the land to examine them on the 15th Aug., was not such a user as is contemplated by the 3rd section of 1 & 2 Will. 4, c. 32.

It was also contended on the part of the appellant that a snare or piece of wire, such as was found set by the respondent, is not an engine or instrument within the meaning of the above section.

It was admitted that the appellant had a proper excise licence for killing game, and also that the appellant had the consent of the owner and occupier of the land to sport over it.

The justices convicted the appellant, and adjudged him to pay a fine of 5s., and 1l. 4s. 6d. costs.

The questions for the court were:—

First. Whether it is an offence against the third section of 1 & 2 Will. 4, c. 32, to set snares on a Saturday (or any other day except Sunday), and allow them to remain set so as to catch or entrap grouse on a Sunday; and

Second. Whether a snare is an engine or instrument within the meaning of the said section of the said Act.

The respondent did not appear.

Holker, Q.C. (Macdonald with him) for the appellant.—The conviction was wrong. A snare is not "an engine or instrument" within the meaning of the statute. The 3rd section enacts "that where any person shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking game on a Sunday," he shall be liable to a penalty. The person using a dog, gun, or net must have a kind of manual control over them, not so with respect to a snare, which differs from a net in the manner in which it acts, and is not therefore *ejusdem generis*. [BLACKBURN, J.—There are draw nets and stake nets, but the ordinary use of a net is to set it, and then the game runs into it. How then does it differ in opera-

tion from a snare?] Then as to the meaning of the word "use," this section of the Act was framed to aid the keeping of the Sabbath. [MELLOR, J.—It is to prevent agricultural labourers rambling over the country on their day of leisure and snaring game.] But this is not the case of a poacher, for the appellant had a licence to take game, and it was on his own land. All the words of the section point to an actual manual user of the means whereby the game is killed, the person being present, "If any person shall kill or take game." [MELLOR, J.—Sect. 3 not only applies to killing game on Sunday, but also in close time.] (a.) [BLACKBURN, J.—It would be difficult to say that if a snare was set on Saturday night and game got into it on Sunday, that the person setting it did not kill the game on Sunday. LUSH, J.—You say he does not use it when he walks away from it; then he never uses it at all?] Only when he is watching it. He puts it down intending it to catch game, not to catch game solely on Sunday. He cannot be expected to go and take a number of snares up every Sunday, and have to replace them on Monday morning. [BLACKBURN, J.—The statute says he must do so. He would be bound to do so in close time.] There is analogy between this section and the Lord's Day Act. Would a fisherman be liable for having his nets down on Sunday, or a miller for not stopping his mill? [BLACKBURN, J.—The wording of this statute is different, and not analogous to the Lord's Day Act. Although Sunday, Christmas Day, and close time, are brought together very oddly, still I do not see why this section should not be treated as one for the preservation of Sunday.] The appellant was doing what he had a perfect right to do on his own land. Is there a desecration of the Sabbath in merely allowing the snares to remain down on Sunday? He must be supposed to have been behaving in a decent way all Sunday. In order to make profitable use of these snares he must be near them to take the grouse out, otherwise the game would be devoured by kites or vermin.

BLACKBURN, J.—There is no doubt that the Legislature, when they passed this Act of Parliament, bound curiously together and mixed up provisions relating to Christmas Day and Sundays with those respecting close-time, for they proceed on different grounds. By sect. 3 of 1 & 2 Will. 4, c. 32, it is enacted that if any person whatever shall kill or take any game or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game on a Sunday or Christmas Day, he shall be liable to a penalty of 5l. There cannot be any doubt that when a person on Saturday night puts down a snare with the intention that it shall be in operation on Sunday, and it kills game on that day, he has made himself liable to that statute. Mr. Holker argued that he must be personally present, but it is clear that one who intentionally causes the death of a grouse on a Sunday comes within the terms of the Act. Now, what this man is convicted of is that he left the snares there on a Sunday, and we must take it that it was his intention for them so to act as they would probably do—viz., kill game on the Sunday. Is not that "using" the snares on a Sunday? I think it is. If he left the engine in such a state as to kill game, is not that "using it to kill game?" Then, as to the contention that "snare" is not a word *ejusdem generis* with the words "dog, gun, or net," if it were once made out that a personal use of the instrument were required by the terms of this section of the Act, then that argument might have weight. But the word "engine" (derived from

(a.) The latter part of the section contains provisions for the offence of killing game in specified close time.

Q. B.]

THOMAS v. PURCELL.

[Q. B.]

ingenia) includes a snare, which is a "contrivance" or "device"—an "engine" for killing game.

MELLOR, J.—I am of the same opinion.

LUSH, J.—I am entirely of the same opinion. Indeed, according to Mr. Holker's argument, there could be no using a snare longer than the moment during which it was being laid down. That cannot be the intention of the statute which says "If any person whatever shall kill or take any game, or use any dog, gun, net, or other engine or instrument, for the purpose of killing any game on a Sunday or Christmas Day," he shall be liable to a penalty. That means if any person puts down a snare and keeps it down on the Sunday.

Judgment for the respondent.

Attorney for appellant, W. P. Roberts.

Thursday, April 28.

THOMAS v. PURCELL.

County Court—Power of amending pleadings—Case sent down for trial after issue joined—19 & 20 Vict. c. 108, ss. 26, 57.

Where a cause commenced in a Superior Court is sent down, after issue joined, for trial in a County Court under sect. 26 of the County Courts Act 1856 (19 & 20 Vict. c. 108):

Semble, per Blackburn and Mellor, JJ.—The judge of the County Court before whom the cause is tried may, by virtue of sect. 57 of the above Act, amend all defects and errors in the proceedings, such as variances and accidental mistakes, but cannot add a new plea, as that would be raising a different issue from that which the judge of the Superior Court in his discretion sent down to be tried.

Semble, per Hannen, J.—In such a case the judge of the County Court may not only amend variances and accidental mistakes, but may exercise the same powers of amendment generally as a judge of the Superior Court sitting at Nisi Prius.

This was an action commenced in the Court of Queen's Bench, and sent down, after issue joined, for trial in the Westminster County Court, under sect. 26 of the 19 & 20 Vict. c. 108.

The declaration was on a bill of exchange, accepted by the defendant, and indorsed to the plaintiff, and there were also the ordinary money counts.

The defendant pleaded (1) a denial of the acceptance; and (2), to the money counts, never indebted.

Issue was joined on both pleas.

The declaration was delivered on the 29th July 1869. Issue was joined on the defendant's pleas on the 25th Oct. of the same year. The cause was set down for trial before the judge of the Westminster County Court on the 16th Nov., but it was by consent adjourned from that day to the 26th Nov., on the ground of the absence through illness of a material witness on the part of the defendant. On the 26th Nov., when the hearing came on, the counsel for the defendant applied to the County Court judge to amend the record by adding a plea of fraud. The learned judge refused to make the amendment asked for, partly, if not wholly, on the ground that he had no power to do so in cases sent down for trial under sect. 26 of 19 & 20 Vict. c. 108. The issue having been found in favour of the plaintiff, a rule nisi was obtained by *Cutbill*, calling upon the plaintiff to show cause why the verdict obtained in the case before the judge of the County Court should not be set aside,

and a new trial had on the ground that the learned judge had power to amend, and ought to have amended, the pleadings by adding a plea of fraud.

Sect. 26 of 19 & 20 Vict. c. 108 enacts that

Where in any action of contract brought in a Superior Court the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.* is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, a judge of a Superior Court, on the application of either party, after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name; and thereupon the plaintiff shall lodge with the registrar of such court, such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties, or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such Superior Court, and judgment in accordance with such certificate may be signed in such Superior Court.

Sect. 57 of the same Act provides that

The judge of a County Court may at all times amend all defects and errors in any proceeding in such court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for.

Bosanquet now showed cause against the rule. The County Court judge had no power to amend the record by adding the plea which he was asked to add by the defendant. The issue must be joined before a cause can be sent down by a judge of the Superior Court in which the action is brought for trial in a County Court; and after the issue is joined the judge of the Superior Court is to exercise his discretion in sending it down. The record still remains in the Superior Court in which the action was commenced; the trial of the issue only is to take place in the County Court, and the registrar of the County Court is, after the hearing, to "certify the result to the master's office of such Superior Court, and judgment in accordance with such certificate may be signed in such Superior Court." If the judge of the County Court could add a plea in a case sent down for trial before him after issue joined, he could alter the whole issue sent down without any exercise of the discretion of the judge of the Superior Court on the new issue thus raised. In *Balmforth v. Pledge*, 7 B. & S. 425, after referring to the latter part of sect. 26 of 19 & 20 Vict. c. 108, which provides that the registrar of the County Court is to certify the result to the master's office of the Superior Court, and that judgment in accordance with the certificate may be signed in such Superior Court. *Shee J.* says, "Now, if the construction which Mr. *Kemplay* contends for were right, this last clause of sect. 26 would be useless, because it does not effect anything which could not be done under sect. 49; for, the cause having become a County Court cause, the judgment would under that section, if for an amount exceeding 20*l.*, be removable by *certiorari* into a Superior Court in order that execution might be had thereon. Sect. 26 makes it obligatory on the registrar to certify the result to the Superior Court, because the cause still remains in it, and judgment is therefore to be signed in that court. . . . The registrar in certifying the result does only a ministerial act; the cause never leaves the Superior Court." And *Lush, J.* observes, "The judge of the County Court is in the same position as the sheriff is placed in by a writ of trial, and as a judge of one of the Superior Courts when acting as a commissioner at *Nisi Prius*: the latter tries the cause as commissioner and not as a judge of the Superior Court; and the general jurisdiction over the cause as to granting a new trial, &c., remains in the court out of which the record came."

Q. B.]

THOMAS v. PURCELL.

[Q. B.]

Bain v. Gregory, 14 L. T. Rep. N. S. 601, was referred to on this point. Further, if the judge had power to amend by adding a plea, he was justified in refusing to do so by the circumstances of the present case; the defendant having had ample time to make the application long before the day of the trial, which had been postponed from a previous day at his request.

Cutbill in support of the rule.—The County Court judge had power to make the amendment asked for. The 26th section of the 19 & 20 Vict. c. 108 provides that the "cause" is to be sent down for trial in the County Court, in this respect differing from 3 & 4 Will. 4, c. 42, by which the "issues" were to be sent to be tried before the sheriff or judge of any court of record for the recovery of debt in the county. If the word "cause" is to have its ordinary meaning in this section, then all the incidents of the trial of a cause at *Nisi Prius* are annexed to it, and the County Court judge must have the same powers of amendment as a judge at *Nisi Prius* has. In *Edwards v. Edwards*, 5 C. B., N. S., 538, in answer to an argument of counsel that there was no substantial distinction between a reference of a cause for trial to the County Court under the 19 & 20 Vict. c. 108, s. 26, and a reference to a County Court judge under the 17 & 18 Vict. c. 125, s. 7, Williams, J. said: "I think decidedly there is. In *Wheatcroft v. Foster*, 27 L. J. 277, Q. B., the effect of the order was to make the cause, for the purpose of trial, a cause in the County Court, whereas the reference under the Common Law Procedure Act is a mere step in ascertaining the damages." [MELLOR, J.—He says "for the purpose of trial."] If it is a cause in the County Court, the County Court judge has by sect. 57 of 19 & 20 Vict. c. 108 the power of making the amendment asked for. [BLACKBURN, J.—It is only a cause tried in the County Court, and by the 26th section of this Act it cannot be sent down until after issue has been joined.] The issue paper sent down is the record, and it has been held that that is the record which can be certified on by the County Court judge. [BLACKBURN, J.—I go with you to this extent, that the County Court judge has power to amend all variances and such like defects. But the addition of a plea raises quite a different issue from that which was sent down for trial, and therefore I think it is not an amendment within the meaning of the 57th section.] This County Court Act was passed after the Common Law Procedure Act 1854, and its 57th section, following as it does almost verbatim the 196th section of the Common Law Procedure Act 1854, ought to be taken to confer on the judge of the County Court the same power of amending that the latter enactments confer on the judge of the Superior Courts. [MELLOR, J.—The exercise of the discretion of the judge at chambers as to the sending down the case would be greatly influenced by the nature of the issue then before him. If that issue could be altered by the County Court judge, he might try what the Superior Court judge would never have sent down.] If the County Court judge had the power to amend he was bound to make the amendment under the circumstances of the case.

BLACKBURN, J.—I think that in this case the rule ought to be discharged. The case involves one question of considerable importance, on which I have formed my own opinion. Perhaps, however, it is not absolutely necessary to the decision in this case. It is this, whether the judge of the County Court, to which a case is sent down for trial under the 26th section of the 19 & 20 Vict. c. 108, has power to add a plea so as to change the issue which was

sent to be tried. There is in point of substance a very great difference between altering or amending a plea so as to make it what it was really intended to be, and adding a plea so as to change the issue from what it originally was to something quite new. Sometimes, no doubt, the distinction is very nice between the two things; but there is, notwithstanding, a substantial difference. It is clear that what the County Court judge was asked to do in the present case was to add to the issue of non-acceptance as to the bill of exchange, a completely new plea, and not merely to change or amend the old one. What we have to see, then, is whether the judge had power to make an alteration of that character. It seems that the learned judge was of opinion that he had not the power to do so; but it appears also that he was of opinion, and I think on very reasonable grounds, that the defendant was too late in making the application to add the new plea, and that even if the judge considered he had the power, as a matter of fact he would not, upon the merits of the case, have added the plea which he was asked to do; and I am of opinion that he had good reasons for refusing. But had the County Court judge power to add the plea if he had been so minded? The 26th section of 19 & 20 Vict. c. 108 enacts that "where in any action of contract brought in a Superior Court, the claim endorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into court, payment, an admitted set-off or otherwise, to a sum not exceeding 50*l.*, a judge of a Superior Court on the application of either party after issue joined may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name; and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such Superior Court, and judgment in accordance with such certificate may be signed in such Superior Court." The words of that section are "after issue joined." Now we have already decided in the case of *Bainforth v. Pledge*, 7 B. & S. 425, and I think quite rightly, that when a case is sent down for trial in the County Court under that section, the case is not turned into a County Court case, but is sent down merely in order that it may be tried there and the result certified to the Superior Court from which it is sent; and, therefore, that a motion for the new trial of a case so sent down must be made in the Superior Court and not in the County Court. Then comes the question as to amendments which justice would require to be made, which of them can be made by the County Court judge? The 96th sect. of the Common Law Procedure Act 1854, as it seems to me, is not so worded as to give the County Court judge the power of making amendments. That section provides that "it shall be lawful for the Superior Courts of common law, and every judge thereof and any judge sitting at *Nisi Prius*, at all times to amend all defects and errors in any proceedings under the provisions of this Act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made if duly applied for." We cannot, I think, bring the

Q. B.]

THOMAS v. PURCELL.

[Q. B.]

County Court judge within the words "Superior Courts of common law, and any judge thereof, and any judge sitting at Nisi Prius," and therefore that section does not give him the power of amendment. But in the County Courts Act of 1856 (19 & 20 Vict. c. 108), there is a section, the 57th, which enacts, in words almost identical with the 96th section of the Common Law Procedure Act 1854, that "the judge of a County Court may at all times amend all defects and errors in any proceedings in such court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made if duly applied for." When a case, then, has been sent down from a Superior Court for trial in a County Court, after issue joined, I think the case becomes a "proceeding" in the County Court, and that therefore all defects, errors, variances, and such other things as exist by mistake, can be amended by the County Court judge, for this is incidental to the trial. But when he is asked to alter the issue altogether, and not merely to amend a slip in the pleadings, such a power does not, I think, fall within the meaning of the words of the section. I think that adding a plea does not come under any of the words used, and that that can only be done by a judge of a Superior Court having the power to do so. We do not generally amend by adding pleas at Nisi Prius after swearing the jury, but summonses are taken out for that purpose. I do not think it was the intention of the Legislature to confer such a power on the judge of the County Court, in cases sent down for trial before him. The judge of the Superior Court is to have the issue joined before him and to send down *that* case to be tried, and any alteration which would have the effect of making it a different case must be made by him. Altering the defence to one of fraud is altering the issue which was sent down to be tried; and if the attention of the Legislature had been called to the matter they would, I think, have said that they did not intend that the case sent down by the Superior Court Judge for trial in a County Court should be altered by the judge of the County Court. I mention all this because the point is one of considerable importance; but I do not think it is necessary to decide it here, because the alteration asked for was one which the judge would not have made even if he had the power. The rule therefore must be discharged.

MELLOR, J.—I am of the same opinion. Before the case of *Balmforth v. Pledge* was decided, a difficulty did present itself to my mind which would have induced me to think that the judgment delivered in that case should have been the other way, because of the inconveniences which might result from holding that the judge of the County Court has not power to amend the record by adding a plea if necessary, and I thought that the use of the word "result" in the 26th section of 19 & 20 Vict. c. 108, providing that the registrar of the County Court is "to certify the result" to the Superior Court, involved the power of making such an amendment. I can now, however, say that I assent to the view of the law which was expressed by my brothers in that case, and to the principle on which that case was decided, because I am convinced that the intention of the Legislature was that the Judge who sent down the issue for trial in the County Court should exercise his discretion on the matter. The 26th section says, that "where in any

action of contract brought in a Superior Court the claim indorsed on the writ does not exceed 50*l.*, &c., a judge of a Superior Court, on the application of either party, after issue joined, may, in his discretion and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name, &c." Now, if the County Court judge can entirely change the issue sent down to the County Court when it comes on to be tried before him, he may try a cause which the judge of the Superior Court in the exercise of his discretion would not have sent down to the County Court at all. I think, therefore, that the strong and explicit words used in the section confine the power of the judge of the County Court to making such amendments, as variances and other defects of that kind. The governing words of sect. 26 of 19 & 20 Vict. c. 108, as bearing on this point are "after issue joined." Consequently I am of opinion that it was not intended by the Legislature that the County Court judge should exercise *his* discretion in altering the issues sent down to be tried before him by a judge of the Superior Court acting in the exercise of his discretion. Our judgment in this respect is entirely supported by the decision in *Balmforth v. Pledge*. But it is not absolutely necessary for us to decide the question in the present case, because I think that in the circumstance that the defendant must have possessed a knowledge of the facts on which he moved to add this plea, long before the trial at which the application was made, the County Court judge had abundant reason for thinking that the application was not a *bonâ fide* one, and for refusing to amend the record by adding the plea which he was asked to add by the defendant.

HANNEN, J.—If it were necessary to decide the question whether the County Court judge has or has not power in cases sent down for trial before him under the 26th section of the 19 & 20 Vict. c. 108, to amend the record by adding a plea, I should have required more time before I gave my judgment, for I have considerable difficulty in agreeing in the opinion expressed on this point by my brother Blackburn. I cannot help thinking that it was intended by the Legislature to confer on the County Court judge in such cases the same powers of amendment as are exercised generally by a judge of a Superior Court at Nisi Prius, by virtue of the 196th section of the Common Law Procedure Act 1854. No doubt the words "after issue joined" in the 26th section of the 19 & 20 Vict. c. 108, show that the judge of the Superior Court is to have the issue joined between the parties before him in order to assist him in making up his mind as to whether the case is a fitting one to be sent down for trial before the judge of a County Court. But we all know that it must frequently happen that though the facts as they appear to the judge of the Superior Court when he makes the order, are such that the case seems fit to be tried in a County Court, yet, when the case comes on to be tried, facts may come out which, if they had been brought to the knowledge of the Superior Court judge in the first instance, would have induced him to refuse to send the case down to the County Court. If such a state of things occurs, must the case be postponed until an application can be made to the judge at chambers? That is a course which would lead to great inconveniences. However, I mention all this merely as showing that if it were necessary to decide this point, I should require more time before I gave my decision. But I agree in the judgment to be pronounced on the ground that, if he had the power to do so, this was not a case in which the judge of the County Court ought to have added such a plea as he was

C. P.]

JOHN v. BACON.

[C. P.]

asked to do. I think the judge had good reason for being of opinion that the case was not a proper one for making the alteration sought for.

Rule discharged.

Attorney for plaintiff, *H. T. Roberts.*

Attorneys for defendant, *Tucker, New, and Langdale.*

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAB and H. H. HOCKING, Esqrs.
Barristers-at-Law.

April 21, May 3, and 4.

JOHN v. BACON.

Negligence—Contract to carry—Invitation—Responsibility for negligence of others.

The defendant was part owner and manager of a line of steamers that plied between M. and L. It was the usual course to take passengers from the shore of M. on board a small steamer to a hulk that was moored in the harbour, and from this hulk the passengers went on to the sea-going steamer. On the hulk there was an office, where a servant of the defendant sold tickets to persons going by the steamer. W., the owner of the hulk, let it to different persons as a depôt for goods. Amongst others he let it to the defendant at a yearly rent for the convenience of passengers and the storage of goods; and it was agreed between him and the defendant that W. should fit it up for the accommodation of passengers to the satisfaction of the defendant's agent, and that the defendant should light it. One servant of W. was stationed on the hulk to look after it. The defendant advertised his steamers to go from M. to L., and in the advertisement the above mode of transit was described. The plaintiff, in pursuance of the advertisement, went in the usual way by the small steamer on to the lower deck of the hulk, up a ladder to the upper deck, where he bought his ticket; then down to the lower deck again for the purpose of going on board the sea-going steamer, when he fell through an open hatchway that was just at the bottom of the ladder, and was much injured. It was quite dark at the time, and there was no light on the lower deck. In an action for compensation for the injuries sustained, the jury having found that there was negligence in leaving the hatchway in this state, and that there was no contributory negligence on the part of the plaintiff, it was

Held, that, irrespectively of the question whose servants they were who were guilty of the negligence, the defendant was liable, both on the contract to carry safely, and on the contract implied by the invitation given to persons intending to go by the steamers to come on board the hulk.

This was an action for negligently carrying the plaintiff, whereby he fell down a hatchway, and was much injured.

Pleas: 1. Not guilty; and, 2. Contributory negligence on the part of the plaintiff.

The action was tried before Channell, B. at the last summer assizes at Pembroke. It appeared that the defendant was the part owner and manager of a line of steamers that plied between Haverfordwest and Liverpool, calling at Milford Haven on the way. One of this line of steamers—the *Sovereign*—was advertised by the defendant to call at Milford Haven on May 6th 1868, at ten o'clock. On the way-bill containing this advertisement, it was stated that intending passengers might start from the shore of Milford Haven on the evening in question in a small steamer called the *Gipsy*, and be carried by her, free of extra charge, to a large hulk that was moored in the harbour, alongside of which the *Sovereign* was to come. This hulk was a large

ship of 1200 tons, so that its upper deck was considerably higher than that of the steamers. It was accordingly the practice for passengers, intending to go by the steamers, to be landed from the small steamer called the *Gipsy* that plied between the hulk and the shore, through a port hole on to the lower deck of the hulk. There was on the other side of the lower deck of the hulk another port-hole, through which the passengers went on board the large sea-going steamers. Midway between these port-holes was a ladder leading on to the upper deck, on which there was a ticket office, in which the defendant's servant sold tickets to persons going by the steamers. Passengers, however, were at liberty, if they chose, to pay their fares when they got on board the steamer. The plaintiff, on the evening in question, went in the *Gipsy*, from the shore of Milford Haven to this hulk, and landed in the usual way through the port-hole on to the lower deck. He then went up the ladder on to the upper deck, and bought his ticket at the ticket office. He then waited on the upper deck until the *Sovereign* (which was about two hours late), came up. He then went down the ladder on to the lower deck, intending to go through the port-hole on board the *Sovereign*. On arriving, however, at the bottom of the ladder, and taking a short step forward, he fell down an open hatchway into the hold of the hulk, and sustained very severe injuries. There was no light on this lower deck, and the open hatchway down which the plaintiff fell, was not more than a couple of feet from the bottom of the ladder. There was one person on board the hulk, who was permanently in charge of it, he was the servant of Williams, the owner of the hulk. The other men who were assisting in the embarkation of passengers by the *Sovereign*, were the servants of the defendant, and had come over with the plaintiff in the *Gipsy*. These servants swore that they cautioned the plaintiff to be careful, and that the plaintiff laughed at the caution, saying this was not the first time he had been on board ship. The plaintiff, however, denied that any such caution was given him, or that he made any such reply, and he was corroborated by several of the passengers.

The agreement between the defendant and Williams was put in by the plaintiff. By it Williams agreed to let the defendant have the use of the hulk at a yearly rent, for the embarkation of passengers and the storage of goods. Williams was to have it properly fitted up for the accommodation of passengers to the satisfaction of the defendant's agent, and the defendant undertook to light it. The defendant, however, had not the sole use of the hulk, but it was used by several other persons as a depôt for goods. The plaintiff's counsel also put in a copy of the way-bill, advertising the departure of the defendant's steamers, for the purpose of showing how it was proposed to make the transit from the shore of Milford. It was stated, at the bottom of the way-bill, that the defendant would not be responsible for any accident happening to passengers on board the hulk. The plaintiff, however, was not cross-examined as to whether he had seen this last notice, and no evidence was given by the defendant to show that he had seen it. The ticket sold to the plaintiff made no allusion to this notice, and merely stated the fare, the class, and the names of the places—Milford Haven to Liverpool.

On this evidence the defendant's counsel submitted that there was no evidence to go to the jury, and the learned judge decided that there was, and the jury having negatived the charge of contributory negligence on the part of the plaintiff, and having assessed the damages, a verdict was entered for the plaintiff, subject to a special case for the opinion of the court.

Allen having obtained a rule nisi for a new trial on

C. P.]

JOHN v. BACON.

[C. P.]

the ground that the jury ought to have found for the defendant on the point of contributory negligence, it was agreed that the special case should be abandoned, and the points that were to have been raised in it argued with the rule.

Bowen and De Rutzen showed cause. The defendant's servants were the persons guilty of the negligence; there was but one servant of Williams permanently on board the hulk, while several servants of the defendant were there superintending the embarkation of the passengers. But even if it was the servants of Williams whose negligence caused this accident, the defendant is responsible, as the accident happened in the course of the transit from Milford Haven to Liverpool, during the whole of which the defendant had contracted to carry the plaintiff safely:

Great Western Railway Company v. Blake, 7 H. & N. 987; 31 L. J. 346, Ex.; 7 L. T. Rep. N. S. 94;

Buxton v. North Eastern Railway, L. Rep. 3 Q. B. 549; 18 L. T. Rep. N. S. 795;

Muscamp v. The Lancaster &c. Railway Company, 8 M. & W. 421.

[SMITH, J. cited *Francis v. Cockrell*, 22 L. T. Rep. N. S. 203.] Moreover, irrespectively of the questions whose hulk it was and whose servants had charge of it, the defendant was bound, having invited the plaintiff and others to come on board the hulk to take their tickets and embark on the steamer, to see that the hulk was in a fit and proper state, and not having seen to that he is liable in this action:

Indermaur v. Dames, 16 L. T. Rep. N. S. 293; L. Rep. 2 C. P. 311; 36 L. J. 181, C. P.

Quain, Q. C. Allen, and Coleridge, in support of the rule.—The facts clearly show that the servants of Williams were responsible for this negligence. It must have been they who left the hatchway in this dangerous state. That being so, the defendant is not liable. In *Blake v. The Great Western Railway Company* (*ubi sup.*) the court decided on the ground that the arrangement between the South Wales and the Great Western Railway Companies was such as virtually to make the South Wales line part of the Great Western Railway, and also to make the two companies partners *quoad* this journey. [BOVILL, C. J.—I think that the case was decided on the ground that there was a contract between the Great Western and Blake, by which the company agreed to carry him safely the whole distance. Moreover the servants, through whose negligence the accident happened, in that case were the servants of the South Wales Company only, and had nothing to do with the train in which Blake was being carried.] Blackburn, J. rested his judgment in the case of *Buxton v. The North-Eastern Railway Company* (*ubi sup.*) on *The Great Western Railway Company v. Blake*, but the decision in that case did not justify him in delivering the judgment he did. The hulk was a *quasi* public place, kept by Williams, and let out by him to various persons. The agreement between Williams and the defendant shows that the defendant had not such exclusive possession of, and control over, the hulk as to make him liable. Moreover, the nature of the contract is disclosed in the way-bill, which shows that the defendant expressly declared he would not be liable for any accident on board the hulk. [BOVILL, C. J.—You never showed that the plaintiff agreed to be bound by that condition.] The plaintiff himself put the way-bill in as part of his case. Moreover, the plaintiff was not bound to go on this hulk. As many passengers went out by boats and got on board the steamer as went on to the hulk. Again, the evidence of contributory negligence was so strong, that the defendant is entitled to a new

trial, on the ground that the verdict was against the evidence.

BOVILL, C. J.—At the trial of this case, the jury found a verdict for the plaintiff for 100*l.*, and the learned judge who presided, gave leave to the defendant to move to have the verdict entered for him, if the court should be of opinion that, on the facts and documents in the case, there was no evidence of negligence for which he was responsible, and the court were to have power to draw inferences of fact. In pursuance of that leave Mr. Allen obtained a rule, and he also obtained a rule for a new trial on the ground that the verdict was against the weight of evidence. The questions raised in this case seem to me to be, first, whether there was any negligence on the part of anybody which led to the accident; secondly, whether the defendant is responsible for the consequences of that negligence; thirdly, whether the defendant is protected by the notice given in the time table; and fourthly, whether there was contributory negligence on the part of the plaintiff conducing to the accident. The jury found that there was negligence in leaving the hatchway as it was, and that there was no contributory negligence. It can scarcely be disputed that there was evidence of negligence on the part of some one with regard to the hatchway. With respect to the question of contributory negligence, I must confess that there certainly seems to me to be a preponderance of evidence in favour of the defendant. Still there are certain points in the evidence given by the defendant's witnesses, which might form fair subjects of comment. At any rate, the jury, who had a great deal better opportunity of arriving at the truth than we have, believed the plaintiff and his witnesses in preference to the witnesses called for the defendant; and, as the learned judge who tried the case has not reported himself dissatisfied with the verdict, we must decline to interfere. With regard to the question of negligence in leaving the hatchway as it was, I do not hesitate to say that there was negligence on the part of somebody. Was the defendant responsible for that negligence? The defendant represents the owners of a line of steamers plying between Haverfordwest and Liverpool. One of these vessels was advertised to leave Milford Haven for Liverpool at ten o'clock at night on the 6th May last year. Now, what was the mode in which that transit was to be performed? According to the time-table, passengers were to embark at Milford on board the *Gipsy*, to be carried free of charge to the stationary hulk. It is stated that the *Gipsy* was to ply between Milford and the hulk in connection with the steamers. The defendant thus made himself a carrier of passengers for reward from Milford to Liverpool, and the transit was, according to the time-table, to be commenced on the *Gipsy*. The *Gipsy* was to land the passengers on board the hulk, and they were then to remain on the hulk until the steamer came. There was a ticket office on board the hulk, at which the defendant sold tickets for the whole journey. The plaintiff was received by the defendant to be carried as a passenger from Milford to Liverpool. He did not pay in the first instance, *i.e.*, on board the *Gipsy*; but in many cases where persons travel by steamer they do not take their tickets until they get on board, and, to all intents and purposes, the defendant was carrying the plaintiff for reward. Before the accident happened, the plaintiff had taken his ticket and paid his fare. The plaintiff, having got on board the hulk, had to wait there until the steamer came up. The steamer was not very punctual; it was advertised for ten but did not arrive till twelve o'clock. The defendant had taken means to secure the use of the hulk for the passengers. In his

C. P.]

JOHN v. BACON.

[C. P.]

answer to the interrogatories, he says, "We had the use of the hulk for receiving goods and passengers." We have, moreover, before us the agreement between him and the owners of the hulk. That shows that the defendant had secured the use of the hulk for the accommodation of the passengers, and in it the defendant stipulates with the owner of the hulk that it is to be fitted up and arranged to the satisfaction of the defendant's agent for the use of passengers by the steamer, and further the defendant engages to provide proper lights. The defendant had not the sole and exclusive use of the hulk, but he was bound to light it himself, and also to see that it was properly fitted up for the accommodation of the passengers. In this state of things the defendant went on board the hulk. He went through the port-hole up the ladder to the upper deck, where he took his ticket at the ticket office. His right course then, when the steamer came up, was to go down the ladder to the lower deck, and thence on board the steamer. The defendant undertook to carry him in this way, and there was a clear invitation on his part to the passengers to go where the plaintiff went. That transit was highly dangerous. There was a hole in the lower deck of a very dangerous character, which was neither lighted nor covered, and the plaintiff, without any negligence on his part, fell into this hole, which was nothing more nor less than a dangerous trap. The defendant had clearly received payment for the journey from Milford to Liverpool, and in the course of this transit there was a dangerous place and no precautions taken. There was a direct invitation to the plaintiff to take this particular course, and, besides that, the plaintiff had contracted to carry the plaintiff, and to use due and reasonable care in so doing. This raises the question whether, independently of the question whether it was the defendant's servants who had charge of the hulk, the defendant was not responsible on this contract. I think, in the first place, that the case falls clearly within the principle of those cases where a man has been held liable for the consequences if he has invited another person to a place where there is a hidden danger in the nature of a trap. *A fortiori* the defendant is liable on his contract to carry safely, on the authority of *The Great Western Railway Company v. Blake* (*ubi sup.*), and *Buxton v. The North-Eastern Railway Company* (*ubi sup.*). In the former case the servants of the South-Wales Railway Company, through whose negligence the accident happened, were in no sense the servants of the Great-Western Railway Company. The facts are not very fully stated in the report of the case. I was engaged as counsel in the case, and I know very well that the engine which caused the accident was not connected with the Great-Western Railway Company, and the agreement between the two companies to share in profits only related to the money paid by the passengers who were carried by the Great-Western Railway Company on the South Wales lines. The agreement between the two companies had no relation to the servants who put the engine on the line, and the case was substantially decided on the ground that the Great Western Railway Company had contracted to carry over the whole space. That doctrine was confirmed in *Buxton v. The North-Eastern Railway Company*, and in the recent case of *Francis v. Cockrell* (*ubi sup.*). The latter case is stronger than the present, as the person who sold the tickets for the grand stand was held to have warranted that the stand had been properly constructed by third parties, whereas here we need only decide that the defendant had contracted to use due and reasonable care. The case also falls within the decision in *Pickard v. Smith*, 10 C. B., N. S., 470. It comes, then, to this: that the plaintiff was lawfully on this hulk, on the

invitation of the defendant, and fell down 'this dangerous hole, without any negligence on his part. Under such circumstances who is responsible if not the defendant? Besides that, the defendant had the use of this hulk, with power to see that it was properly fitted up, and with the obligation (as between himself and the owner of the hulk) to see that it was properly lighted, and as he contracted to carry the plaintiff, and the passage across the hulk formed part of the transit, I think he is clearly responsible if the hulk was in an unsafe and improper condition. With regard to the condition inserted in the time bill, I do not think it is necessary to inquire whether that would protect the defendant against the consequences of such negligence as this, as there was no evidence to show that the plaintiff had notice of the condition, so as to import it into the contract between him and the defendant. Moreover, the point was not raised at the trial, nor was the rule granted on this point. True, the time-bill was put in evidence by the plaintiff at the trial but it was not put in as evidence of the contract, nor does the plaintiff appear to have been cross-examined as to whether he saw the time-table before taking his ticket. On these grounds, I think that this rule must be discharged.

KEATING, J.—I am of the same opinion. I think that the case falls within the principle of cases that have long been decided and acted upon, and that the defendant is clearly liable. The defendant held out an invitation to the plaintiff to come on board the hulk, of which he had not certainly the exclusive possession, but of which he had such a possession as to throw on him the duty of seeing that those whom he invited on board were not brought into undue danger. The plaintiff, having been so invited on board, went up the ladder to the upper deck, got his ticket, and on the arrival of the steamer, he went down the ladder again. On his getting on to the lower deck, he met with this accident in consequence of there being a hatchway close to the bottom of the ladder, which was uncovered, and very badly lighted. That is quite sufficient to make the defendant liable. I also entirely agree that the defendant is liable on the contract. He contracted to take the plaintiff from Milford Haven to Liverpool, and it was clearly in course of the transit from one place to the other, that this accident happened. Whether the accident was caused by the negligence of the defendant's servants, or by that of the servants of Williams (the owner of the hulk), is, on the authority of the *Great Western Railway Company v. Blake* (*ubi sup.*) immaterial. I cannot agree that that case was decided on the ground suggested by Mr. Quain, viz., that there was an agreement between the Great Western and the South Wales Railway Companies to share in profits so as to make the servants of the latter company the servants equally of the former. In my opinion, it was decided on the ground that by their contract with their passengers the Great Western Company had undertaken to use due care on the whole journey for which they had received payment. I was a party to that decision, and my impression corroborates that of my lord, that that was the ground on which the judgment proceeded, though one or two of the judges used expressions which might bear another interpretation. I think, then, that on this ground also the defendant is liable. Another ground taken on behalf of the defendant is that the notice in the time-table exempts him from liability. But there was no evidence to show that this notice was ever brought to the knowledge of the plaintiff. He may have seen the advertisement, but there is nothing to fix him with knowledge of this condition. The ticket is silent as to it, and

C. P.]

COUCHMAN v. SILLAR AND ANOTHER.

[C. P.]

where it is necessary to bind a party by terms of special exemption it is necessary to show that he had notice of them. I think that the cases have already gone far enough in presuming notice. It can never be said that a party must be taken to know all the contents of a time-table, which he is not shown to have ever seen at all. As to the question of contributory negligence the evidence was conflicting; the jury decided in favour of the plaintiff, and the learned judge has not reported himself dissatisfied with the verdict. I think, therefore, that this rule ought to be discharged.

M. SMITH, J.—I am of the same opinion. I think it is immaterial whether or not the hulk was in the exclusive possession and management of the defendant. Suffice it to say, that it was used by the defendant for the purpose of the embarkation of passengers, which took place under the control of the defendant's servants. If these servants merely held out to the public that passengers might take their tickets on this hulk and embark from it on the steamer, I think that, on the authority of *Indermaur v. Dames* (*ubi sup.*), that is sufficient to make the defendant responsible for an accident caused by a hidden danger on the hulk to a person who was lawfully there and on his invitation. But I also think that the defendant had contracted to carry the plaintiff from the shore of Milford Haven to Liverpool, and that it was an essential part of such a contract that the plaintiff should be carried with due care. The main contention on the part of the defendant is, that there was no want of care on the part of the defendant's servants. But I think that, the defendant having contracted to use due care throughout the whole of the transit, the passengers have a right to see that due care is exercised in the management of the vessels engaged in the transit, whether they are under the charge of the defendant's servants or of those of a third party. That is established by a series of authorities, the leading case on the subject being the *Great Western Railway Company v. Blake* (*ubi sup.*). The recent case of *Francis v. Cockrell* (*ubi sup.*) has carried a similar obligation into contracts not relating to carriage. There the person who received payment for admission to a race-stand was held to have warranted that due care had been exercised in its erection. If carriers choose not to perform the whole journey themselves, and contract with others to do a part of it, they are still bound to see that due care is taken of their passengers, and are responsible if it is not. As to the other points raised, I also agree that this rule must be discharged.

BRETT, J.—I think that, on the question of contributory negligence, there was strong evidence for the defendant, and I am not prepared to say, that, if I had been on the jury, I should not have found on this ground for the defendant. Still, for the reasons given by the rest of the court, I do not think that the verdict of the jury should be disturbed on this ground. With regard to the point raised as to the defendant being absolved from liability by the notice given in the time-table, I also agree with the rest of the court. The question, then, is reduced to this, whether the defendant is liable for the admitted negligence on the part of somebody in leaving the hatchway in such a dangerous state. It is argued, first, that the defendant is liable, as his servants had charge of the hulk. I cannot, however, satisfy myself that that is so. It was not the duty of the defendant's servants (looking at the matter as between the defendant and Williams) to open or close the hatchways. I am not at all satisfied that any part of the agreement between the defendant and Williams could be relied on to prove the

liability of the defendant for this accident. If the negligence in this case could be said to be partly the negligence of the defendant's servants, in not seeing the place properly lighted, and partly that of Williams' servants in not shutting down the hatchways, I think the defendant might be held liable; and there is strong evidence to show that, as against Williams, the defendant was bound to provide lights. But I think that, even if we assume that the accident was caused partly from the hatchway being left open, and partly from the absence of lights, and that the servants of Williams were responsible for both these pieces of negligence, the question arises whether the defendant is not even then liable. He had contracted to carry the plaintiff from the shore of Milford Haven to Liverpool. The advertisement of the defendant's steamers was put in by the plaintiff, not as part of the contract between him and the defendant, but to show how that contract was to be carried out. This advertisement showed that the proposed mode of performing the contract was by carrying passengers on the *Gipsy* from the shore to the hulk, by leaving them on the hulk until the steamer came up, and then by transferring them to the steamer. Thus the hulk was made a part of the mode of transit, and there was negligence in leaving that part in an unsafe state. If that was so, then, irrespectively of the question whose servants were guilty of the negligence, I think that, as there was a contract to carry from the shore of Milford Haven to Liverpool, the defendant is liable for this accident. I think he is so, on the authority of the *Great Western Railway Company v. Blake*. The view taken by the Lord Chief Justice and by Mr. Justice Byles in that case is confirmed and explained in *Buxton v. The North-Eastern Railway Company* (*ubi sup.*), and seems to me a clear authority in favour of the plaintiff. Moreover, the recent decision in *Francis v. Cockrell*, is a strong authority to show that, in all these cases, where one party contracts to carry another from one place to another, there is an implied warranty that no accident shall happen to the passenger through the negligence of anybody.

Rule discharged.

Attorney for the plaintiff, *Jas. Price*, Haverfordwest.

Attorney for the defendant, *J. H. Lydall*.

Monday, May 2.

COUCHMAN v. SILLAR AND ANOTHER.

Apprenticeship agreement—Dissolution of partnership—Demurrer.

To an action upon an agreement of apprenticeship against the defendants, who were partners, for not teaching the plaintiff's son, the defendants pleaded that they were always ready and willing to perform the agreement, but that the plaintiff's son absented himself from the service of the defendants, and thereby prevented the defendants from performing the said agreement on their part, and refused to permit them to do so.

The plaintiff newly assigned, and the defendants pleaded that before the alleged breaches the partnership between the defendants was dissolved, and the defendants ceased to carry on the business of tea and general colonial brokers in partnership, and the said business was, therefore, carried on as before, and as in the agreement in the declaration referred to, by one of the defendants alone, and he was always ready and willing to teach and instruct the plaintiff's son in the said business, and gave him every facility for acquiring a full knowledge of the same, and in all respects to the

C. P.]

COUCHMAN v. SILLAR AND ANOTHER.

[C. P.]

utmost of his power helped the plaintiff's son to a thorough knowledge of the said business in pursuance of the agreement set out in the declaration :

Held, on demurrer, that the plea to the declaration was good, but the plea to the new assignment was bad.

This was a demurrer to two pleas, one a plea to the declaration, the other to a new assignment.

The declaration stated that an agreement was entered into between J. C. Sillar and A. H. Bateman, tea and general colonial brokers, of the first part; Charles Couchman (the plaintiff) of Morley-road, Lewisham, Kent, of the second part; and Charles Couchman, the younger, of Morley-road aforesaid, a minor, son of the said Charles Couchman, of the third part; whereby the said J. C. Sillar and A. H. Bateman, in consideration of 99*l.* 19*s.* paid by the said Charles Couchman, the elder, to them, agreed with the said Charles Couchman, the elder, to take the said C. Couchman, the younger, into their business of tea and general colonial brokers for two years from the date of the agreement; and during such two years to teach and instruct the said C. Couchman, the younger, in all branches of the said business as the same shall be carried on by them, and to give the said C. Couchman, the younger, every facility for acquiring a full knowledge of the said business that occasion may afford, and in all other respects to the utmost of their, or either of their, power to help the said Charles Couchman, the younger, to a thorough knowledge of the business of a tea and general colonial broker. Then followed a covenant by Couchman, the elder, for Couchman, the younger, faithfully to serve the firm. It was then averred that the plaintiff paid the said sum of 99*l.* 19*s.* above mentioned to the defendants, and all things were done, &c., to entitle the plaintiff to have the said agreement kept by the defendants, and to sue for the breaches thereafter mentioned, and the defendants did for a certain period observe and perform the same, and receive the said C. Couchman, the younger, into their service and teach him for a certain part of the said two years; yet they did not nor would teach and instruct the said C. Couchman in all or any branches of the business of tea and general colonial brokers during the residue of such two years, nor give him every facility for acquiring a full knowledge of the same that occasion might afford, nor did nor would in all other respects to the utmost of their, or either of their, power help the said C. Couchman, the younger, to a thorough knowledge of the said business, but failed, neglected, and refused so to do, and wrongfully and without any cause, dismissed the said C. Couchman, the younger, from their services, and did not nor would permit or suffer him to serve them in their said business of tea and general colonial brokers as agreed, and did not nor would during the said two years after the making the said agreement carry on the said business of tea and general colonial brokers, but before the expiration of that time dissolved partnership, and ceased to carry on such business, and by their own acts and defaults disabled themselves from carrying on the said business, and performing their said agreement; whereby the plaintiff lost the benefit thereof, and of the expenses which he was put to and in and about the same, and the advantage which he would have obtained from having the same further performed by the said defendants, and was and will be put to expenses in and about having the said C. Couchman, the younger, instructed by other persons in the said business.

There were also counts for money had and received, and on accounts stated.

The third plea stated that the defendants, as to so much of the said first count as alleges that they did not nor would teach or instruct

the said C. Couchman, the younger, in all or any branches of the business of tea and general colonial brokers, during the residue of the said two years, nor give him every facility for acquiring a full knowledge of the same that occasion might afford, nor did nor would in all other respects to the utmost of their or either of their power help the said C. Couchman, the younger, to a thorough knowledge of the said business, but failed and neglected so to do; say that they were always ready and willing to perform the said agreement upon their part, but that the said C. Couchman, the younger, absented himself from the service of the defendants, and thereby prevented the defendants from performing the said agreement on their part, and refused to permit them so to do.

The plaintiff demurred to the third plea, and newly assigned.

The ground of the demurrer was stated to be that the absence of C. Couchman, the younger, was not alleged as having happened before breach, and the absence after breach would not release a prior breach, or excuse the defendants from performance, except during such absence, and that therefore the plea attempted too large a justification.

There was joinder in demurrer, and for a second plea to the plaintiff's new assignment the defendants said that before the alleged breaches the partnership between the defendants was dissolved, and the defendants ceased to carry on the business of tea and general and colonial brokers in partnership, and the said business was thenceforth carried on as before, and as in the agreement in the declaration referred to by the defendant, A. H. Bateman, alone; and the defendant, A. H. Bateman, was always ready and willing to teach and instruct the said Charles Couchman, the younger, in the said business, and gave him every facility for acquiring a full knowledge of the same, and in all respects to the utmost of his power helped the said C. Couchman, the younger, to a thorough knowledge of the said business in pursuance of the agreement set out in the declaration.

This second plea to the new assignment was demurred to, on the ground that it admitted the breaches complained of in the declaration without avoiding or justifying the same.

The issues of fact had been tried, and a verdict of £40 entered for the plaintiff, subject to the decision of the court upon these demurrers.

Garth, Q.C. (with him *Collier*) argued for the plaintiff.—The third plea omits to say whether it was before or after the alleged breach that the plaintiff's son absented himself from the service of the defendants; and if he really absented himself only after the breach the plea is no answer: (*Hughes v. Humphery*, 6 B & C. 680.) The second plea to the new assignment states as a reason for the defendants not fulfilling their contract, that they had dissolved their partnership, i.e., having by an act of their own rendered it impossible for them to do what they had agreed to do, they give that act as an excuse for not carrying out the agreement. In the case of *Brook* (app.) v. *Dawson* (resp.), 20 L. T. Rep. N. S. 611, the Court of Queen's Bench affirmed a decision of a magistrate to the effect that upon the dissolution of partnership of two persons to whom a boy was jointly apprenticed, the person carrying on the business alone could not take steps under the magistrates' summary jurisdiction against the apprentice for misconduct.

Brown, Q.C. (with *T. Salter*) for the defendants.—There is no authority exactly in point, although *Popham v. Jones*, 13 C. B. 225, and other cases like it, nearly touch the matter. The nearest is that cited by the other side, but in the argument there

C. P.]

PEMBROKE BOROUGH ELECTION.

[C. P.]

Lloyd v. Blackburn, 11 L. J. 210, Ex., was cited, where Lord Abinger said, "It is possible that where, on a dissolution of partnership, one partner agrees to resign the apprentice to another, the apprenticeship may still subsist." The question really is whether this was an engagement on the defendant's part that both partners should personally instruct the apprentice, or merely cause him to be instructed. The words "their or either of their power" suggest that one partner alone could perform the agreement. [Not heard as to the plea to the declaration.]

BOVILL, C. J.—I have no doubt the plaintiff has a right to bring this action. He paid his money to the defendants, and in consideration of that payment, and the services of his son, the two defendants agreed to take the plaintiff's son into their business of tea and general colonial brokers for two years, and during such two years to teach and instruct him in all branches of the said business as the same should be carried on by them, and to give him every facility for acquiring a full knowledge of the said business that occasion might afford, and in all other respects to the utmost of their or either of their power to help him to a thorough knowledge of the business of a tea and general colonial broker. To the alleged breach of this agreement, the defendants have answered that before breach the partnership between the defendants was dissolved, and the defendants ceased to carry on the business of tea and general colonial brokers in partnership, and the said business was thenceforth carried on as before, and as in the agreement referred to, by the defendant A. H. Bateman alone, and the defendant, A. H. Bateman, was always ready and willing to teach and instruct the plaintiff's son in the said business, &c. The defendants admit that they have disabled themselves from carrying out their contract, and by every principle of law non-performance of a contract cannot be excused by a fault of the person whose duty it is to perform it. As to the other demurrer, the plea is perfectly good; it is in substance a complete answer to the action, although it might, perhaps, upon a special demurrer, be bad for the omission of some more particular words. The clause, "thereby prevented the defendants from performing the said agreement," shows that the plaintiff refers to a time before the breach.

KEATING, J.—I am of the same opinion.

SMITH, J.—I am of the same opinion. I think any objection made by Mr. Brown would go to show that there was no breach of the agreement. But it is admitted on the record that both defendants did not, and could not, teach the plaintiff's son as they agreed to do.

BRETT, J.—I was anxious to hear what could be said in support of the plea to the new assignment, and it seems to me, as I expected, that it cannot be a good answer to a breach of the agreement. I think the other plea demurred to is perfectly good.

Judgment for plaintiff on one demurrer, for defendant on the other.

Attorney for plaintiff, *H. Gover*.

Attorneys for defendants, *Shepherd and Son*.

PEMBROKE BOROUGH ELECTION.

Wednesday, May 11.

Re AN ELECTION PETITION; HUGHES v. MEYRICK.

Withdrawal of petition—Costs—Expenses of respondent before delivery of particulars—Election Petitions Act 1868 (31 & 32 Vict. c. 125), sect. 41—Regulæ generales, Mich. Term, 1868, No. 6.

An election petition had been fixed to be tried on the 1st April (Thursday in Easter week), and an order was made on the 22nd March that particulars should be given three days before the trial of all persons alleged to have been bribed, treated, and unduly influenced; no particulars were delivered, but on the 29th March (Monday in Easter week) notice was given to the respondent that an application would be made by the petitioner to withdraw his petition; on the 5th April an order was made that the petitioner should be at liberty to withdraw, and that he should pay the costs of the respondent.

Upon the taxation of costs, the master disallowed all the respondent's expenses, with the exception of 10 guineas, for expenses of the respondent's attorney in getting up the defence, and in drawing the briefs, for fees paid to counsel, and for subpoenas:

Held, upon a rule to review the taxation, that the liability for costs is not to be limited to expenses incurred by the opposite side after the delivery of particulars, but that the master should exercise his discretion whether, under the circumstances, it was reasonable for the respondent to make preparations for defence before he had notice of the charges to be brought against him.

A rule nisi had been granted calling upon the petitioner to show cause why the master should not be at liberty to review his taxation of the respondent's costs in the matter of the said petition, viz., first, as to the disallowance of instructions for briefs; secondly, of charges for briefs; thirdly, of fees to counsel with their briefs, and charges for attendance therewith; fourthly, of the costs for issuing subpoenas, and the service of some of them.

It appeared from the affidavit of the respondent's attorney, who had conducted the defence to the petition, that

The petition was served on the respondent on the 14th Dec. 1868. On the 26th Feb. 1869 notice was given that the petition would be tried at Pembroke on the 1st April 1869 (being the Thursday in Easter week), and on such other subsequent days as might be needful.

On the 22nd March 1869 an order was made that the petitioner should, three days before the day appointed for trial, leave with the master, and also give the respondent or his agents, particulars in writing of all persons alleged to have been bribed, of all persons alleged to have been treated, and of all persons alleged to have been unduly influenced, before, during, and after the election, and that no evidence should be given by the petitioner of any objection not specified in such particulars, except by leave of a judge, upon such terms, if any, as to amendment, postponement, and payment of costs, as might be ordered.

No particulars were delivered in pursuance of the said order, but on the 29th March 1869 (being the Monday in Easter week) between the hours of five and six p.m., a notice was served at the office of the respondent's attorney, that the petitioner proposed to apply to withdraw his petition, on the ground that the evidence which he had been able to obtain in support of his petition was not sufficiently strong to justify the further prosecution thereof.

On the 5th April 1869, an order was made by Martin, B., the judge who had been appointed to try the petition, that the petitioner should be at liberty to withdraw the petition, and that the petitioner should pay the costs of the respondent.

In pursuance of this order, the costs of the respondent were taxed, and the master made his allocatur dated the 23rd Feb. 1870, whereby he allowed the sum of 63l. 6s. 6d. for the costs of the respondent.

The borough of Pembroke consists of the several boroughs, towns, or districts of Pembroke, Pembroke Dock, or Pater, Monkton, Milford, New Milford, or Neyland, Hakin Tenby, and Wiston, some of which places are situate at considerable distance from each other.

In order to prepare for the defence of the respondent,

C. P.]

PEMBROKE BOROUGH ELECTION.

[C. P.]

and ascertain what charges might possibly or probably be brought forward in support of the petition, it was necessary to employ persons in each of the places above mentioned to keep a watch upon the movements of the petitioner and his agents, and other persons acting in his interest, and collect evidence to rebut such charges. It was also necessary to collect evidence to show generally that the election had been conducted with perfect purity and absence from bribery (treating and undue influence as, alleged by the petition), on the part of the respondent or his agent. The preparation for the defence also involved very voluminous correspondence with the persons so employed as aforesaid, and attendances upon respondent and other persons, including a journey to Pembroke, where the respondent's attorney was personally engaged for six days, and in his judgment I could not properly have conducted the defence had the petition come on for trial without preparing for the same in the manner detailed, inasmuch as the particulars ordered to be given by the petitioner could not, even if transmitted by telegraph, have been made available at Pembroke for more than two clear days, before the trial, which, having regard to the extended nature of the constituency, would not have allowed sufficient time for the necessary inquiries and collection of evidence.

That the bill of costs of the respondent included a charge as "instructions for briefs," comprising the work just referred to, and including a sum of 189*l.* 3*s.* 8*d.* for the charges of the persons employed on behalf of the respondent as aforesaid, amounting to the sum of 367*l.* the whole of which was disallowed by the master.

The bill of costs also included a sum of 8*l.* 4*s.* for the expenses which the respondent's attorney actually incurred by his said journey to Pembroke, which was also disallowed by the said master.

The said bill of costs also included a charge of 29*l.* 6*s.* 8*d.* for drawing the brief for the defence, with a charge of 14*l.* 13*s.* 4*d.* for a copy thereof for use, in respect of all which charges the master allowed a sum of 10*l.* 10*s.* only.

The facts and matter stated in the brief were material, and were set out *bona fide*, and the charges for the same were fair and proper.

The bill of costs also included a sum of 210*l.* 10*s.* for the fee paid with the brief to the senior counsel, and a sum of 110*l.* for the fee paid to the junior counsel retained, the defence, together with the usual and proper charges for attendances on them respectively with their briefs, which were actually delivered and the fees were actually paid before the notice was given by the petitioner of his intention to apply for leave to withdraw from the petition, but the said fees and charges were wholly disallowed by the master.

In consequence of the offices of this court being closed on the Monday and Tuesday in Easter week it was necessary during the previous week to obtain such a number of subpoenas for witnesses as having regard to the size of the constituency, which consisted of nearly 3000 voters, and the general nature of the allegations contained in the petition, would be required; as, if such subpoenas had not been obtained until the Wednesday in Easter week after delivery of particulars, such subpoenas could not have been transmitted to Pembroke and the other places comprised in the borough for service in time to ensure the attendance of witnesses at the trial on the following day, even assuming they were all to be served in the neighbourhood, but the master disallowed the whole of the charges for such subpoenas, which were also included in the bill of costs.

In consequence of the petitioner's agents having verbally informed the respondent's attorney that he intended to proceed on a charge of undue influence by a commander of one of H. M.'s ships, it became necessary to subpoena two persons as witnesses who, as he was informed and believed, could disprove such undue influence, and one of such witnesses was then serving on board one of H. M.'s ships at Plymouth, and the other was about to join his ship at Portsmouth, and in order to ensure their attendance in due time it was necessary to subpoena such two witnesses, without awaiting for the delivery of the particulars, but the whole of the charges included in the said bill of costs for the expenses attending the serving of the said witnesses with subpoenas, as well as the payments made to them, were disallowed by the master.

The amount of costs claimed for the respondent was 918*l.* 4*s.* 5*d.*; of which the master disallowed 854*l.* 18*s.* 1*d.*; leaving only to be paid by the petitioner 63*l.* 6*s.* 4*d.*

H. James, Q. C. showed cause against the rule. —By the 6th of the general rules drawn up in pursuance of the Act of 1867, "the court or a judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial, in the same way as in ordinary proceedings in the Court of Common Pleas, and upon such terms as to costs and otherwise as may

be ordered." The election judges have fixed three days as the usual time before trial at which particulars should be given, and this court has approved of that practice: (*Beal v. Smith*, L. Rep. 4 C. P., 145; 19 L. T. Rep. 565.) The question is, whether it is reasonable for a respondent to incur expense in preparing and delivering briefs before he can know what case is to be brought against him. Under the old system of parliamentary petitions, no particulars were delivered until the trial had actually commenced; the object of the alteration was to put an end to unnecessary expense of this very kind. [SMITH, J.—If the master thought a brief should never, as a rigid rule, be delivered before the receipt of the particulars, this review, perhaps, should be allowed; but if, as a matter of discretion, the master thought this was a case in which there was no necessity to incur expense for the defence before the particulars were known, we should be unwilling to interfere.]

Upon inquiry, it was understood that the master had acted in accordance with the rule supported by the petitioner's counsel.

Mellish, Q. C. (with him Harrington), for the respondent, was not heard in support of the rule.

BOVILL, C. J.—The Legislature has declared that the costs of election petitions are to be taxed according to the same principles as costs between attorney and client are taxed in a suit in the High Court of Chancery (sect. 4 of the Election Petitions Act 1868), and rules have been drawn up which this court considered in the case of *Hill v. Peel*, L. Rep. 5 C. P., 172; 22 L. T. Rep. N. S. 98. We there concluded that parties who obtained an order for costs were entitled to an indemnity for all expenses that were reasonably incurred by them in the ordinary course of matters of this nature; and we also intimated an opinion, which I now repeat, that the parties are entitled to have the judgment of the master upon particular items, if they think fit. No definite rule can be laid down as to the interpretation of expenses reasonably incurred; it must depend upon the facts of each case, and if the master has exercised his discretion after consideration of all the circumstances, we are very unwilling to interfere with his decision. He seems here, however, to have acted on the principle that the delivery of particulars has the same effect as that of notice of trial in an ordinary action; I am of opinion that is not the correct view either of the Legislature or of this court. It is true that the election judges and this court concluded in the case of *Beal v. Smith* that the petitioners should give, three days before the trial of an election petition, particulars in writing of all persons alleged to have been bribed, treated, and unduly influenced; but we have never intimated, at least I never intended to intimate, that the respondent's brief was not to be delivered until after the particulars had been received by the respondent. It would be hard upon the respondent if his case is to be prepared only after the delivery of particulars. The election judge must make his arrangements as to the day on which the trial is to commence, and if the petitioner persists in prosecuting his petition until within a day or two of the time for the delivery of particulars, and then withdraws, it would be a denial of justice if he should escape the payment of the reasonable expenses which the respondent has already incurred. Generally, the party petitioned against may get some information upon which he can act, before he knows the particular cases relied on by the other side; for instance, the persons who had acted as his agents can be consulted, and a variety of other matters may be considered upon which the master should exercise his

C. P.]

REG. v. ELIZABETH BROWN.

[C. CAS. R.]

discretion as to whether expense was properly incurred. Here, although I do not wish to fetter the master's discretion, I do not think he has acted upon the rule that all expenses reasonably incurred are to be allowed. The fact that the trial was fixed to take place in Easter week should not be altogether disregarded in considering the fair time for delivering the briefs; but I will not go into details. The parties are entitled to the opinion of the master upon every item of the costs, and the same rule applies to the subpoenas. The briefs need not always be delivered immediately upon the filing of a petition; but the master should exercise his discretion as to whether the expenses charged are reasonable between attorney and client for the defence of a prudent and reasonable man. This taxation should go back to the master in order that he may act upon the principles laid down in *Hill v. Peel*.

KEATING, J.—I am of the same opinion. I think it is a principle which cannot be recognised that no brief ought to be delivered to a counsel on behalf of a respondent before the particulars have been received. Each case ought to depend upon its circumstances, and although the particulars ought not to be lost sight of in the consideration of the amount of preparation for the defence, we cannot expect that a respondent should do nothing up to three days before the trial.

SMITH, J.—I concur in making this rule absolute on the ground that the master has acted on a wrong principle, viz., that the petitioner should be responsible for no expense, beyond that of a nominal brief, which the respondent may have incurred before he receives particulars. I think he ought not to have so confined the costs which the petitioner should pay. In some cases the respondent might be entitled to incur considerable costs about a matter concerning which he has reason to expect, without specific notice, that an attack is going to be made. He is in a state of war, and if the petition is withdrawn he is entitled to be indemnified against all expenses which he reasonably incurs, or those expenses which a prudent man would have paid out of his own pocket. I do not say that in this case the briefs were not delivered before it was necessary, but whether it was so or not is a question for the discretion of the master. I may say that it is not fair either to counsel or their clients that the delivery of briefs should be delayed until a day too close upon the trial. The master seems to have exercised no discretion upon this point, and therefore this taxation should go back to him.

BRETT, J.—It seems to me that the only rule which should govern this matter is that the costs should be allowed if they were incurred in respect of an act which the attorney would have been justified in doing without specific instructions from his client. As I understand it, although the master considered the delivery of the briefs at this time a reasonable act, he has refused to allow the costs, because the respondent had not then received the petitioner's particulars. Such a rule might, I think, cause the greatest injustice, and a petitioner can always protect himself by withdrawing his petition earlier than was done here.

Rule absolute.

Attorneys for petitioner, Wyatt and Hoskins.

Attorneys for respondent, Law, Hussey, and Hulbert.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, May 7.

(Before BOVILL, C. J., WILLES, BYLES, and HANNEN, JJ., and CLEASBY, B.)

REG. v. ELIZABETH BROWN.

Concealment of birth—What is—24 & 25 Vict. c. 100, s. 60.

What is a secret disposition of the dead body of a child within the meaning of 24 & 25 Vict. c. 100, s. 60, is a question for the jury, depending on the circumstances of the particular case.

Where the dead body of a child was thrown into a field over a wall 4½ ft. high, separating the yard of a public-house from the field, and a person looking over the wall from the yard might have seen the body, but persons going through the yard or using it in the ordinary way would not, it was held that this was evidence from which the jury might infer a secret disposition of the body.

Case reserved for the opinion of this court by Mr. Justice Brett:—

The prisoner, Elizabeth Brown, was tried and convicted before me at Newcastle, at the last Spring Assizes for the county of Northumberland, for endeavouring to conceal the birth of her child by secretly disposing of the dead body thereof.

The evidence as to the disposition of the body was a statement by the prisoner that she had put the body over a wall near which it was found; and statements before the jury by witnesses that the wall was 4½ ft. high, dividing a yard from a field; that the yard was at the back of a public house, used for the convenience of that house and three other tenements by the occupiers thereof; that there was no thoroughfare into or through the yard, and no other entrance to it than by a narrow passage from the street; that the prisoner, who did not live at the public-house or at any of the tenements, must have passed from the street into the yard in order to throw the body over the wall into the field; that a person looking over the wall from the yard would see the child, but persons going through the yard or using it in the ordinary way would not see the child; the wall would hide the child from such persons; that the field in which the body was found was a grass field, used by a butcher to graze cattle; that it was a field with no gate into it from any road or from the public-house yard, but with a gate from the butcher's own yard; that there was no public path through the field; that there was no track or path in the field which would take anyone within sight of the body; that no person going into the field in their ordinary occupation would go near the body or see it; that no one in the field would see it unless he went accidentally or on search up to the part of the wall where the body lay; that a little girl picking flowers in the field went accidentally to the wall and found the body; that it was close to the wall, as near to it as could possibly be. It seemed as if it had been thrown over the wall; there was blood on the wall; the body was lying on its face, at twenty yards from the gate, naked, with nothing on or over it, nothing to conceal it but its situation in the field and the wall.

Upon this evidence, it was contended, on behalf of the prisoner, that there was no evidence of a secret disposition of the dead body, and the case of *Reg. v. Nixon*, 4 F. & F. 1040, was cited.

I left, upon this part of the case, the following question to the jury:—

Did the wall and the position of the child in the

C. CAS. R.]

REG. v. GUTHRIE.

[C. CAS. R.]

field, and with regard to the wall and the mode in which the field and the yard were used, conceal the body from all the world, unless from a person who, by searching for the child, might find it, or by going out of the way in the field or by looking over the wall might accidentally discover it. I told them that if they found an answer in the affirmative they might find that there was a secret disposition of the body, but that if they found an answer in the negative, they could not, in my opinion, find that there was a secret disposition. The jury found the prisoner guilty.

I desire the judgment of the Court of Criminal Appeal upon two points, first, whether there was any evidence of a secret disposition of the dead body of the child within the meaning of the statute; and, secondly, whether, if there was such evidence, the form in which the question was left to the jury was wrong in law.

If the court should be of opinion that there was no evidence, or that the form of the question was wrong, then the conviction to be quashed; but if the court should be of opinion that there was evidence, and that the form of the question was not wrong, then the conviction to stand.

WM. BALIOL BRETT.

No counsel appeared for the prisoner.

Ridley for the prosecution.—The question is whether there was any secret disposition of the body of the child. The case of *Reg. v. Nixon* was one where the prisoner was seen to remove the body out of the house, and it was afterwards found in the penfold or pond, 150yds. off an open place (though locked), surrounded with a wall 5ft. high on the outside, and along which was a public pathway, so that anyone who passed could look over and see it. In that case the probability was that people passing would find the body; here the circumstances are such that probably no one would find the body. In *Reg. v. Clarke*, 4 F. & F. 1040, it was held to be a question for the judge whether there has been a secret disposing of the body, i.e., a disposing of it in such a place as that the offence may have been committed (and a dustbin is such a place), but it is for the jury to say whether there has been such a disposing of the body by the prisoner. In the old statute, 9 Geo. 4, c. 31, s. 14, the words were "by secret burying or otherwise disposing of the dead body of the child;" but in the present Act, the 24 & 25 Vict. c. 100, s. 60, the words are "every person who shall by any secret disposition of the dead body of the child;" the change is material. And in *Reg. v. Sleep*, 9 Cox Crim. Cas. 559, the words of the 24 & 25 Vict. c. 100, s. 60, were held to mean the putting the body of the dead child in a place where it is not likely to be found, but merely placing it in an open box in a bedroom, and afterwards, on inquiry by the medical man, informing him that the body was in the box, was held not a secret disposition within the statute. In *Reg. v. Eliza Cook*, 22 L. T. Rep. N. S. 216, it was held that though the placing the dead body of the child in an unlocked box is not of itself sufficient evidence of concealment of birth, yet all the attendant circumstances must be considered, in order to determine whether or not the offence has been committed within the 24 & 25 Vict. c. 100, s. 60.

BOVILL, C.J.—The first question is whether there was any evidence of the secret disposition of the dead body of the child within the meaning of the statute. Now, what is a secret disposition of the dead body depends upon the circumstances of each case. One may conceive of such a disposition where the circumstances might also amount to a public exposure, as placing the body in the middle of a large moor in winter, or on the top of a high mountain where persons are not likely to go. It is for the jury in

each case to say what amounts to a secret disposition of the body. In the present case there was abundant evidence of a secret disposition of the body, for the body was put over a wall near which it was found, and the wall might conceal the body, and whether it did so was a question for the jury. A woman might throw the dead body of a child over a cliff on to the seashore, and if the shore was frequented by persons at the spot, the act might not amount to a secret disposition of the body; but if it was unfrequented, then it might amount to a secret disposition. The only other question is as to the direction of the learned judge to the jury, and we think that that was correct, and that the conviction ought to stand.

The rest of the COURT concurring,

Conviction affirmed.

REG. v. GUTHRIE.

Carnal knowledge of a girl under twelve—Assault—Indictment.

An indictment charged that G., in and upon D., a girl above the age of ten, and under the age of twelve, unlawfully did make an assault, and her the said D. did then unlawfully and carnally know and abuse against the form of the statute.

Held, that the indictment contained two charges, one of common assault, and the other of the statutable misdemeanor (24 & 25 Vict. c. 100, s. 51), and that the prisoner might be convicted of a common assault upon it.

Case reserved for the opinion of this court by John Robert Davison, the chairman of the Court of Quarter Sessions for the county palatine of Durham.

Durham, to wit. At the general quarter sessions of the peace of our lady the Queen, holden at Durham, in and for the county of Durham, on Monday the 4th April, in the thirty-third year of the reign of our sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen defender of the faith, and in the year of our Lord 1870. Before John Robert Davison and Anthony Wilkinson, and John Fawcett, Esqs., and Edmund Hector Shipperdson, clerk, and others their fellows justices of our said lady the Queen, assigned to keep the peace of our said lady the Queen, and also to hear and determine divers felonies, trespasses, and other misdemeanors done and committed in the said county.

John Guthrie was tried on an indictment, of which the following is a copy:—

Durham, to wit. The jurors for our lady the Queen, upon their oath present, that John Guthrie, on the 24th Dec., in the year of our Lord 1869, in and upon one Margaret Davidson, a girl above the age of ten years, and under the age of twelve, to wit, of the age of ten years and three days, unlawfully did make an assault, and her the said Margaret Davidson did then unlawfully and carnally know and abuse against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her Crown and dignity.

There was no other count in the indictment.

The offence of carnally knowing and abusing the girl was disproved, but there was evidence of an assault of an indecent and very violent character, which I left to the jury, who found the accused guilty of a common assault.

I did not sentence the prisoner, who remains in gaol, being unable to find bail.

The opinion of this Honourable Court is requested as to whether John Guthrie could be properly convicted on this indictment of a common assault.

No counsel appeared to argue for the prisoner.

John Edge, for the prosecution.—The indictment, which contained only one count, was founded on the 24 & 25 Vict. c. 100 s. 51, which makes it a misdemeanor to carnally know and abuse any girl being above the age of ten and under the age of twelve years. The count, however, as framed,

C. CAS. R.]

REG. v. HENWOOD.

[C. CAS. R.]

charges substantially two offences — the first, a common assault, and the second the statutable misdemeanor created by sec. 51. If the count had stopped with the words "unlawfully did make an assault," it would have been a sufficient charge of a common assault. And those words are not necessary in the indictment for the misdemeanor created by sect. 51. After conviction this objection cannot be entertained. In *Nash v. The Queen*, 4 B. & S. 985; 38 L. J. 94, M. C., a count of an indictment framed under sect. 221 of the Bankruptcy Act 1861 charged that the defendant was adjudged bankrupt in the Liverpool District Court of Bankruptcy, and that upon his examination in the said court with intent to defraud his creditors he did not fully and truly discover to the best of his knowledge and belief all his property, to wit all his personal property in money and goods, and did not as to part of his property fully and truly discover to the best of his knowledge and belief how, and to whom, and for what consideration, and when he had disposed of, assigned or transferred such part thereof, to wit 1000*l.*, 1000 sacks of corn, &c. The defendant having been convicted on this count, and having brought a writ of error, it was held that if the count charged two offences, duplicity was not a ground of error. In *Rex v. Withal and Overend*, 2 East P. C. 515, it was held that different offences might be laid in the same indictment, and that the prisoner might be acquitted of part and found guilty of the rest; as, if the prisoner be charged that he feloniously and burglariously broke and entered the dwelling-house of J. S., and then and there certain goods of J. S. feloniously and burglariously did steal, &c., the indictment comprises two offences, viz., burglary and larceny; and therefore he may be acquitted of the burglary, and found guilty only of the larceny. [CLEASBY, B.—You would not say that if the prisoner was found guilty of carnally knowing a girl under the age of twelve with her consent, you could upon this indictment find him guilty of a common assault?] No; in that case he ought to be found not guilty of the common assault. In *Rex v. Dawson*, 3 Stark. Rep. 62, Holroyd, J. held that the averment of intention was divisible in an indictment which charged the prisoner with having assaulted a female child with intent to abuse and carnally know her, the jury having found that the prisoner assaulted the child with intent to abuse her but not with intent to carnally know her. In *Reg. v. Cockburn*, 3 Cox Crim. Cas. 543, where, upon an indictment which charged the prisoner with carnally knowing a girl under the age of ten years, and upon the evidence the charge of rape could not be sustained, the counsel for the prosecution suggested that the prisoner might be convicted of an assault, and that the consent of the child could not be presumed by reason of its tender age; but Patteson, J. directed an acquittal on the ground that a child could give such consent as to render the attempt no assault. But in *Reg. v. Banks*, 8 C. & P. 574, Patteson, J. held that the offence of carnally knowing and abusing a female child under ten years old is not a felony which includes an assault within the 1 Vict. c. 85, s. 11, even though it be stated in the indictment that the prisoner made an assault on the child, on the ground that the very offence showed that there was no assault. In *Reg. v. Oliver Bell*, C. C. 287, it was held upon a count for assaulting, beating, and wounding, and occasioning actual bodily harm, against the statute, that a prisoner might be convicted of a common assault. [BOVILL, C. J.—The case of *Reg. v. Yeaton*, L. & C. 81; 9 Cox Crim. Cas. 91; is to the same effect.] *Reg. v. Taylor*, 11 Cox Crim. Cas. 261; L. Rep. 1 Cr. Cas. Res. 194; was also cited.

distinctly an offence at common law that the prisoner in and upon one Margaret Davidson, a girl above the age of ten years and under the age of twelve years, unlawfully did make an assault. And it further charges, "and her, the said Margaret Davidson, did then unlawfully and carnally know and abuse against the form of the statute." The second charge is a statutable one. If there is any objection to the indictment on the ground of duplicity, it is no objection at this stage of the case. It was only necessary to prove such facts as were material to support either charge. With regard to the charge of assault, that would not have been made out if consent on the part of the girl had been proved. There is no ground for saying that the prisoner was not properly convicted if the charge is contained in the indictment. The cases of *Reg. v. Gliver*, *Reg. v. Yeaton*, and *Reg. v. Taylor*, show that the conviction for the assault was right. Then, the addition of some more serious charge in the indictment does not prevent the prisoner being found guilty of the assault.

WILLES, J. concurred.

BYLES, J.—My mind is not free from doubt in this case, but the doubt is not sufficiently strong to make me differ from the rest of the court.

HANNEN, J. concurred.

CLEASBY, B.—I thought at first that the indictment charged one offence only, but it may be read as including the two offences. And, if so, the prisoner was properly convicted of a common assault.

Conviction affirmed.

REG. v. HENWOOD.

Larceny—Indictment—Election—Continuous taking
—24 & 25 Vict. c. 96, s. 6.

An indictment charged an assistant to a photographer with stealing divers articles belonging to his employer. It did not appear when the articles were taken, whether at one or more times, but only that one particular article could not have been taken before a given month:

Held, that this was not a case in which the prosecutor should be put to elect upon which articles to proceed under 24 & 25 Vict. c. 96, s. 6.

At the Quarter Sessions for the borough of Brighton held on the 11th March 1870, before me, John Locke, Esq., one of Her Majesty's counsel and Recorder of the said borough, Charles Henwood was indicted for stealing a quantity of negatives, chemicals, and other things, the property of John Jabez Edwin Mayall, a photographer, his master. The indictment was in the words following:

Borough of Brighton to wit.—The jurors for our lady the Queen upon their oath present that before and at the time of the committing of the offence hereinafter mentioned, Charles Henwood was servant to one John Jabez Edwin Mayall, and that the said Charles Henwood, whilst he was such servant to the said John Edwin Jabez Mayall, to wit, on the 17th Jan. 1870, feloniously did steal, take, and carry away twenty negatives, twenty sheets of photographic glass, fifty mounting cards, four black sheets of publication portraits, fifty mounted positives, four quires of aluminised paper, 4oz. chloride of gold, one Winchester quart of collodion, 20oz. of nitrate of silver, 10oz. of proto-sulphate of iron, 1oz. of spirit varnish, or the goods and chattels of the said John Jabez Edwin Mayall, his said master as aforesaid, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

There was a second count for receiving the same things.

First. The prisoner had been in the service of the prosecutor for nine years, and was in his service on the 17th Jan. 1870, and the evidence given in support of the indictment was that on that day a

BOVILL, C. J.—In this case the indictment charges

C. CAS. R.]

THE BRISTOL ELECTION PETITION.

[JUDGES' CH.

number of articles similar to those mentioned in the indictment and which were proved to be the property of the prosecutor, were found at the prisoner's lodgings in a box belonging to the prisoner, but there was no evidence given as to when any of the said articles were taken by or came into the possession of the prisoner, or were first missed by the prosecutor.

Secondly. With reference to one of the articles, namely, the photograph of a lady, it was contended by the prisoner's counsel that it was taken by the prisoner in the month of March 1868, but although it was clear that it could not have been taken before that time there was no positive evidence as to when it was taken.

Thirdly. Counsel for the prisoner then objected that under these circumstances such a state of things arose as to bring into operation the 6th section of the 24 & 25 Vict. c. 96, and require the prosecutor to elect.

Upon this counsel for the prosecution abandoned the case as to the photograph of the lady mentioned in paragraph 2, but contended as regarded all the other articles named in the indictment that the taking was continuous, and he referred to the case of *Reg. v. Firth*, L. Rep. 1 Cr. Cas. Res. 179.

I was of this opinion; but at the request of the prisoner's counsel, I reserved the point for the opinion of this Court.

The prisoner was convicted and liberated on bail.

The question for the court is whether the conviction was right.

JOHN LOCKE, Recorder of Brighton.

Besley for the prisoner.—The question arises on the 24 & 25 Vict. c. 96, s. 6. "If upon the trial of any indictment for larceny it shall appear that the property alleged in such indictment to have been stolen at one time, was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings not exceeding three, as appear to have taken place within the period of six months from the first and the last of such takings." The question was reserved upon the following passage in a judgment of Bovill, C. J., in *Reg. v. Firth*, L. Rep. Cr. Cas. Res. 175; 11 Cox Crim. Cas. 234. "Another case might be suggested of a man at work in a house stealing on different days out of different rooms, and taking one article out of one room, and another out of another at intervals of a quarter of an hour or longer, all during the same job of work. I should rather suppose that this would be one continuous act, and might be included in one indictment." When once it appears that any one article was taken more than six months from the others the statute applies. In this case the photograph was so taken. [By the COURT.—The case as to that was abandoned.]

BOVILL, C. J.—The objection raised at the trial was that the prosecutor ought to be put to his election under sect. 6 of the 24 & 25 Vict. c. 96. Thereupon the counsel for the prosecution abandoned the case as to one particular photograph, and the case then proceeded with respect to the other articles. To make the statute applicable it must appear that the different articles enumerated in the indictment were stolen at different times, but there is nothing in this case inconsistent with all having been taken at one time, or in such a way as to form one continuous taking. Now the statute says that the prosecutor shall not be required to elect

except in certain events. In the first place it must appear that the property was taken at different times, then that there were more than three takings, or that more than six months elapsed between the first and the last of such takings. The statute, therefore, has no application to this case. Had there been evidence of distinct takings it would have made no difference, for the case would then have been similar to the taking of coal at different times in a mine (*Rex v. Bleasdale*, 2 Car. & K. 675), and the case of cutting trees at such times as to form one continuous taking (*Reg. v. Shepherd*, 87 L. J. 45, M. C.; 11 Cox Crim. Cas. 110), and to the case of taking gas for a long time in succession: (*Reg. v. Firth*, 11 Cox Crim. Cas. 234.) The conviction, therefore, must be affirmed.

Conviction affirmed.

JUDGES' CHAMBERS.

THE BRISTOL ELECTION PETITION.

Wednesday, May 11.

(Before BRAMWELL, B.)

BRETT AND OTHERS v. ROBINSON.

Bribery and treating—Personation—Test ballot—Time for giving particulars.

A vacancy having occurred in the representation of a city, several candidates of like politics started but agreed to a test ballot to decide which should continue the contest. It was alleged that corrupt practices had prevailed at this ballot:

Held, that the trial of the petition being fixed for Monday, May 23, particulars must be given on the 17th, with permission to add to them up to the 19th, containing the names and addresses of the persons alleged to have been bribed and treated, and of those who bribed and treated, and the places where and times when the alleged treating took place.

This case came before his Lordship on an application by the sitting member for particulars of the charges alleged in the petition against him. It was the first case in which bribery and treating have been alleged in reference to a test ballot. Of the three Liberal candidates at the recent election for Bristol, Mr. Hodgson, Mr. Robinson, and Mr. Odger, the test ballot was in favour of Mr. Robinson, and at the election he was returned, thereby defeating the Conservative candidate. A petition was subsequently presented under the Parliamentary Elections Act 1868 against Mr. Robinson, in which he was charged with bribery, treating, and the personation of voters. The seat was not claimed by the petition. Bramwell, B. appointed Monday, the 23rd instant, for trying the petition at Bristol, and a summons was taken out for particulars of the charges alleged.

The Hon. *Chandos Leigh* appeared as counsel for the sitting member; and

Barrow, solicitor, for the petitioners.

The summons was for particulars in writing containing the names and addresses of the persons alleged to have been bribed, and of the persons alleged to have been treated, and of the persons by whom such persons were bribed or treated, and as far as known the places where and the times when the alleged treating occurred, and similar particulars of the other corrupt practices and personations of voters mentioned in the petition.

Leigh said the other election judges had under the General Orders held that "forthwith," in reference to giving particulars, should mean three clear days

JUDGES' CH.]

THE ANDRINA.

[ADM.]

before the hearing. He had, however, to ask his Lordship that the particulars should be directed to be given on the Monday or Tuesday in the week preceding the trial.

Barrow thought the rule laid down of three clear days should be adhered to. He was willing to give all the particulars he could before the period prescribed, but from the large constituency of Bristol, and the number of voters on the last occasion, it might not be in his power to comply with the order if his Lordship made one.

Leigh said there was in this case a circumstance which rendered it necessary that more than the usual time should be given for inquiries to be made. At the late election there was a test ballot, and Mr. Robinson was returned, and as it was before the election the petitioners alleged bribery and treating before the election. It was therefore necessary that full particulars should be given, and that Mr. Robinson should know what charges he was called upon to answer.

BRAMWELL, B. said as only one day was, in fact, between the parties, perhaps some particulars would be given before the usual time, and, if necessary, additional information afterwards. Perhaps the best course would be to order the particulars to be given on or before Tuesday, the 17th inst., and additional particulars, if necessary, on the Thursday following.

The following was the order made:

"Upon hearing counsel for the respondent, and the attorney or agent for the petitioners, I do order that the petitioners shall, on or before Tuesday the 17th inst. (with liberty to add up to the 19th inst.), leave with the master, and also give to the respondent or his agents particulars in writing containing the names and addresses of the persons alleged to have been bribed, and of the persons alleged to have been treated, and of the persons by whom such persons were respectively bribed or treated, and, as far as is known, the places where, and times when, the alleged treating took place, and similar particulars of the other corrupt practices and personation of voters mentioned in the petition, and that no evidence be given of any objection not specified in such particulars without leave of the judge."

Friday, May 20.

Further particulars—Christian names and addresses—Times and places.

Order made for further and better particulars, giving the Christian names of parties bribing and bribed and treated, and the time when the respective corrupt acts alleged took place

Particulars had been furnished in this matter, but not, as alleged by the respondent, sufficient to comply with the terms of the order, and therefore another summons was taken out for fuller and better particulars, specially in relation to the persons by whom the voters were alleged to have been bribed and treated, and for the addresses and Christian names of all such persons, as also for the specific times at which the treating was alleged to have occurred.

A produced to his Lordship the particulars delivered, and contended that they were not in compliance with the order made by Bramwell, B. Several names were coupled together, and nothing specific was alleged as to the bribery. It was impossible for a member of Parliament to meet such a case.

HANNEN, J., inspected the particulars, and concurred in this opinion.

Barrow submitted that the particulars were sufficient, and referred to the *Hastings* petition, and also to the *Reigate* case. It was not like an action at law where definitive particulars could be given. The question of bribery was a difficult one, and until the parties were put into the witness-box, and indemnified from consequences, would they give full information on the subject?

Leigh said there was no *Reigate* case under the new Act.

Barrow said it was under the old Act, but the other case—the *Hastings* petition—was under the new Act. He held it in his hand, and the particulars were furnished in the same manner as in the present case.

Leigh said there was a laxity in the first petitions as to particulars.

HANNEN, J. expressed an opinion that they were not sufficient, and he must grant the application for better particulars.

Leigh then referred to the persons alleged to have been treated, and the time specified was from Feb. to March. He had to ask for better particulars on that point.

Barrow said the best particulars had been furnished considering the short time allowed. It was not possible that he could give the addresses and Christian names of the parties.

HANNEN, J. said he must make the order as asked, and better particulars must be given.

Leigh mentioned that some particulars were given at nearly twelve o'clock on Tuesday night, and some afterwards, as allowed by the order of Bramwell, B.

Barrow professed his inability to give the Christian names and addresses of the parties.

HANNEN, J. made an order for better particulars. There must not be a merely colourable compliance with the order of Bramwell, B.

An order was made in compliance with the terms of the summons.

ADMIRALTY COURT.

Reported by H. F. PURCELL, Esq., Barrister-at-Law.

Friday, May 20.

THE ANDRINA.

Apportionment of salvage—Derelict.

Where a derelict brig was met with by a passenger steamer, and which had also a valuable cargo on board, and was towed into port against a strong wind, with a heavy sea rolling, the values of the brig, cargo, and freight being about 2800*l*.

The court awarded to the salvors 900*l*.

This was a cause of salvage instituted on behalf of the owners, master and crew of the steam vessel *Athlete*, against the brig *Andrina*, her cargo and freight.

The following are the principal facts which were stated in the petition:—

The *Athlete* is an iron screw steamer of 356 tons register, with a crew of seventeen hands all told. She has engines of 90-horse power nominal, working up to 363-horse power, and is of the value of 8000*l*. or thereabouts. On the 6th Jan. 1870, the *Athlete* left Liverpool, on a voyage to Bristol, with a valuable cargo, and three passengers on board.

At about 9.15 on the evening of the 9th, the

ADM.]

In the Goods of GRAY (deceased).

[PROB.]

Athlete was off Skokham Island. The wind was blowing very strong from the northward, with a high sea. The night was clear and moonlight, and the mate of the *Athlete* reported what appeared to be a vessel apparently unmanageable about half a mile distant on the starboard bow.

The course of the *Athlete* was altered so as to bring her under the lee of the vessel which was lying in the trough of the sea. She was rolling heavily with the sea breaking over her.

The quarter boat of the *Athlete* was lowered, and the mate and four men who volunteered for the service, proceeded to the vessel. The mate and two men with great difficulty succeeded in getting on board. They found that she was the Austrian brig *Andrina*, totally abandoned. She had a strong list to port, and was much down by the head. The sea was breaking constantly over her, making it difficult and dangerous to do anything on board. The moon at this time had set, and it was quite dark. By means of the boat and the two men left in it a line was taken from the *Athlete* to the *Andrina*, and a 6in. hawser was thus passed from the *Athlete* to the *Andrina*, and made fast. The boat was then hoisted up, and the *Athlete* began to tow slowly. After towing for a quarter of an hour the hawser parted, owing to the heavy sea. Those on board the *Andrina* set her foresail and jib, and kept her before the wind, whilst the crew of the *Athlete* hauled in the broken hawser, and again lowered a boat for the purpose of sending another line to the *Andrina*. With much difficulty, and after several failures having at one time been obliged to let go the hawser as the two vessels were nearly fouling each other, they succeeded in getting another 6in. hawser, and afterwards a new 5in. hawser on board the *Andrina*, both of which were made fast. The *Athlete* then proceeded to Milford with the *Andrina* in tow, and the latter vessel was brought to anchor in Milford Haven at about four a.m. on the 10th Jan. If the *Andrina* had not been taken in tow by the *Athlete*, she would have gone ashore in the course of the night upon the rocks of Skomar Island, or otherwise would have been totally lost. The men who went to the *Andrina* in the boat were in great danger of their lives, the sea running very high on both the occasions on which the boat was lowered. The *Athlete* herself also ran great risk of injury by collision with the *Andrina*, and incurred the risk also of her propeller being fouled by the towing hawsers, in which event she would have been in great peril. The owners of the *Athlete* employed men to pump out the water from the *Andrina*, and incurred expenses amounting to 93*l.* or thereabouts in taking care of the vessel, trimming and securing cargo, and in temporary repairs, and they estimated the damage to the hawsers at about 30*l.*

The owners of the *Andrina*, and the owners of the cargo laden on board her, submitted to the judgment of the court upon the facts stated in the petition. It was argued that the value of the *Andrina* was 825*l.*, the value of her cargo 1450*l.*, and the value of her nett freight 500*l.*

Butt, Q. C., and W. C. Gully, for the owners, master, mate, and the bulk of the crew of the *Athlete*.

Inderwick for others of the crew of the *Athlete*.

E. C. Clarkson for the owners of the *Andrina*.

Lodge for the owners of the cargo of the *Andrina*.

Sir ROBERT PHILLIMORE.—There can be no doubt that an important salvage service has been rendered in this case; it is owing to the exertions of the salvors that the property has been saved from being totally lost. It is admitted in the case that the

men who went in the boat to the *Andrina* were in danger of their lives, but at the same time I must bring my experience to bear upon the statements in the case, and I am satisfied that the danger incurred by them cannot have been extreme. I award the sum of 900*l.* to the salvors. I direct it to be apportioned as follows: I award 450*l.* to the owners of the *Athlete*; this sum I intend to cover the expenses and damages they have sustained. I award 100*l.* to the master of the *Athlete*, and 200*l.* to the boats' crew, the amount to be distributed amongst them according to their rating; and 150*l.* to the rest of the crew of the *Athlete*, the amount to be distributed amongst them in like manner. I see no reason why more than one set of costs should be allowed to the plaintiffs.

Proctors for the owners, master, mate, and some of the crew of the *Athlete*, Pritchard and Sons.

Solicitor for others of the crew of the *Athlete*, Eaden.

Solicitors for the owners of the *Andrina*, Fielder and Sumner.

Solicitors for the owners of cargo, Waltons, Bubb, and Walton.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

March 8 and 22.

(Before LORD PENZANCE.)

In the Goods of GRAY (deceased).

Administration—Will and copy of later will—No proof of existence of later will.

A testator left a will dated in 1831, and the copy of a will dated 1847, the original of which was not forthcoming. The copy was signed by the testator, but it had not been reattested; and the person who made the copy could not depose to the signature of the testator, nor of the attesting witnesses in the original.

The court held that there was no evidence of the existence of the will of 1847, and granted administration with the will of 1831 annexed.

Wm. Gray, late of Manchester, died Aug. 23, 1863 leaving a will, dated April 18, 1831, and the copy of a will, dated June 4, 1847. Both papers were similar in effect, being in favour of the testator's wife Mrs. Gray. The question was whether the will of 1831 was revoked by the will of 1847, of which only a copy was forthcoming. The circumstances attending the making of that copy were explained in the affidavit of two persons of the name of Scott. About three years before his death, the testator produced to the Scotts a paper writing which he declared to be his will, and which he desired to have copied for him to sign, because as he alleged there was some writing indorsed on the back of it. Thereupon Wm. Scott copied out the will, including the names and descriptions of the attesting witnesses, and the deceased affixed his signature to it, but there was no attestation of the document thus copied.

The original will and the copy were then returned to the testator, and the former was never seen again. Both the attesting witnesses to the will of 1847, one of whom was Mr. Kay, the solicitor of the deceased, have since died, and the Scotts being unacquainted with their signatures, were unable to depose to their handwriting. After the death of the testator in 1865, the widow deposited the will of 1831, and the copy of the will of 1847 in the district registry of the Court of Probate at Manchester, and died in 1869, without having taken out probate of either. It did not appear that any

PROP.]

HOME INSURANCE COMPANY v. PROP CONCORD.

[ADM.]

search had been made for the original will of 1847 in the repositories of the testator during the widow's lifetime, but it was made without success after her death, and the offices and papers of Mr. Kay were also unsuccessfully searched for proof of his having made a will for the testator.

The matter now came before the court on the application to grant administration of the effects of the deceased with the will of 1831 annexed, to the executors of the widow the sole universal legatee of the testator under that will. The Scotts in their affidavit stated that they were unable to depose to the handwriting of the testator, and that at the time the copy of the will of 1847 was made the said original will was produced to them by the testator, and declared by him to be his will legally drawn up and signed by him.

Dr. Tristram for the executors.

Cur. adv. vult.

March 22.—Lord PENZANCE. — When this case came before the court there were some defects in the papers, but since then the particulars which were wanting have been supplied. The testator made his will many years ago before the Wills Act, and no doubt that will is still existing as a valid will unless revoked. The mode in which it is said it may have been revoked is by a subsequent will of 1847. That will is not in existence, and it is said it has been destroyed *animo revocandi* by the testator. The first question is whether it ever existed as a valid document. Before the court can hold an existing will to have been revoked by another instrument it must be satisfied that that instrument has existed, and that it was a valid document. The paper itself is not in existence, and all the court knows about it is, that shortly before his death the testator called on two people of the name of Scott, and asked one of them to write a copy of a paper, which he called his will. Wm. Scott says he did duly copy out the paper. The copy before the court is all in the handwriting of Scott, and it is apparently a will, with the names of two attesting witnesses. Scott did not copy the name of the testator, the statement being that the testator wished to sign the will, and that he thought that, by having a copy made with the names of two attesting witnesses, and by signing that copy, he could make it a good will. Clearly that cannot be so. The question is whether there is evidence of the original will having existed as a valid will. Scott does not state that he is able to depose to the original paper being signed in the handwriting of the testator, nor does he depose to the handwriting of the attesting witnesses. The result is this, the court has before it a paper, apparently with the name of the testator and the name of two attesting witnesses. But there is no proof of the handwriting, only a statement by the testator to the Scotts that he did make a will. I am constrained to say that this does not appear to the court to be satisfactory evidence of the existence of the will of 1847. It has already been held at common law, that the statement a testator makes is not evidence. There is a question which will have to be considered at some future period, because there will be cases in which it will be impossible to exclude the evidence of testators. But it has been held up to the present time that these statements are inadmissible. But supposing the statement of the testator in this case had been in evidence, does it go far enough? I think not. The court ought to have some evidence besides the statement of the testator as to the will having been duly signed by these two people as attesting witnesses. I think, therefore, the proof of the will of 1847 having been in existence fails altogether, and without that the

other questions connected with the case fail also. Nothing appears to me to stand in the way of the original will of 1831 being admitted to probate.

Attorney, Ayrton.

UNITED STATES DISTRICT COURT OF MICHIGAN—IN ADMIRALTY

HOME INSURANCE COMPANY v. PROP CONCORD.

Bonded vessel—Jurisdiction of court—Right of mortgagee to intervene pendente lite.

A bonded vessel was remanded to the custody of a marshal of a Court of Admiralty, on the ground that the sureties had become insolvent since the bond was given:

Held, that a mortgagee might intervene, pendente lite, to obtain the discharge of the vessel:

Held, further (following The Kalamazoo, 15 Jur. 885), that a vessel once released on bond cannot be again arrested in the same suit, and that the order remanding the vessel into custody was bad.

The only remedy where sureties become insolvent is to apply to the court for an order requiring new sureties to be given.

The following judgment, which explains the case, was delivered by

LONGYEAR, J.—In this case the propeller was arrested Nov. 10, 1868, and bonded on the same day by John Hutchings, claimant, with two sureties. Dec. 18, 1868, Hutchings mortgaged the propeller to Eber B. Ward, who has intervened *pendente lite*, setting up his mortgage as the basis of his right to intervene. July 5, 1869, an order was entered in this court, remanding the propeller to the custody of the marshal, on the *ex parte* application of the libellants, on the ground that the sureties had become insolvent since the bond was given. Ward now moves to vacate the order so remanding the propeller on the ground that the court had no jurisdiction over the vessel after she was so bonded, and therefore had no power to make the order. It is contended, on behalf of libellants, that Ward has no standing in court, he being a mortgagee merely, and not the owner or an agent, consignee or bailee, or the owner, as required by rule twenty-six. Rule twenty-six has been considerably altered and enlarged, if not entirely superseded by the Act of March 3, 1847, (9 Stat. 181.) But the rule and the Act relate exclusively to the conditions to be complied with to entitle a claimant to avoid an arrest of the property or to obtain its discharge after it shall have been arrested, and not to conditions necessary to entitle a party to intervene *pendente lite*, to participate in the distribution of proceeds, or to protect any interest he may have in the subject-matter of the litigation. The right of a party to intervene for these purposes has been recognised both in England and in this country as extending to judgment-creditors who have acquired a lien, and also to attaching creditor: (See 1 Conk, Ad. 55, 66-70, citing *The Flora*; 1 Haggard R., 298, 303; Ware's R. 204; *The Mary Ann*, decided by Judge Ware, in the District Court for the District of Maine.) This being so, what reason can there be why a mortgagee should not be admitted to intervene for protection of his own interest, and contest a forfeiture so far as his right or interest would be prejudiced by the decree? I can see none. I am therefore clearly of the opinion that Ward is properly admitted to intervene as mortgagee, and consequently that he has a right to make this motion and to be heard upon it. The next and

[Ex.]

THE DUKE OF NORTHUMBERLAND v. HOUGHTON AND OTHERS.

[Ex.]

remaining question is as to the validity of the order remanding the vessel. I shall not stop to argue the question. It seems to be too well settled, both in this country and in England, to need further elucidation, that the vessel, on being discharged from arrest upon the giving of the bond or stipulation, returns into the hands of her owner, discharged from the lien or incumbrance which constituted the foundation of the proceedings against her for ever, and for all purposes whatsoever, the surety taken being as a substitution for the vessel, and the court has no power or jurisdiction over her thereafter in the same suit or for the same cause: (*The Union*, 4 Blatch. C. C. R. 90,93; *The White Squall*, *ibid* 102; *The Kalamazoo*, 15 Jur. 885.) No question of fraud, mistake, or improvidence in entering into the bond or discharging the vessel arises in this case, and therefore need not be considered. The only remedy that seems to be provided in a case where the sureties shall become insolvent, is an application to the court for an order requiring new sureties to be given. Disobedience to such order would put the party in contempt, and he could be proceeded against accordingly, and be denied the right further to appear and contest the suit until he complied with the order, or otherwise purged his contempt: (Adm. Rule 6; Ben. Adm. sec. 492; Conk. Adm. 112). I am therefore of opinion that the court had no power to make the order remanding the vessel into the custody of the Marshal, and the motion to vacate the same must be granted.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law

Jan. 24 and 26.

THE DUKE OF NORTHUMBERLAND v. HOUGHTON AND OTHERS.

Several fishery—Tidal river—Royal franchises—Forfeiture—Prerogative—Merger—Markets, free warren, waifs, wreck, &c.—Time immemorial—Grant before Magna Charta—Presumption of, from modern user—Statute of Limitations—Proper mode of directing a jury—Evidence.

A several fishery in the waters of the river Tyne, the immemorial existence, and, consequently, the legal origin of which, by an original grant from the Crown to the prior and monks of the monastery of Tynemouth, anterior to Magna Charta, was proved, was claimed by the plaintiff: and, it being proved on the trial that, subsequently to Magna Charta, temp. Edw. 1, "certain liberties and free usages," claimed by the prior and his predecessors, "had been adjudged by the king's court to have been forfeited," the defendants contended that the fishery in question came within the terms "liberties and free usages," and so had merged on reverting to the Crown by forfeiture, and could not be re-granted:

Held, by the Court of Exchequer (Kelly, C.B. and Martin and Pigott, BB.), that the plaintiff had a sufficient title to the several fishery to enable him to maintain trespass against the defendants.

Evidence of actual user and enjoyment, by a plaintiff, of a right of several fishery in a tidal river for 110 years prior to action brought, is, of itself alone, satisfactory evidence upon which a jury, if not actually called upon to presume, would be amply justified in presuming that the right had existed from time immemorial, and, consequently, that there must have been a valid grant of the fishery by the Crown anterior to Magna Charta; and it lies on the defendant, who questions the right to establish either that the fishery was, in fact, created since the time of legal memory and Magna Charta, or that, at some period subsequent thereto, no such fishery was in existence.

By Kelly C.B. and Pigott B., there was no evidence of forfeiture of the fishery subsequently to Magna Charta, a several fishery being a franchise which could not, in common parlance, or legally, be held to be included within the words "liberties and free usages," and therefore the question of merger did not arise.

*By Martin, B. (and, semble also, if the question of merger had arisen and it had been necessary to decide the point, by Kelly, C.B. and Pigott, B.), a several fishery, granted by the Crown before Magna Charta, does not merge in the Crown upon reverting to the king by forfeiture or otherwise, it being a franchise in the same category with fairs, markets, warrens, "et similia," enumerated by Lord Coke as franchises "originally created by the king, and not before flowers in the garland of the Crown, and which therefore, on reverting to the king, remain as they were before in esse, not merged in the Crown," and differing in that respect from franchises such as felons' goods, waifs, estrays, wrecks, &c., which, "being flowers in the garland, are merged in the Crown on reverting to the king, and he has them again in jure coronæ:" (See *The Abbot of Strata Marcella's case*, 9 Rep. 24a; *Heddy v. Wheelhouse*, Cro. Eliz. 558-591.)*

*By Martin, B., the proper mode of dealing with such a question, in summing up to the jury, is that pointed out and laid down by Parke, B. in *Jenkins v. Harvey*, 1 Cr. M. & R. 877; 2 Ib. 407; 5 L. J., N. S., 17 and 21, Ex., and cited with approbation by Blackburn, J. in *Sheppard v. Payne*, in the Exchequer Chamber, 10 L. T. Rep. N. S. 194; 16 C. B., N. S., 126; 33 L. J. 158, C. P.*

This was an action of trespass by the plaintiff against the defendant for breaking and entering an alleged several salmon fishery of the plaintiff in the waters of the River Tyne, in the county of Northumberland, and catching and disturbing the fish there. After the commencement of the action, by agreement between the parties and a judge's order, a *special case* was stated, without pleading, for the opinion of the Court of Exchequer, in which the history of the fishery, claimed by the plaintiff, from the time of King William Rufus down to the present day, with the various charters, documents, and other evidence, showing the existence of the fishery in question from before the time of legal memory, and also evidence of the continuous user and enjoyment of it by the plaintiff and his predecessors in title for 110 years prior to the time of action brought, were set out at very great length. The following abridged abstract of the case will be sufficient for the purpose of this report.

Paragraphs 1 to 6: The priory or monastery of Tynemouth, which was in existence in the time of the Saxons, was, early in the reign of William Rufus, endowed by Robert de Mowbray, Earl of Northumberland, subject to and dependent, as a cell, on the Abbey of St. Albans, and by letters patent of confirmation, by *inspeximus* of 55 Hen. 3, it appeared that King Henry II. by his charter granted and confirmed to God, and St. Alban, and St. Oswyn, of Tynemouth, and the monks there serving God, the church of Tynemouth, and all the churches, lands, &c. . . . And, moreover, whatsoever Robert, Earl of Northumberland, and his men, had given to the aforesaid church and St. Oswyn. Wherefore he willed and commanded that the church and monks aforesaid should have all the above said freely and quietly, with all their appurtenances in wood and plain, &c. . . . And fisheries, and pools, within borough and without. And they might have their court as fully and freely as he himself had, and as the charters of King William and King Henry, his grandfather, did testify, and he willed that they should maintain and defend the aforesaid church from all injury as his own alms.

7 to 13: By charters of 10 Ric. 1, and 5 John,

Ex.]

THE DUKE OF NORTHUMBERLAND v. HOUGHTON AND OTHERS.

[Ex.]

and two charters of Hen. 3, the priory of Tynemouth was confirmed in all its abovementioned possessions and privileges.

14 and 15: In the 20th Edw. 1 (A.D. 1292) disputes arose touching the rights of the monastery of Tynemouth; and, from the record of the proceedings with reference thereto, it appears that the burgesses of Newcastle instituted a suit in the King's Court against the prior of the monastery, and, by the King's attorney, complained that the prior had made a port and forestalled the merchandise, and had had raised a new town of Sheeles; and taken there wreck which belonged to the king, and prisages and customs from vessels of wine, and from vessels and boats of seafish, and had raised weirs at Tynemouth, and had a market there, and took amendment of bread and ale without warrant. The prior, by his answer, as to wreck and forestalling of merchandise, justified the same by setting out the beforementioned charters of Ric. 1. And as to founding a new town he denied having done so, and said that the king had no soil or freehold there, for that the soil and freehold of the monastery extended into the middle of the water of Tyne, and that between the middle of the water and the lands of the monastery *he (the prior) had his free fishery by the length of the same land in the same water*; and that he and his predecessors had built houses there, for fishermen and others who had sold bread, ale, and fish, without amends to the king, but only to the same prior; and as to the fishermen and bakers, &c., that his predecessors had their own private fishermen *at their pleasure fishing in the water aforesaid*, for the support of their house, without paying toll to the king, notwithstanding that the port of the water of Tyne specially and entirely belonged to the king; and that the same have had certain their tenants at Sheeles with their boats free within their demesne lands; and as to the market, he claimed there no market, but there was a tumbrell, and there were bakers and brewers, and ovens for hire, and stalls for putting up bread, &c., for sale.

The burgesses, by the king's attorney replied; and afterwards in 19 Edw. 1., an inquisition was taken before the king's justices in eyre, by the oaths of twelve lawful men, who found against the prior and in favour of the Crown with respect to the matter complained of by the said burgesses in the said suit, and they assessed the damages in respect of the said several matters, and thereupon judgment was given in favour of the Crown; but neither in the replication nor in the judgment was any reference made to *the fishery*, or the claim of the prior thereto, nor was the right of the prior to such fishery in any way affected by the said judgment.

16: King Edward I., by charter of the 27th year of his reign (A.D. 1299), after reciting that *certain liberties and free usages* claimed by the prior of Tynemouth and his predecessors, by virtue of their charter, had been adjudged by the king's court to have been forfeited, and were seized into the king's hands, did, for himself and his heirs, restore and yield up all the aforesaid *liberties and free usages* unto the said prior and monks, to have and to hold, to them and their successors, &c., for ever, as fully, as well in land and water as in other places, as they had and held the same, by virtue of the said charter, before the said seizure.

17 to 33: Set out a commission of 25 Hen. 6, and an inquisition taken under and by virtue thereof respecting certain alleged encroachments and usurpations by the prior of Tynemouth in the soil of the river Tyne, within the flux and reflux of the said river, and also a charter of the 3 Edw. 4 (A.D. 1464), granting and confirming to the Abbot of St. Albans, and to the prior and convent of Tynemouth,

and their successors, the rights and privileges in the said charter mentioned; and a charter of confirmation of 2 Hen. 8, setting forth and confirming the aforesaid grant by *inspeximus*.

34 to 36: In the 30 Hen. 8, the said monastery of Tynemouth, which had previously been granted and confirmed to the king, his heirs, and successors, was dissolved, and all the possessions, estates, and rights belonging to the said monks of St. Albans, which, at the time of the said grants and dissolution respectively, were above the clear yearly value of 200*l.*, became and were vested in the Crown, and by letters patent in the same year (30 Hen. 8), shortly after the dissolution, the site of the said monastery, with its demesne and other lands and hereditaments to the late monastery formerly appertaining, together with (*inter alia*) "the tithes of fish of all vessels and boats fishing at the Shelths, in Tynemouth, parcel of the rectory of Tynemouth," were demised by the Crown to Sir Thomas Hylton, for 21 years, at certain reserved yearly rents.

37 to 46: Accounts of the said fishery were, from time to time, during the reigns of Hen. 8 and Eliz., rendered into the Exchequer, and in accounts for the year 31 Hen. 8, one of the accountants (the said Sir Thomas Hylton) answered for "the ferm of the site of the said priory, demesne, lands, tithes, and other commodities," and in the account of another of the accountants, one Thomas Johns. there is the following entry:—

Ferm of Salt pans with a Fishery.—Of the ferm of the salmon fishery in the salt waters within the bounds of the township of Sheeles and Tynemouth, he (the accountant) answers not here, because the fishermen there are bound to deliver for every 20 salmon so taken, one fish to the hands of the bailiff there, by ancient custom, and no such fishing hath been made or had by the time aforesaid.

And in an account rendered for the 20 Eliz. there is the following (amongst other entries):—

North Sheeles.—The account of Robert Arderne, bailiff there, of any profit arising from the ferm of the salmon fishery in the salt waters, within the bounds of the town of Sheeles and Tynemouth, where the tenants of the town ought to answer for every twenty salmon one salmon. For the time of this account he doth not answer, because no such fish have been taken within the bounds aforesaid during the same time.

Again, at the conclusion of a survey of the Manor of Tynemouth (12 Jac. 1, A.D., 1608), there is the following note.

"ITEM. There is a fishing for salmon there in the water of the Tyne, extending from the mouth of the river, where Tyne falleth into the sea, into Howden Head, near the territories of Willington, for which there hath been anciently paid 3*s.* 4*d.* by the year."

And by letters patent, 7 Jac. 1. (A.D. 1610), certain messuages, &c., in North Sheeles together with a salmon fishery described as "Our Salmon Fishery, in the water of Tyne, aforesaid extending from a place where the water of Tyne, aforesaid, falls into the sea, unto a place called Howden Head, near the territory of Willington, for which no rent is now answered but of the yearly value of 8*s.* 4*d.*," parcel of our manor of Tynemouth, and to the late monastery of Tynemouth aforesaid formerly belonging, and late parcel of the lands and possession thereof were granted by the King to Watkinson and Helme, for 21 years, at reserved yearly rents, and by letters patent, 21 Jac. 1. (A.D. 1624), parcel of the possession of the said late monastery were granted by the King in fee, to Henry, Earl of Northumberland, an ancestor of the plaintiff, without any express mention of any fishery, but with the usual general words, and amongst them the words "all and singular fisheries and fishings to the aforesaid messuages and lands, &c. belonging or appertaining."

47 to 71. By letters patent, 1 Car. 1 (1625) the king granted to Edward Ramsey and Robert Ramsey, their heirs and assigns, at a rent (*inter alia*) "A salmon fishery," described as "all that salmon fishery in the water of Tyne, extending

Ex.]

THE DUKE OF NORTHUMBERLAND v. HOUGHTON AND OTHERS.

[Ex.]

from the place where the water of Tyne falls into the sea unto a place called Howden Head, near the territory of Willington aforesaid," and mentioned to have been devised to William Watkinson and, Henry Helme, and to have been parcel of the lands and premises of the Monastery of Tynemouth; and by indenture of bargain and sale, 15th Feb. 1637 (13 Car. 1), "all those fishings for salmon in the water of Tyne aforesaid, extending from the place where the water of Tyne falls into the sea unto the place called Howden Head aforesaid," with the appurtenances, were (*inter alia*) granted by the said Robert Ramsey (who had survived the said Edward Ramsey) unto George and William Milburn, their heirs and assigns, in fee farm rent, for ever, from whom, by a series of transmissions by deed, the said fishery passed into the hands of various successive owners, until, by indenture of 2nd May, 1759, it became the property of Hugh Earl of Northumberland, his heirs and assigns for ever, by the description of "all those fisheries or rights of fishing, piscaries, and fishing places in the river Tyne, at the Low Lights near Clifford's Port," with all appurtenances; and in settlements executed by the descendants of those claiming under the said Hugh Earl (afterwards Duke) of Northumberland, since the date of the last-mentioned indenture to the present time, a salmon fishery is mentioned and comprised, and is described as "all that salmon fishery in the river Tyne near adjoining to Tynemouth and North Shields, purchased by the said duke of Mr. Hall."

There was evidence set out in the remaining paragraphs of the case of the exclusive user, occupation, and enjoyment of the fishery in question, as a several fishery, by the plaintiff and his predecessors from 1759 to the commencement of the present action, being a period of 110 years. The trespass and grievance complained of were admitted if, upon the facts above stated, the plaintiff was entitled to a fishery in the said river.

The court were to have the same power of drawing inferences of fact that a jury would have; and the question for the court's opinion was whether, under the circumstances stated, the plaintiff had a sufficient title to a several fishery in the river Tyne to enable him to maintain the action?

Mellish, Q.C. (with him were Manisty, Q.C., and Pinder) for the plaintiff: It is impossible for the defendants successfully to contend, in the face of the overwhelming documentary evidence set out and referred to in the special case, that the several fishery in question had not a legal origin long anterior to Magna Charta, and going back beyond the time of legal memory applicable to such a question; and again, the evidence of continuous user and enjoyment of the fishery by the plaintiff and his predecessors in title for a period of 110 years prior to action brought, was equally conclusive and overwhelming on that point. But the defendants will seek to meet the plaintiff's case by urging that the fishery was forfeited and reverted to the Crown in the time of King Edward, or upon the dissolution of the monasteries by Henry VIII., and so had merged. But in the first place there is no distinct or sufficient evidence of the alleged forfeiture (*temp.* Edw. 1), and secondly, the doctrine of merger is not applicable to such a franchise as a several fishery. It is not within the range of the "liberties and free usages" found in the case to have been forfeited in Edward I.'s time. Such "liberties and free usages," are more analogous to wrecks, estrays, and felons' goods, &c., which on the forfeiture of the manor would belong to the king *in jure coronæ*, and not as lord of the manor; but a free or several fishery is in the same category with free warrens, markets and fairs, with toll, &c., which

do not merge or become extinct by the accession or reversion of them to the Crown. For this proposition the case of *The Abbot of Strata Marcella*, 9 Rep. 24 A, is a direct and decisive authority. See also Com. Dig. tit. "Franchises" G. 1. With regard to the alleged merger at the dissolution of the monastery, the Act of 32 Hen. 8, c. 20, reviving in the Crown all the late privileges and franchises of the abbots, &c., would operate to prevent any such merger.

Pickering, Q.C. (with him Gainsford Bruce), for the defendants. This fishery, with all other liberties and franchises of the priory, was forfeited, and consequently merged in the Crown, *temp.* Edw. 1 at a period subsequent to Magna Charta, since which there could be no new creation or grant of a several fishery. See Hale de Portibus Maris, pl. 2, Hale de Jure Maris, c. 2, p. 7, and c. 4; 4th Institute p. 300; Bro. Abr. "Quo warranto," pl. 9, 11. There being no direct authority on the express point, recourse must be had to principle. It could work no injury to the Crown who, upon resuming possession of a several fishery, had power immediately afterwards to recreate it, even in water where the soil belonged to a private individual; differing, it is submitted, in this respect from a free warren, which could not be created by the Crown, *in invitum*, in a subject's lands; though, upon consent of the proprietor of the soil being obtained, there would be no merger of the recreated warren, on its reverting to the Crown, since it is not the property of the Crown by virtue of the prerogative; but the Crown had an interest of pleasure in these fisheries as part of its prerogative, as is stated by Hale. There is no analogy between it and a warren: (*Rogers v. Allen*, 1 Campb. 310.) *The Abbot of Strata Marcella's* case is distinguishable and not applicable here as being decided on the terms of 32 Hen. 8, c. 20; but, if not so, there is no similarity or analogy between a fishery and a warren,—the former resembling more closely other franchises, such as wreck, waifs, estrays, &c., which admittedly merge upon reverting to the Crown, and so become extinct. He cited also, and referred to the following authorities: *the Case of the Swans*, 7 Rep. 16 A; *Holford v. George*, 18 L. T. Rep. N. S. 817; L. Rep. 3, Q. B., 639; 37 L. J. 185, Q. B.; Bac. Abr. "Prerogative," E. 3; 3 Cru. Dig. tit. "Franchises," 267; Paterson's Fishery Laws.—[MARTIN, B., referred to *Jenkins v. Harvey*, 1 Cr. M. & R 877; 2 Ib. 407; 5 L. J., N. S., 17, 21, Ex.; and the rule there laid down by Parke, B., as to the correct mode in which such a question should be dealt with by the judge in summing up to the jury, and also to the observations of Blackburn, J., thereupon in *Sheppard v. Payne*, in the Exchequer Chamber, 10 L. T. Rep. N. S. 194; 16 C. B., N. S., 126; 33 L. J. 158, C. P.]

Mellish, Q. C. in reply—There is no proof of merger, and the defendant's argument, therefore, fails at its foundation; but, apart from that a royal fishery cannot merge. *Heddlly v. Wheelhouse*, Cro. Eliz. 558—591. He further cited also, *The Banne fishery case*, Davis' Rep. 55a; *The Duke of Somerset v. Fogwell*, 5 B. & C. 875; 5 L. J. 49, K. B.; *Malcolmson v. O'Dea and others*, in the H. of L., 9 L. T. Rep. N. S. 93; 10 H. of L. Cas. 593; *Gann v. The Whitstable Free Fishers*, in the House of Lords, 12 L. T. Rep. N. S. 150; 85 L. J. 29, C. P.; 11 H. of L. Cas. 192. [PIGOTT, B., referred to the case of *The Mayor, &c. of Colchester v. Brooks* in the Queen's Bench, 15 L. T. Rep. N. S. 59 and 173; 7 Q. B. Rep. 339.]

KELLY, C.B.—I am of opinion that the plaintiff is entitled to judgment. His claim is to a several fishery in the tidal waters of the river Tyne, and, in sup-

Ex.]

THE DUKE OF NORTHUMBERLAND v. HOUGHTON AND OTHERS.

[Ex.]

port of it he has clearly proved that he and his ancestors have been in the actual possession (so far as that term can be applied to an incorporeal hereditament) and enjoyment of the fishery from 1759 to the present time. Now, this evidence alone of the actual user and enjoyment of a right of this nature for 110 years, would, if the case rested there, be satisfactory evidence upon which a jury, if not absolutely called upon to presume, would be amply justified in presuming that the right to the fishery had existed from time immemorial, and, consequently that there must have been some valid grant of it by the Crown anterior to Magna Charta. But, the case does not rest there. It appears by paragraphs 37, 38, and 39 and several subsequent paragraphs of the special case, that from the year 1540, at least, a fishery in these waters had been actually in existence and had been used and enjoyed (but for a short time only) by King Henry VIII., and afterwards by the several persons, grantees of the Crown, or claiming title to it, from Henry VIII. The first mention of a free fishery, or a several fishery, by that name and clearly describing the fishery in question, as now claimed, is in the above named three paragraphs, where it appears, by the minister's accounts, rendered to the Exchequer, *temp.* 31 Hen. 8., that one of the accountants answers for the ferm of the site of the said priory, demesne lands, tithes, and other commodities by the yearly rent reserved to the Crown. And in the account of another accountant is the following entry: "North Sheeles. The account of Thomas Johns, bailiff there for the time aforesaid, Ferm of salt pans, with a fishery. Of the ferm of the salmon fishery in the salt waters, within the bounds of the township of Sheeles and Tynemouth, he (the accountant) answers not." And he gives reasons for not answering, which, in effect, would go to show that the fishery was actually enjoyed by fishermen, who were bound to render for every twenty salmon, one fish to the bailiff. I refer to that, to show that at that time a fishery existed, and was enjoyed in these waters. As early, therefore, as 1540, we find there was a fishery existing which must have been a several fishery of the nature, as well as in the same water as that now claimed by the plaintiff. Again, in 1608 (6 Jac. 1), a survey was made, and among the items we find this:—"There is a fishery for salmon in the water of the Tyne, extending from the mouth of the river, where Tyne falleth into the sea, unto Howden Head, near the territories of Willington," and so forth. That carries us from the year 1540 (31 Hen. 8) to 1608 (6 Jas. 1). Again we find in 1610, two years afterwards, in the reign of the same last-named king, by letters patent, the "salmon fishery in the waters of Tyne aforesaid" (describing it by its limits) as "extending from a place where the waters of Tyne aforesaid fall into the sea, unto a place called Howden Head, near the territory of Willington, for which no rent is now answered, but of the yearly value of 3s. 4d; and all which said premises are therein described as being parcel of our manor of Tynemouth, in our said county of Northumberland, and to the late monastery of Tynemouth aforesaid, formerly belonging and appertaining, and late were parcel of the lands and possessions thereof." Here there is direct and incontrovertible proof that this fishery, as now claimed, existed in 1610; that during the reign of James I. it had existed and was the property of the monastery before its dissolution, and that upon that event it had passed into the hands of other parties from and through whom it passed to the plaintiff's ancestor. That is *prima facie*, and in the absence of evidence to the contrary, conclusive evidence that this fishery existed by law and according to law before the time of legal memory, and, consequently, before Magna Charta. The proposition then being

established that this fishery existed under some valid and lawful grant before the time of legal memory and Magna Charta, it lies upon the defendants, who question the right of the plaintiff to the fishery, to establish one of two propositions, either that this fishery (though upon the evidence it may be presumed to have existed before) was in fact created *since* the time of legal memory and Magna Charta, and so could not be lawfully created, but of such a fact as that there is no evidence whatever; or, that at some period subsequent to Magna Charta no such fishery was in existence, in which case it could have come into existence at such subsequent period only by the grant of the Crown to the subject, which grant, being contrary to Magna Charta, would be void in law. How then does the case stand with regard to that? We find *prima facie* and presumptive evidence of the fishery being not only in existence, but of long actual user and enjoyment of it for 330 years and more; and on looking at the documents we find, in the first place, that the priory or monastery of Tynemouth was in existence in Saxon times; and that as early as the reign of William Rufus, "the priory was endowed by Robert de Mowbray, Earl of Northumberland, subject to and dependent as a cell upon the Abbey of St. Albans, in the county of Herts." Now it is quite possible, though we have not the express words, properly to be a grant of this fishery, in the charter of William Rufus, that it may have been granted thereby, and coupling with that possibility, even if it be no more, the evidence to which I have adverted of a user of 330 years and upwards, we may fairly presume, in the absence of evidence to the contrary, that this fishery was granted by William Rufus to the predecessors, whosoever they may have been, of the present Duke of Northumberland, the plaintiff in this suit. Then we come to the next document, the letters patent of confirmation by *inspeximus* of 55 Hen. 3., which, of course, if they had purported to grant the fishery at that date, would have had no such effect in law. But they state "that King Henry the Second, by his charter, granted and confirmed to God and St. Alban and St. Oswin of Tynemouth, and the monks that serve God, the Church of Tynemouth, and all the churches, lands and tithes, and other tenures, to the same appertaining; that is to say, Wyteley and Setun, and Sihal," &c., and then, after a number of other matters, we find this: "These things above said, and moreover whatever Robert Earl of Northumberland and his men have given to the aforesaid Church and Saint Oswyn, &c., hath been, or shall be in future, reasonably given to the same by any donor whomsoever, He, the said King, granted and confirmed to the same in perpetual alms;" and then come these general words, that the church aforesaid and the monks "should have and hold all the things above said well and in peace, freely and quietly, wholly and honourably, with all their appurtenances, in wood and plain, in meadows and feedings, in ways and paths, in waters and mills, and *fisheries* and pools," &c. And then follow some other general words. It is quite true that that is not a direct grant of the fishery; but it clearly recognises that in former grants at least there may have been a fishery; and when we couple that with the charter of William Rufus, and again with the long user and enjoyment of 330 years and more, it is fair to presume that this, although not a direct grant of the fishery, yet with the charter of confirmation of lands, manors, and other possessions, included that as granted, which was granted incidentally. Passing through the whole of the documents, we come to the question whether there is any one of them (it is not necessary to go through the whole of them) which, either in distinct terms or by necessary implication, raises even a presumption

Ex.]

THE DUKE OF NORTHUMBERLAND v. HOUGHTON AND OTHERS.

[Ex.

that at any time, subject to Magna Charta, this fishery did not *de facto* exist? I can find nothing upon which even an argument can be suggested to that effect, unless it be in the document set forth first in the appendix to the case—namely, the “abstract of the record of the proceedings between King Edward I. and the burgesses of Newcastle, and the prior of Tynemouth.” It certainly appears there that “the prior answered in the said suit as to wreck of the sea and forestalling of merchandise by setting out the charter of Ric. I.” (referred to in par. 8 of this case), and then as to founding the new town at Sheeles, and so forth, he denied that he had encroached upon the rights of the king in any way in those respects. Then he went on to say that “the king had no soil or freehold there, for that *the soil and freehold of the monastery extended into the middle of the water of the Tyne, and that between the middle of the water and the land of the monastery he had his free fishery by the length of the same land in the same water*, and that he and his predecessors had built houses there for fishermen and others, who had sold bread, ale, and fish without making any amends to the king, but only to the said prior,” and then proceeded further with his answer. In the first place, the suit was instituted for certain purposes which are clearly expressed and defined, and the claim was not for the fishery. There was no question raised as to the right of the monks or the monastery to the fishery, and if there had been any general words in the decree, or in what was insisted upon by the Attorney-General, on behalf of the Crown, tending to negative the right of the prior to this fishery, it would have scarcely amounted to a satisfactory answer to this claim. But what was then claimed was not anything touching the fishery, but “that the prior had made a port and had forestalled merchandise, and had raised a new town, at Sheeles, and took there wreck of the sea, which belonged to the king, and took prisages and customs from vessels of wine, and from vessels and boats of sea fish, and so deprived the king of his prisages and customs, and that he “had raised four ovens at Tynemouth, and had a market there, and took amendment of bread and ale without warrant.” Now all these things were encroachments upon the royal prerogative, or something which the king might have granted to the burgesses of Newcastle, but it involved no claim to the fishery which is now in question before this court. But upon looking further at the replication of the Attorney-General, and at the decree, or judgment in the case, and upon which the jury assessed damages, we find that which satisfies me that the claim to the fishery was in no way interfered with, but rather, on the contrary, that it was indirectly and by implication admitted. First of all, the prior, on behalf of the monastery, had claimed the land from high water-mark to the middle of the river, and had claimed also *the free fishery* now in question; the Attorney-General replied that the prior had in Sheeles sixteen fishermen or more fishing with great boats in the sea through the year for the sake of trading, and not for the sake of supplying his house, from whom the king did not receive any toll or his due custom, and also that the prior “had caused to be made the twenty-six houses upon the soil, which ought to belong to the king, because it was included in the flow and overflow of the sea,” and therefore the Attorney-General denied the right of the monastery to the soil, in the flow and overflow of the sea, but he did not anywhere, either expressly or by implication, deny the right of the said monastery to the fishery which the prior had incidentally only, but yet in full, clear, and express terms, claimed in his answer to the suit. Then in the decree or judgment we find

nothing at all touching the claim to the fishery, which had appeared in express terms on the record. The paragraph concludes thus: “concerning herrings and haddocks and other fish, they said that so many fishermen and other men are dwelling there, that sailors and fishermen landing there found so much demand for their merchandise, that they unloaded their vessels and sold their fish, whereby the king lost his prisages.” That is, fishermen who took fish in the river or sea, came and sold them upon the land, upon what afterwards became the town of Shields or Tynemouth, and so the king lost his prisages. But that has nothing to do with the fishery or the claim to it. The judgment then proceeds thus: “and as to founding the town of North Shields, they said that certain houses were built there on the lands of the king, and that certain other houses built between the bourne and the flood marks on the soil of the said priory were there, which had quays built beyond the flood marks on the soil of the king, and the jury assessed the damages in respect of the said several matters.” That is, they assessed that the soil between high water mark and the middle of the river was then the property of the king. So it may have been, and so it probably was; but there was no reference direct or indirect to any right in the Crown or burgesses, or anybody else to the fishery in question. As far as the record of the proceedings taken altogether applies, or can be made applicable to the present case, there is, in the answer of the prior of the monastery, a clear and distinct claim to the fishery now in question before this court, and no reply denying that claim, and no judgment at all relating to it, although there is a judgment against the prior as to other allegations and other claims made in the course of the proceedings. As to this document, therefore, which is the only document I can find, from the beginning to the end of this case, upon which even an argument can be suggested that the fishery was not in existence except in the Crown at some period subsequently to Magna Charta, I find, not only that that is not the fair inference to be drawn from the whole of it taken together, but that the contrary presumption arises, namely, a presumption that the prior who claimed the fishery at that very early period, was then entitled to it by law. We find then, that there has been the actual user and enjoyment of this fishery for more than 330 years; that there are documents in existence before Magna Charta, and before the time of legal memory, under which the fishery may have been granted by the Crown to the predecessors in title of the present plaintiff, and that there is no evidence whatever of an original grant of the fishery subsequently to Magna Charta, or that at any period between Magna Charta and the present time, this fishery did not *de facto* exist, and was not *de facto* enjoyed. This really brings me to the end of the case with the exception of the sole remaining question of merger. Now as to that, it has been contended that, by law, a several fishery is parcel of the prerogative of the Crown, and though it might have been lawfully granted away to a subject before Magna Charta, yet if, after that Act of Parliament, it reverted to the Crown, whether by forfeiture or any other legal means of transmission, that it would then become merged in the Royal prerogative and extinguished. Now before we could accede to that doctrine, and admit it to be a sound and true proposition of law, I certainly, speaking for myself, should desire to pause and consider what the effect of a decision to that effect of a court of law in Westminster Hall would be upon a great number of titles to valuable fisheries in many parts of the kingdom, I do not say that the mere circumstance that the title to fisheries which have been held and enjoyed for centuries by descent, or otherwise, by various

[Ex.]

THE DUKE OF NORTHUMBERLAND v. HOUGHTON AND OTHERS.

[Ex.]

families in the kingdom, would be thereby made defective, would justify us in rejecting that which we were satisfied, upon argument and authority, was a sound proposition of law. But it is certainly well to consider whether such a proposition is so incontrovertibly established upon authority that we are bound to accept it, and make it the foundation of our decision in the present case. In the first place, however, I do not see any satisfactory evidence at all that this fishery ever did revert to, or ever was in the possession or enjoyment of, the Crown subsequent to Magna Charta until the dissolution of the monasteries in the time of Henry VIII. It is stated in paragraph 16 that King Edward I., by his charter of the twenty-seventh year of his reign (A.D. 1299), recites that "*certain liberties and free usages* claimed by the Prior of Tyne-mouth and his predecessors by virtue of their charters had been adjudged by the King's Court to have been forfeited." But in a case in which the decision we are called on to pronounce would go to shake the title to perhaps half the fisheries in the kingdom, I do not think we should give an effect to the words "*certain liberties and free usages*" which does not necessarily follow from the language used, and which language seems to me to point rather to the contrary conclusion. No doubt, there may be "*liberties and free usages*" of various kinds, and which may be forfeited; but I do not think that a *several fishery* granted by the Crown to a subject before Magna Charta can be taken in common parlance, or be held in law, to be included within the terms "*liberties and free usages*." I am clearly of opinion, therefore, that there is no evidence that this fishery ever did revert to the Crown until the reign of Henry VIII. As our attention has been called to the several conditions upon which it was contended that a free fishery, when it reverted to the Crown, merged in the prerogative, I may observe that, looking to the description of rights and franchises, which have been decided to be extinguished by merger in the prerogative, upon coming, back from a subject into the possession of the Crown and without intending to pronounce any final and decisive opinion upon the subject, that it certainly appears to me that such rights and franchises are waifs, estrays, wreck, and such like, and do not include a *several fishery*, which does not, in my opinion, at all range itself within them. Those rights or properties which have been held not to be merged in the Crown, are free warrens, markets with tolls, and fairs, *et similia*, whilst those which have been held to merge, are waifs, estrays, wrecks, felons' goods, &c., and certainly if I were called upon I should be inclined to hold that a *several fishery*, granted by the Crown to a subject before Magna Charta, would rather range itself within "*free warrens, markets with tolls, and fairs*," and so forth, than within the other franchises to which I have before alluded. But it is unnecessary to decide that question. If, therefore, the right of the plaintiff to the fishery is established by the evidence already referred to of this long user and enjoyment, and is not met by any evidence on the part of the defendants to the effect that it was originally granted by the Crown to a subject subsequently to Magna Charta, or that there was any period of time between Magna Charta and the dissolution of the monasteries in which this fishery was proved not to exist, I am of opinion that the right was clearly established, that the objection on the ground of merger in the prerogative cannot prevail, and that the plaintiff, consequently, is entitled to the judgment of the court.

MARTIN, B.—I am of the same opinion. This is an action of trespass brought by the Duke of Northumberland against the defendants for break-

ing and entering his several salmon fishery in the river Tyne, and catching and disturbing the fish therein. The case has been argued with very great ability on both sides, and Mr. Pickering, on behalf of the defendants, has fully brought before us, and with the greatest candour and fairness, everything that could be urged on their behalf. He has dealt with the real difficulties of the case, and has not relied on mere extrinsic matter, which would have been unsatisfactory when the real facts of the case came to be known. By so arguing a case counsel greatly assist those who have to adjudicate upon it, and are entitled to every consideration which the court can give. I should state for myself, that I should not have been prepared to have delivered my judgment in this case immediately after the conclusion of the argument, had it not been that my attention has been very much called to the same question, within the last six months, in a case before this court, in which the Duke of Manchester, as the plaintiff, claimed a toll of 2*d.* upon every beast sold in the market of St. Ives. That was a claim depending substantially upon the same principle as the present case. It certainly seems a strange and anomalous thing that although by the law of England twenty years' possession would give to the Duke of Northumberland an absolute right to the soil of the river Tyne, which by reason of the Statute of Limitations could not be disputed, yet it has been a matter of controversy before us to-day whether an exclusive possession for 110 years of this fishery in the waters of that river does or not give him a title to such fishery. That does seem to be a very great anomaly, and a matter which, if possible, ought, I think, to be put upon a different footing. It may be accounted for thus. The only Statute of Limitations which affects property like a fishery, a market, or a toll, &c. is one which passed in the reign of Edward I., and no subsequent Statute of Limitations has affected such franchises. But in dealing with land we have a Statute of Limitations passed in the reign of King William IV., whilst, with respect to tithes, we find a Statute of Limitations passed in the reign of George IV.; but when we come to deal with a fishery or a toll, we must go back to the Statute of Limitations passed at a time when the period of limitation was made to run from certain well-known events; and the Statute of Limitations upon which this case depends is the return of King Richard I. from the Holy Land, after his great military performances there, and after his imprisonment by the Duke of Austria on his way home, which were events no doubt well known to all the people of this country. So that, in dealing with such cases as the present, we have to go back from living memory to so remote a period of time as the return of King Richard I. from Palestine. It seems to me that the proper mode of dealing with such a question is that which is pointed out by the late Lord Wensleydale (then Parke, B.) In the case to which I have referred, in the course of the argument, of *Jenkins v. Harvey* (1 Cr. M. & R. 877; 5 L. J., N. S., Ex. 17), Alderson, B., at the conclusion of his judgment in that case (p. 895), says: "If an uninterrupted usage of upwards of seventy years, unanswered by any evidence to the contrary, is not enough to establish a right like the present" (that was with reference to a toll in the harbour of Truro), "there are innumerable titles which could not be sustained." I am sure it may be well said that if the exclusive occupation of this fishery by the Duke of Northumberland and his lessees and licencees for 110 years cannot establish a right to this fishery, a vast quantity of this kind of property would be gone. It seems to me that we ought to give to this, and every case of the kind, great, if not conclusive weight, to such

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THE DUKE OF NORTHUMBERLAND v. HOUGHTON AND OTHERS.

[Ex.

a long period of possession. But I will adopt the rule laid down by Parke, B. in the case to which I have just referred. Now, that learned judge there says (1 Cr. M. & R. 894): "The correct mode of presenting the point to the jury would have been that from the uninterrupted modern usage they should find the immemorial existence of the payment, unless evidence be given to the contrary." "That," he goes on to say, "is the ordinary mode in which such questions are left to a jury; and it is very important that the rule should be observed, not only with respect to claims like the present, but also with regard to various public exemptions depending upon usage, such as a modus and similar rights. The learned judge, however, did not so leave the case to the jury. He told them merely that he was not aware that there was any rule of law to prevent them from presuming the immemorial existence of the right from the modern usage; but he did not advise them that they ought to make such presumption unless some evidence to the contrary appeared." And, in commenting on that case, Blackburn, J., in his judgment in the case of *Sheppard v. Payne*, in the Exchequer Chamber (at p. 135 of 16 C. B., N. S.; 10 L. T. Rep. N. S. 194; 33 L. J. 160, C. P.), says, "The true rule seems to be laid down by Lord Wensleydale (then Parke, B.) in *Jenkins v. Harvey*, 1 Cr. M. & R. 877, where he says that the correct mode to direct a jury is to tell them that, from uninterrupted modern usage, they should find the immemorial existence of the payment (if that be necessary for its validity), unless some evidence be given to the contrary; or, as he says, on delivering the written judgment of the court, in the second trial of the case, 2 Cr. M. & R. 407 (5 L. J., N. S., 21, Ex.), from proof that an office existed in 1752, the jury may and ought to presume it to be prescriptive if that be necessary to make it valid, unless the contrary be proved." Blackburn, J., goes on to say, "The claim in that case (*Jenkins v. Harvey*) was by the corporation of Truro for a metage due of 4d. per chaldron of coals in that port, and it was supported. I mention this as showing what is meant by the latter part of the sentence quoted. I suppose neither the Barons of the Exchequer, nor the jury as antiquaries, believed that 4d. per chaldron was actually paid before Richard I. returned from the Holy Land; but the modern user was enough to cast upon the other side the onus of proving that it was a usurpation." I apprehend the present case must be dealt with in the manner stated by Parke, B. Now, it appears that in the conveyance of this property, now claimed by the plaintiff, a predecessor in title to the duke, it is described simply as "the fishery at Low Lights." But after the Duke of Northumberland purchased it in 1759, he immediately dealt with it in a different way, and it is always competent by extrinsic evidence to show the subject-matter of the grant. He, so long ago as 1760, which is now 110 years ago, described it as a fishery extending "from where the Pow Burn enters the Tyne, to the centre of the Tyne, and down to the place near to the bar," and therefore I apprehend, when it is found that he had been in possession for an immense number of years, the rule of Parke, B. is immediately let in, and it is incumbent upon the defendants to show that the fishery could not by possibility have existed at the time when the period of legal memory commenced. It may be taken, then, that the Duke of Northumberland had for 110 years exclusive use of this fishery, and what evidence do the defendants produce to show that it could not exist? So far from their adducing any, it seems to me that the evidence in this case is as strong as possible to show that the fishery did exist, and my real belief is that it

did exist before the time of legal memory, and did exist in the abbot, or prior, or monastery, at Tyne-mouth. Now, what is the history of it? In the year 1637, upwards of 200 years ago, it is described in paragraph 50 as a fishery contained in the river, exactly as it is described now. It is true it was a fishery from the mouth of the river up to Howden Pans; but Mr. Pickering said to-day, and most correctly, that, where a person had a fishery from Howden Pans down to the mouth of the river, it was competent for him to divide it, and grant a portion of it, as was done by the then owner, from whom the Duke of Northumberland claims. It seems to me that that paragraph in the grant of King Charles I. had a strong tendency to show the existence of this right. Then we find in par. 47, the fishery described in express terms as a fishery "from Howden Pans down to the mouth of the river." We find it so far back as the reign of Elizabeth; and it is dealt with as a fishery while in the hands of the Crown, and dealt with as distinct from the other property. Then it is established that in the reign of William Rufus, Robert de Mowbray, Earl of Northumberland, gave this property to the monks of Tynemouth Castle; and as early as the reign of Henry III., we find that "the lands which had been granted by the Earl of Northumberland and his men, to the aforesaid Church and St. Oswyn, were granted by the King and confirmed to the church." My real belief is that this was a portion of the property which did belong to Robert de Mowbray, Earl of Northumberland, and from his grant came into their possession, and which continued in their possession, or that of their representatives, down to the present time, and that a portion of it is undoubtedly in the possession of the present Duke of Northumberland. I think that it is not merely a potential, but an actual state of things, and in my judgment it is the strongest case of title of this kind which I have ever seen or heard proved, and I have had to deal with many such. And now with respect to the question of merger. It seems to me that this case comes directly within the judgment of my Lord Coke in the case of *The Abbot of Strata Marcella* (9 Rep. 24 a.), and that it is also in precise conformity with the rule laid down by Mr. Justice Popham and the other judges of the Queen's Bench in their judgment, in *Heddy v. Wheelhouse* (Cro. Eliz. pp. 558, 591). The question in the former case was very much the same as that which is raised on the present occasion. The king (Henry VIII.) had, I take it, seized and laid hands upon that with all the other monasteries; and, according to Lord Coke, it becoming a question whether the intention of the Act of the 32nd Hen. 8, c. 20, was "to advance these possessions;" that is, the possessions which the Crown had got hold of, "as well in valuation as estimation, and to revive actually and really such privileges, liberties, franchises and temporal jurisdictions, which the late owners of the abbays had," &c.; then it is to be considered (he says) "what privileges, liberties, franchises, and jurisdictions were extinct in the Crown by the accession of the said possessions to it." Therefore Lord Coke is dealing with this very identical point in his judgment in that case, namely, the franchises, liberties, and privileges belonging to the abbots, which were merged. Then he proceeds, "And as to that, it is to be known that when the king grants any privileges, liberties, franchises, &c., which were privileges, liberties, or franchises, in his own hands, as parcel of the flowers of his Crown, as *bona et catalla felonum fugitivorum, utlagatorum, &c., bona et catalla, raviata, extrahit, deodanda, wreccum maris, &c.*, within such possessions there, if they come again to the king they are merged in the Crown, and he has them again in *jure coronæ*" (not merged by

[Ex.]

THE DUKE OF NORTHUMBERLAND v. HOUGHTON AND OTHERS.

[Ex.]

reason of going into the land, but by reason of their coming to him in right of the Crown); "and if the wreck or goods waifed, estrays, &c., were appendant before to possessions, now the appendancy is extinct, and the king is seised of them *in jure coronæ*; but when a privilege, liberty, franchise, or jurisdiction was, at the beginning, erected and created by the king, and was not any such flower before in the garland of the Crown, there, by the accession of them again to the Crown, they are not extinct, nor the appendancy of them severed from the possessions; and if a fair, market, hundred leet, park warren, *et similia*, are appendants to manors or in gross, and afterwards they come back to the king, they remain as they were before, *in esse*, not merged in the Crown; for they were at first created and newly erected by the king, and were not *in esse* before, and time and usage has made them appendant, which difference (says Lord Coke) "was agreed *per totam curiam*." Now, I cannot conceive any two things to be more similar the one to the other than a several fishery and a free warren; the one is an exclusive right to take certain descriptions of birds and animals upon the land, and the other is an exclusive right to take fish in the sea. I am of opinion, therefore, that the present case falls directly within the judgment in the case of *The Abbot of Strata Marcella*. It seems to me to be the strongest case of the kind that has ever come before me.

PICOTT, B.—I am of the same opinion. The sole question here, is, whether, under the circumstances above stated, the plaintiff had a sufficient title to a several salmon fishery in the river Tyne, to enable him to maintain the present action. That involves the question whether this has been proved to us in point of fact, taking the law to be correctly laid down, as it has been by my Lord Chief Baron, and my Brother Martin. I agree with the observations of my brother Martin, and think that we are very much indebted to both the learned counsel for the arguments that have taken place upon this case. The real points have been elucidated and presented to us clear of all fallacies and obscurities, which do not arise when the facts come to be understood, and only those objections which really arise upon the case have been taken. There is clear evidence of possession and enjoyment by the Duke of Northumberland of this fishery from the year 1759. Then we find in addition to that, from deeds, documents, and letters patent, which are set forth in the case, that the existence of this fishery is shown from the year 1540. The long user which has been thus shown, raises the presumption of a legal origin prior to Magna Charta, and the question then is, whether there is anything, either in point of fact, or upon the true construction of the documents, to rebut that presumption. Mr. Pickering has made two prominent objections. One is, that, when the language of these old charters and deeds comes to be closely looked at, they do not identically mention this fishery, as a several fishery, and that the words used may well be referable to some other species of fishery. But in answer to my question on that point, Mr. Pickering failed to give me the name of any other kind of fishery, because probably he felt a difficulty in giving a name to any such property. Now with regard to the weight of the objection; we find, first of all, no doubt, that in several of these documents it is called "a salmon fishery in the waters of the Tyne" simply; in another document in James I.'s time, "a fishing for salmon in the waters of the Tyne." Then if we go back to one of the minister's accounts in the time of Queen Elizabeth, it seems to me that language is used which is very precise and definite to show that this must have been a several fishery. In the accounts

of Robert Arderne, the bailiff, of any profit arising it is described as being "for the ferm of the salmon fishery in the salt water within the bounds of the town of Sheels." If it is "a ferm of the salmon fishery," I do not know what it can be but a "several fishery." It is truly represented as being a ferm of the salmon fishery. But another objection was made arising out of the language of the same account, and it was said that the account, together with the language of the document of 22 Hen. 8 and the letters patent, shews that what the monastery was entitled to was not a "several fishery," but the *tithes of the fish*. And if the language used would bear that construction, it would carry Mr. Pickering a long way on his journey to rebut the presumption of its being a several fishery; but I think the language of the minister's accounts in the time of Queen Elizabeth itself rebuts the notion that they are speaking of tithes. It speaks of "the ferm of salmon fishery in the salt waters within the bounds of the town of Shields and Tynemouth, where the tenants of the towns aforesaid ought to answer for every twenty salmon, one salmon, for the time of this account he doth not answer because no such fish have been taken within the bounds aforesaid during the same time." That does not give one the notion of a tithe of salmon; because I never heard of a tithe being one in twenty. But, be that as it may, "the ferm of the salmon fishery," is what is spoken of in that document, and that has, in my judgment, nothing to do with a mere right to tithe. The letters patent of Hen. 8, it is true, speak of "hereditaments to the late monastery formerly appertaining, together with certain tithes, including the tithes of fish of all the vessels and boats fishing at the Shelths in Tinemouth, parcel of the Rectory of Tinemouth." But they are there speaking of tithes *nominatim*. That has nothing to do with the several fishery. It is a different matter altogether. I do not, therefore, find anything in any of these documents which goes to rebut the presumption, that we are bound to make of the legal origin of this fishery, from the long user and enjoyment of it, and from the deeds which have been put in evidence to show that it was existing at a time prior to the time as to which there is any evidence of enjoyment. There is one other document to which we ought to allude, and it is a very ancient one, and the only other one which could raise, as it seems to me, an argument of a presumption contrary to the existence of this fishery, and that is the record of the proceedings in the time of Edward I. I must say for myself that I cannot say there is not something there which looks inconsistent with "a several fishery at the Low Lights, and extending from the Low Lights to the Pow Burn," and that is the part of the river opposite to where the monastery was. There is no doubt that the prior there was setting up a right to the soil of half the river, "and that between the middle of the water and the land of the monastery he had his free fishery by the length of the same land in the same water, and that he and his predecessors had built houses there for his fishermen." I think, however, it would be giving too much importance to that to draw the conclusion that that does rebut the presumption of a several fishery existing in the waters of the Tyne, as described in these deeds. I do not go more into detail after the explanation which my Lord has given upon that, and the judgment that has proceeded upon it; but I do not think that that is enough to raise any serious question. Then I come to the remaining question of merger, on which Mr. Pickering has argued with so much ability and fairness, though I cannot assent to his argument. The question is whether there is any evidence of merger in this case, and, if so, what the law is upon

[Priv. Co.]

DAVID DOUGLAS YOUNG AND ANOTHER v. JAMES THOMAS LAMBERT.

[Priv. Co.]

that subject? I find no evidence in the case showing that there was a merger in point of fact, or that the fishery was ever forfeited. I do not think it necessary to say more about it, or go into a detailed examination of the different cases upon the subject. It is sufficient to say that I am not satisfied that there was any merger, but that if it were necessary to decide that point now, which it is not, I should be of opinion that a several fishery would not, upon reverting to the Crown, be merged in the prerogative, as contended for by Mr. Pickering; but would exist in the King as a distinct and separate property, capable of being regranted by him to a subject. It seems to me to be a mistake to say that a right like a free or several fishery merged in the prerogative of the Crown, and for this reason, that it did not originally grow out of the prerogative. I take it that the origin of such a right is that the king was formerly considered the universal lord and original proprietor of all the lands in this kingdom; that from that arose this right to grant property like this fishery, or those which are mentioned as being like this. It is quite possible, then, that the king might have parted with the very land out of which this franchise was granted; and then, if this franchise came back to him, it would not merge in the land, for he would no longer possess the land; nor in the prerogative of the Crown, because it did not grow out of the prerogative of the Crown. It is not like "a flower in the garland of the Crown," as wrecks, estrays, or waifs are, but rather like a free warren, and such like franchises, which, it is conceded, would not be destroyed by reverting to the Crown. It is not, however, necessary to decide this. I am of opinion, with the rest of the court, that the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Attorneys for the plaintiff, Bell and Stewards, 49, Lincoln's-inn-fields, W.C.

Attorneys for the defendants, Vizard, Crowder, Anstie, and Young, 55, Lincoln's-inn-fields, W.C.; agents for Tinley, Adamson, and Co., North Shields, and Tynemouth.

Judicial Committee of the Privy Council.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Jan. 24 and 25, and Feb. 11.

(Present—The Right Hon. Lord WESTBURY, Sir JAMES W. COLVILE, and Sir JOSEPH NAPIER.)

DAVID DOUGLAS YOUNG AND ANOTHER (apps.) v. JAMES THOMAS LAMBERT (resp.)

Goods at Customs House subject to lien—Pledge of—Constructive delivery,

Goods, arriving at Quebec, were taken to the customs examining warehouse, according to the r. the port. The goods were entered by the officer in charge, as consigned to M. and S. The goods remained subject to the lien for freight, and to the charges for customs' duties and storage. Till these several claims were discharged the officer in charge was bound not to part with the goods. Subsequently M. and S. obtained an advance from the appellants on the security of these goods, and gave to them a request note, signed by M. and S., and directed to the officer in charge, requesting him to hold the goods "subject to the order," of the appellants, "they paying the duty and storage charge before removal." This note was sent to the officer in charge, who accepted it and made a corresponding entry in his book. Afterwards the goods, while still lying at the customs' warehouse, were seized by the respondent, a judgment creditor of M. and S.

Held (reversing the judgment of the Court of Queen's Bench for Quebec, Canada, appeal side), that the seizure was bad, there having been a valid constructive delivery and transfer of the goods to the appellants as pledgees.

This was an appeal brought to try the right to certain wire rope and other goods, which were taken in execution, on the 17th June 1865, by the sheriff of Quebec, while lying at the Government Examining Warehouse in that city.

The writ under which the goods were seized was issued by the respondent, on the 30th May 1865, on a judgment obtained by him against Messrs. Maxwell and Stevenson, merchants, of Quebec, on the 13th October 1864.

To this seizure the appellants, on the 27th June 1865, filed an opposition *afin d'annuler*, alleging in effect that the goods had been previously assigned to them in pledge by the said Maxwell and Stevenson as security for an advance of 1800 dols., together with interest, commission, and other charges thereon, and that, at the time of the seizure, the said goods were in their lawful possession as pledgees as security for a sum of 2058½ dols. to which the whole sum so due to them then amounted.

To the opposition so filed, the respondent, on the 3rd Oct. 1865, pleaded the general issue, and also as a special *exception péremptoire en droit*, that Messrs. Maxwell and Stevenson were, at the time of the advance, notoriously, and to the knowledge of the opposants, insolvent, and had stopped payment, and that the goods pledged constituted their whole estate, and the transaction was illegal, and in fraud of the creditors.

On these pleadings, issue was joined, on the 11th Oct. 1865.

Both parties subsequently proceeded to take evidence, when the following were shown to be the facts of the case:—

The goods in question were sent from Liverpool by the steamer *St. David*, in the summer of 1864, consigned to the said Maxwell and Stevenson, and, on their arrival at Quebec, were landed and placed in the Government examining warehouse on the 6th Aug. in that year.

The examining warehouse is a part of the customs department, established under the authority of the Canadian Customs Act (Consolidated Statutes of Canada), c. 17, s. 11, cl. 4, and s. 14, cl. 4.

The routine of the Custom House at Quebec was proved to be as follows:—"In the first place the master of a vessel arriving produces a manifest or statement of his cargo; then the respective owners of goods possessing bills of lading, or any other legal mark of ownership, pass entries for them. If this is not done, the goods are sent to the examining warehouse as unclaimed; when there, they are held until properly passed through the customs; that is to say, either the duty paid, or the necessary bond given." If this be not done within three months, a power is given by the Customs Act, s. 17, to sell the goods, to pay the duty, and the expenses of warehousing, &c. When an entry of goods is passed, whether on their first landing, or while lying at the examining warehouse, the duties are paid at the time of such entry, and a permit given for their removal, or a bond is given by their owner for the due payment of the duties, and the goods are then entered in the bonded warehouse book, and placed in some bonded warehouse; the examining warehouse is treated as a bonded warehouse for this purpose, and goods which are there before entry remain so afterwards. Goods which have been so bonded are not delivered out of the examining warehouse, or other bonded warehouse, without a permit from the head locker, who at the time in question

[Priv. Co.]

DAVID DOUGLAS YOUNG AND ANOTHER v. JAMES THOMAS LAMBERT.

[Priv. Co.]

was one James Sealey. Special statutory provisions are contained in the Customs Act, s. 46, for the transfer by bill of sale of bonded goods, and a book was kept by the said James Sealey for the purpose of entering such sales.

The whole of the customs department is under the control of the collector of customs at the port of Quebec, but the examining warehouse has been for 15 years under the special charge of François Xavier Métivier, who, on his appointment to that position, received from the collector the following written instructions:—

Charged with the care of the examining warehouse, it will be his duty to keep an exact account of all merchandise and goods received into and passed out of the examining warehouse, according to the warrants addressed to him, and to collect and keep an accurate account of all storage dues.

Métivier received no express instructions from the collector to accept any order for the delivery or transfer of goods from the parties owning them, but it was always his custom to do so, and considered by him to be the rule of the office, and though it appears to have been known to, was never objected to by, the collector.

Shortly after the goods were bonded and placed in the examining warehouse, Messrs. Maxwell and Stevenson applied to the appellants, who were also merchants at Quebec, carrying on their business under the style of "D. D. Young and Co.," for a loan of 1800dols. upon the security of their goods. The appellant having consented, gave to Messrs. Maxwell and Stevenson their promissory note at three months date for that amount, and received from them the following document:—

1800dols. Quebec, 19th Aug., 1864.

Received from D. D. Young and Co., their note at three months date for eighteen hundred dollars, being an advance on eighty-nine packages of wire rope rigging, marked M. & S., No. 1 @ eighty-nine ex-stmr. "St. David," and now in H. M. examining warehouse, said advance to be repaid to D. D. Young and Co., on or before the maturity of their note, together with a commission of 5 per cent. on the amount advanced. Should the advance not be prepaid by that time, D. D. Young and Co., to have the right of selling the rigging, &c., and paying themselves out of the proceeds.

MAXWELL AND STEVENSON.

Messrs. Maxwell and Stevenson at the same time gave to the appellants the following order on the officer in charge of the examining warehouse:

The Officer in charge of H.M. Examining Warehouse.

Quebec, 19th Aug. 1864.

Will please hold, subject to the order of D. D. Young and Co., thirteen coils wire rope, Nos. 1 to 13; one bag iron-work, No. 14; seventy-four coils rope, Nos. 15 to 88; and one bale merchandise, No. 89, all marked M. & S., landed from the steamer *St. David*, on her last passage from Liverpool, they paying the duty and storage charge before removal, and oblige

MAXWELL AND STEVENSON.

This order was the same day taken by one of the appellants' clerks to the said François X. Métivier above-mentioned, who wrote across it, "accepted, F. X. Métivier," and at the same time wrote opposite the entry of the goods in the warehouse book kept by him, "subject to D. D. Young's order."

Messrs. Maxwell and Stevenson discounted the appellant's note, and employed part of the proceeds in paying the freight upon the goods. The exact date of this payment was not proved.

Messrs. Maxwell and Stevenson were unable to repay the advance before the note became due; but at their request the appellants consented not to sell the goods, but to hold them as security for their advance, in consideration of being paid an extra commission of 2½ per cent. for an extension of time of three months. Interest was also to be paid at 7 per cent. the appellants accordingly retired the said note at maturity, and continued to hold the goods.

Shortly after, on 30th Dec. 1864, Messrs. Maxwell and Stevenson duly entered the goods and bonded them. An entry of them was then made in the bonded warehouse book, kept by James Sealey

as above-mentioned, but the goods remained in the examining warehouse.

In the month of June 1865 the three months' extension of time having expired, the appellants prepared to sell the goods, and gave instructions to their brokers, A. J. Markham and Co., to that effect. The sale was, however, stopped by the seizure of the goods in execution as above-mentioned.

The *enquêtes* of both parties having been closed, the case was heard on the merits before Stuart, J., who, on July 2, 1867, gave judgment for the appellants, declaring them pledgees of the goods in question, and granting *main levée* of the seizure thereof.

The respondent having inscribed the cause upon the roll for review before three judges, the cause was again argued before Meredith, C. J., and Stuart and Taschereau, JJ., and on the 5th Feb. 1868, the court gave judgment, reversing the judgment of the preceding 2nd July, on the ground that the appellants did not obtain possession of the goods so as to give effect to the contract of pledge, and dismissing the opposition of the appellants with costs, Stuart, J. dissenting.

From this judgment the appellants appealed to the Court of Queen's Bench of the province of Quebec, Canada, and on the 19th Dec. 1868, that court gave judgment confirming the judgment of the Superior Court, on the grounds that the warehousekeeper was the agent and depositary of the goods for the shipowner or master to retain possession of them for him, and to prevent control over them by the consignees till freight was paid; that the case was different from one of sale or deposit of a bill of lading, but was one of an ordinary pledge of goods in which possession must accompany the pledge; and that here the goods had been landed and stored in the customs-warehouse in the interest of the shipowner or master only, and had never been actually or constructively in the possession of the consignees. The court referred to Massé, *Droit Commercial*, vol. 6, pp. 498, 502; Troplong, *Hypothèques et Privilèges*; Civil Code of Canada, arts. 1971-2; *Meyerstein v. Barber*, 15 L. T. Rep. N. S. 359; L. Rep. 2 C. P. 51.

It was from this judgment that the present appeal was brought.

Sir Roundell Palmer, Q. C., and Bompas, for the appellants.—Métivier had authority to accept the order of Maxwell and Stevenson, that the goods should be held subject to the appellants' order. The possession of Métivier was, from the time that he accepted such order, the possession of the appellants, notwithstanding the lien of the shipowner for freight, and, if not, it became so as soon as freight was paid. At the time of the seizure, Maxwell and Stevenson had no legal right, or actual power, to take possession of or interfere with or sell the goods without first paying to the appellants the sum due to them; and the creditors of Maxwell and Stevenson could have no further rights in that respect than their debtors. The goods had been validly pledged to the appellants, and were in their constructive possession at the date of the seizure, and goods in the possession of a pledgee cannot be taken in execution by judgment-creditors of the pledgor. They referred to

Eyre v. McDowell, 9 H. of L. Cas. 619;

Beavan v. Earl of Oxford, 6 De G. M. & G. 492;

Bittlestone v. Cooke, 6 E. & B. 297;

Pearson v. Dawson, E. B. & E. 448;

Watts v. Porter, 3 E. & B. 743.

The appeal was *ex parte*.

Cur. adv. vult.

Feb. 11.—Judgment was delivered by Sir JOSEPH NAPIER.—In this case the respondent claims the

PRIV. CO.]

DAVID DOUGLAS YOUNG AND ANOTHER v. JAMES THOMAS LAMBERT.

[PRIV. CO.]

benefit of a seizure of goods, under a writ of *fiery facias*, issued on a judgment recovered by him against Messrs. Maxwell and Stevenson, of Quebec, merchants. The writ was issued on the 30th May 1865, and certain goods, alleged to be the property of Messrs. Maxwell and Stevenson, were seized under the writ by the sheriff. The appellants opposed the execution on the ground that by a contract in writing, bearing date the 19th Aug. 1864, the property of Maxwell and Stevenson in the goods in question was conveyed to them, and an authority to sell expressly conferred by Maxwell and Stevenson for the purpose of securing repayment of advances made by the appellants on the faith of this contract; and as repayment had not been made, that the seizure under the writ should be set aside. The cause was heard in the first instance by Mr. Justice Stuart, one of the judges of the Superior Court of Lower Canada. He allowed the opposition, and, after declaring that the opponents were pledgees of the goods in question, he granted *main levée* of the seizure thereof, that is, directed an *amoveas manus* against the execution-creditor. The decision was reviewed by the full court. The majority of the judges held that the contract had not been perfected by delivery of possession of the goods so as to constitute a pledge; and on this ground they reversed the decision of Stuart, J., and dismissed the opposition to the execution. The case was then taken by appeal to the Court of Queen's Bench, and the judgment of the Superior Court was affirmed. The appeal to Her Majesty in Council now under consideration has been brought against the judgment of the Court of Queen's Bench. In the reasons of the judges, which have been elaborately drawn up by Badgley, J., the material point of contention is stated to be "the opposants' want of possession of the pledge, actually or constructively," on or after the 19th Aug. 1864. It is at the same time stated that "the preferential privilege of the pledgee in the thing pledged, according to our law, is undeniable, over the creditors of the pledgor when the contract is complete and perfect." It is suggested (but for the first time) that supposing the contract of pledge to have been completed, the course adopted by the appellants in opposing the execution was not in accordance with the Canadian law. The goods in question were shipped at Liverpool, on board a steamer called the *St. David*. They arrived at Quebec early in Aug. 1864, and were reported by the master of the vessel at the Customs in Quebec as consigned to Messrs. Maxwell and Stevenson. According to the regulations of the Customs, the goods were taken to their examining warehouse, and in the book of M. Métivier (the chief officer in charge of the warehouse) an entry was made of them as consigned to Maxwell and Stevenson. They were marked "M. and S." The lien on them for freight continued, and they were also liable to detention until the charges for customs duties and storage had been satisfied. Subject to these conditions the consignees had the ownership and the possession of the goods and also the right of dealing with them according to the rules of law applicable to transfers of goods that are subject to charges, and actual delivery does not take place at the time of the transfer. The officer in charge of the warehouse was bound not to part with the goods until the several claims for freight, duties, and storage had been discharged. But he was at liberty, with the sanction of the consignees, to substitute in his warehouse book the name of another as entitled to their property and possession subject to the conditions then subsisting. "The general rule of my office," says M. Métivier, "is, when a party applies to transfer the goods to another party, I generally make a remark in my book to keep in mind of asking a proper order from

the party to whom the goods are transferred, and that is very often." The goods having thus been placed in the customs' examining warehouse, and the entry having been made in the book of M. Métivier, Maxwell and Stevenson, on the 19th Aug., 1864, asked for and obtained from the appellants an advance of 1800 dols. on the goods, described in the receipt for the "advance, signed by Maxwell and Stevenson, as wire-rope, rigging, &c., marked M. & S., ex steamer *St. David*, and now in Her Majesty's Examining Warehouse; said advance to be repaid to D. D. Young and Co., on or before the maturity of their note, together with a commission of 5 per cent. on amount advanced. Should the advance not be repaid at that time, D. D. Young and Co. to have the right of selling the rigging, &c., and paying themselves out of proceeds." A request note of the same date, directed to the officer in charge of Her Majesty's Examining Warehouse, and signed by Maxwell and Stevenson, was given by them to the appellants, whereby the officer was requested "to hold the goods" (described as in the receipt) "subject to the order of D. D. Young and Co., they paying the duty and storage charge before removal." On the same day this was sent to M. Métivier, who wrote across it "Accepted, F. X. Métivier," and it was then returned to and kept by the appellants. M. Métivier also wrote an entry in his own book opposite to the entry made when the goods were first placed in the warehouse. This second entry was—"Subject to D. D. Young's order." He says, "I made that entry in order that, in case the said wire and rope-rigging were claimed by anybody, I should require the order of D. D. Young and Co. before delivery." He further says that he would not have delivered the goods to Maxwell and Stevenson, or to any other, without an order from the appellants. Thus, as between the customs and the appellants, the latter stood precisely in the position in which Maxwell and Stevenson had stood before the request note was accepted and the entry made in the warehouse-book by M. Métivier; and as between the appellants and Maxwell and Stevenson, the goods in question were sufficiently transferred for the purposes of the pledge or mortgage. It appears to their Lordships that by the express agreement of the parties in this case, followed by the acceptance of the chief warehouse keeper, there was a valid constructive delivery of the property comprised in the contract, and that the judgment under appeal, which dismissed the opposition and gave effect to the seizure under the execution, to the prejudice of the rights of the appellants as pledgees, cannot be supported. Their Lordships will, therefore, humbly advise Her Majesty that the judgment of the Court of Queen's Bench should be reversed, and that in lieu thereof it should be ordered that the judgment of the Superior Court, which reversed the judgment of Stuart, J., should also be reversed, and the judgment of Stuart, J. be affirmed with costs in both courts. The appellants are entitled to have their costs of this appeal.

Judgment reversed.

Solicitors for the appellants, *Bischoff, Bompas, and Bischoff*.

CHAN.]

BURDICK v. GARRICK.

[CHAN.]

Equity Courts.**COURT OF APPEAL IN CHANCERY.**Reported by T. BROOKSBANK and E. STEWART ROCHE, Esqrs.,
Barristers-at-Law

March 14 and 18.

(Before Lord Justice GIFFARD.)

BURDICK v. GARRICK.

Practice—Appeal to House of Lords—Suspending proceedings under decree—Costs.

The costs of a motion to suspend proceedings under a decree, pending an appeal to the House of Lords, are, notwithstanding what was said in Topham v. The Duke of Portland, 7 L. T. Rep. N. S. 11; 1 De G. J. & S. 603, shown by Walford v. Walford, 19 L. T. Rep. N. S. 233, to be in the discretion of the court, in accordance with what was laid down in The Earl of Shrewsbury v. Trappes, 6 L. T. Rep. N. S. 516; 2 De G. F. & J. 172.

As a general rule it is fair that the costs of such a motion, if successful, should abide the result of the appeal to the House of Lords.

In a suit to compel trustees to account for certain trust-funds a decree was made by the Court of Appeal that defendants should account to the plaintiff and pay what should be found due upon the taking of the account, and also the costs of the suit. The defendants having presented a petition of appeal to the House of Lords against this decree, moved before the Court of Appeal for an order suspending the proceedings under the decree:

Held, that no order ought to be made to stay the taking of the account or the taxation of the costs:

But held, the plaintiff being out of the jurisdiction of the court, that the trust-fund must be paid into court and remain there pending the appeal, unless the plaintiff was prepared to give undeniable security to refund in case the decision should be reversed by the House of Lords. The costs of the suit were ordered to be paid to the plaintiff's solicitor upon his giving satisfactory security to refund them if the decision should be reversed on appeal. If he declined to give that security the amount of taxed costs must be paid into court pending the appeal. The defendants were to give an undertaking to abide by any order which the court might think fit to make with regard to payment of interest into court:

Held, moreover, that the costs of the motion to suspend proceedings pending the appeal must abide the result of the appeal.

As to the facts of this case, it is enough to state that the suit was instituted by a lady resident in America, against defendants who resided in England, for the purpose of compelling them to pay to the plaintiff a fund which she alleged they held upon trust for her.

A decree was made by the Court of Appeal that the defendants should account to the plaintiff and pay what should be found due, together with interest and the costs of the suit. From this decree the defendants presented a petition of appeal to the House of Lords, and then moved for an order to suspend the proceedings under the decree pending the appeal.

Dickinson, Q. C., and G. W. Collins, on behalf of the defendants, contended that there ought to be security that the fund in question in the suit should be forthcoming in case the House of Lords should reverse the decision of the Court of Chancery. The plaintiff was out of the jurisdiction, and therefore the fund ought not to be paid over pending the appeal. If the fund were lost there would be

an irreparable injury, and the possibility of irreparable injury had always been held a sufficient ground for the suspending of proceedings pending an appeal. The costs of the present application ought to abide the result of the appeal, there being no settled rule that in such a case the applicant should as a matter of course pay them. On the contrary, it was laid down that such costs were in the discretion of the court.

The Earl of Shrewsbury v. Trappes, 6 L. T. Rep. N. S. 516; 2 De G. F. & J. 172;

Walford v. Walford, 19 L. T. Rep. N. S. 233; L. Rep. 3 Ch. App. 812.

Greene, Q. C., and Hanson, on behalf of the defendants, urged that no sufficient reason had been shown why the proceedings under the decree should be suspended.

Lord Justice GIFFARD said that he should order the payment of the money directed by the decree, and the payment of the costs of the suit to be suspended pending the appeal, unless the plaintiff would give undeniable security for the repayment of the money in case the House of Lords should reverse the decree of the Court of Chancery. But the taking of the accounts and the taxation of the costs need not be suspended. The amount of the taxed costs must, however, be paid into court, unless the plaintiff's solicitor would give some reasonable security for repayment. The security need not be so strict a one as that for the repayment of the trust money. As to the costs of this motion, his Lordship thought that it would be right that they should abide the result of the appeal.

Greene, Q. C. and Hanson then argued that it would be sufficient to have the personal undertaking of the plaintiff's solicitor to refund the costs. *Gibbs v. Daniel, 4 Giff. 41.* As to the costs of this application, it was an indulgence that was asked for, and the applicant ought to pay the costs of it. In *Topham v. the Duke of Portland, 7 L. T. Rep. N. S. 11; 8 Ib. 679; 1 De G. J. & S. 603;* which was a later case than *The Earl of Shrewsbury v. Trappes, 6 L. T. Rep. N. S. 516,* it was said to be the course of the court that the applicant should pay the costs of such an application, and there was nothing said in *Walford v. Walford, 19 L. T. Rep. N. S. 233; L. Rep. 3 Ch. App. 812,* inconsistent with that.

Lord Justice GIFFARD said that he could not see anything in the report of *Walford v. Walford* which was inconsistent with what was said in *Topham v. The Duke of Portland* to be the course of the court, and unless there was any subsequent decision to the contrary he could not depart from the rule there laid down. He knew from having been himself counsel in that case that the point was fully argued, and that the then Lords Justices took great pains to come to a right conclusion. They consulted the registrars of the court before expressing their opinion. The costs of such an application could not be very large, and the payment of them went to show that the appeal was a *bona fide* one, and in that point of view the rule that the applicant should pay them appeared reasonable. If, however, the fund in question in the suit were paid over without some substantial security being given that it should be refunded if necessary, there would practically be a denial of the right of appealing to the House of Lords. The costs when taxed must be paid to the plaintiff's solicitor on his giving satisfactory security to refund. If that was not given the amount must be paid into court, and the defendant must give an undertaking to abide by such order as the court might think fit to make as to the payment of interest. The case might be mentioned again with regard to the security to be given.

CHAN.]

BOVILL v. COWAN—THE MASONS' HALL TAVERN COMPANY v. NOKES.

[ROLLS.

March 18.—The application was mentioned again to-day with regard to the security to be given.

Greene, Q. C. and Hanson stated that the plaintiff was not prepared to give any security, and therefore the fund would have to remain in court. But her solicitor would give a satisfactory security to refund the costs if called upon to do so.

Dickinson, Q. C., and G. W. Collins, on behalf of the defendants, now stated that since the former hearing of this application they had ascertained that there was a much fuller report of what took place in *Walford v. Walford*, in 19 L. T. Rep. N. S. 233, and that it appeared that *Topham v. The Duke of Portland* was cited to the court, and that, notwithstanding, Wood and Selwyn, L.J.J. said that the costs of such an application were in the discretion of the court. In *Walford v. Walford* the application was in form an appeal by way of motion from the refusal of Stuart, V. C. to suspend the proceedings under the decree pending an appeal to the Court of Appeal in Chancery. But the application was in substance an original motion, for after the notice of appeal motion had been given by the defendant the plaintiff enrolled the decree, and at the bar the defendant asked that the proceedings might be suspended pending an appeal to the House of Lords.

Greene, Q. C. and Hanson said that there were very special circumstances in *Walford v. Walford*, and as the reports of the case did not agree, it was not an authority to overrule the decision in *Topham v. The Duke of Portland*, which was come to after the judges had consulted the registrars as to the practice.

Lord Justice GIFFARD said that he had no hesitation in stating his own opinion to be that the reasonable rule was that the costs of an application of this kind should abide the result of the appeal. It now appeared that in *Walford v. Walford* the then Lords Justices thought that, notwithstanding the decision in *Topham v. The Duke of Portland*, there was no inflexible rule that the applicant should pay the costs of the application; but that, on the contrary, the costs were in the discretion of the court. It was to be observed also that the late Knight Bruce, L. J., who took part in the decision of *Topham v. The Duke of Portland*, said in the former case of *The Earl of Shrewsbury v. Trappes*, that there was no inflexible rule on the subject. That being so, his Lordship was at liberty to act on his own view of what the former rule was, namely, that the costs should abide the result of the appeal.

Solicitor for the plaintiff, *Helsham*.

Solicitors for the defendants, *Monckton and Monckton*.

Monday, March 21.

(Before Lord Justice GIFFARD.)

BOVILL v. COWAN.

Practice—Affidavit of documents—Sufficiency—Joint possession.

Where a person who makes an affidavit of documents in his possession sets up a case of joint possession, his affidavit will be insufficient if he does not show enough to satisfy the court what is the nature of the alleged joint possession.

This was a suit to restrain the infringement of the plaintiff's patent by the defendant.

The suit was instituted by G. H. Bovill. He afterwards died, and the suit was revived and carried on by his executors. On the 29th May 1869,

they, upon the application of the defendant, were ordered "to make and file a full and sufficient affidavit stating whether they, or either of them, have or have had or has or has had in their or either of their possession or power any and what licences, or agreements or duplicates, or counterparts, or drafts or copies of licences, or agreements granted or entered into by the late plaintiff G. H. Bovill, to or with any and what person or persons of the improvements patented by the said late plaintiff in June 1849, and accounting for the same."

In pursuance of this order the plaintiffs on the 16th June 1869 made an affidavit, in which they deposed as follows:

According to the best of our knowledge, information, and belief, we have not now, and never have had in our exclusive possession, custody, or power, or in the possession, custody, or power of our solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other person on our behalf, any licence, duplicate licence, or agreement for the use of the patent of the 5th June 1849, or any copies of such documents, but we have in our possession jointly with a third person who is not a party to the suit a bundle of such documents, and we can only produce the said documents with the consent of such third person in whose possession jointly with us the said documents now are, and we have applied for such consent accordingly, and if accorded we have no objection to produce the said documents.

The affidavit was held insufficient by the Master of the Rolls, and the plaintiffs were ordered to make a further affidavit. This they did, and they then said as follows:—"We have set forth in the schedule hereto the particulars of the bundle of documents referred to in our previous affidavit, and we further say that Mr. John Lockett, of Liverpool, is the person referred to in the said affidavit in whose joint ownership the said documents are." This further affidavit was also held by the Master of the Rolls to be insufficient, and his Lordship ordered the plaintiffs to make another affidavit. From this decision they appealed.

Sir R. Baggallay, Q. C., and Everitt, in support of the appeal, argued that, from the two affidavits taken together, it was quite clear that the documents in question were not in the possession of a person whom the plaintiffs could compel to produce them. They cited

Burbidge v. Robinson, 2 Mac. & G. 244.

Without calling upon *Jessel*, Q. C., and *Ford North*, who appeared for the defendant,

Lord Justice GIFFARD said that he thought the affidavit insufficient. When parties made an affidavit of this sort, and alleged a joint possession of documents, they were bound to show enough to satisfy the court what the nature of the joint ownership was. The appeal must be dismissed with costs.

Solicitors for the appellants, *Harrison, Beal, and Harrison*.

Solicitor for the defendant, *W. W. Wynne*.

ROLLS COURT.

Reported by HENRY PEAT, Esq., Barrister-at-Law.

Jan. 26, 27, 28, and Feb. 8.

THE MASONS' HALL TAVERN COMPANY v. NOKES.

Solicitor and client—Formation of company to take over property purchased by solicitors—Sale to company by their solicitors—Liability to account for profit.

A firm of solicitors purchased a certain leasehold property, and soon afterwards they formed a company (of which they were appointed the solicitors) to take over the property, which they sold to the company at a price greatly in excess of that which they had paid for it.

a bill by the official liquidator of the company, which

[ROLLS.]

THE MASONS' HALL TAVERN COMPANY v. NOKES.

[ROLLS.]

had been ordered to be wound-up, seeking to make the solicitors answerable for the profit which they had made by the sale to the company.

Held, that no fiduciary relation having existed between the parties at the time when the solicitors purchased the property, and there having been no fraud, concealment, or misrepresentation on the part of the solicitors, and all the then members of the company having been fully aware of the facts of the case, the sale could not be opened, and the solicitors were not accountable for the profit made on the transaction.

Bill accordingly dismissed with costs.

The Bank of London v. Tyrrell, 27 Beav. 273; 6 L. T. Rep. N. S. 1; 10 H. L. Cas. 26; and The Society of Practical Knowledge v. Abbott, 2 Beav. 559, distinguished.

This suit was instituted by the Masons' Hall Tavern Company against William Federau Nokes, George Carlisle, and Swinford Francis, who were solicitors, carrying on business in partnership, in Finch-lane in the city of London, for the purpose of making them answerable for the profits made by them arising from the sale to the company of certain property, on the ground of the relation of solicitor and client which subsisted between them and the company, and of alleged concealment on their part with reference to the sale.

The facts of the case were as follows:

In July 1865, Nokes entered into an agreement with one Charles Hicks, for the purchase of the residue then unexpired (fifty-five years) of the lease of certain hereditaments, known as the Masons' Hall Tavern, at the price of 7500*l.* He bought it on behalf of himself and three other persons, namely, John Kelday, Arthur Kelday, and Edward Habershon, who had agreed together to buy the lease as a joint speculation, for the purpose of resale, at a profit or sub-letting, &c. These four persons were to have each one-fourth of the property, but Nokes' fourth was to be divided into three parts, one of which was to belong to himself, and the other two to his partners, Carlisle and Francis. By the agreement between Nokes and Hicks, the stock-in-trade, fixtures, &c., were to be taken at a valuation, and they were valued at 3900*l.* On the 5th Aug. 1865, the lease was assigned to Nokes, who had previously, on behalf of himself and the other persons interested in the lease, entered into a contract to grant an underlease of the property to one Frederick Potter, for a term of forty-two years from June 1865, at an annual rent of 1000*l.*, subject to a stipulation that Potter should purchase the fixtures, furniture, and stock-in-trade at a valuation, and upon the further condition that Potter would surrender the underlease whenever required so to do on payment to him of 500*l.* The arrangement with Potter fell through, and he held the tavern for some time as manager for Nokes and the other persons interested in it, receiving a per centage upon the profits.

Soon afterwards the persons interested in the tavern projected a company for the purchase of the Masons' Hall Tavern, and Nos. 13 and 14, Basinghall-street, which adjoined it, and a prospectus was issued, which stated that the capital was to be 50,000*l.*, in 5000 shares of 10*l.* each, and that the object of the company was to purchase the property, which was described at the price of 42,000*l.*, and to carry on the business of a tavern, in combination with auction and public meeting rooms. The company was registered on the 12th Oct. 1865.

Nokes had, before the formation of the company, entered into contracts for the purchase of the reversion of the tavern, and also of Nos. 13 and 14, Basinghall-street. The amount to be paid by the company for the whole property, viz., 42,000*l.*, was

to include stock-in-trade, goodwill, law costs, and preliminary expenses generally. Nokes and the other persons entitled to the leasehold interest in the tavern in fact received 14,000*l.* for it.

The company was ordered to be wound-up on the 1st June 1867, and in the following year the official liquidator filed the present bill against the solicitors for the object above stated. The two Keldays and Habershon were not made defendants.

Jessel, Q.C., and Lindley, for the plaintiffs, contended that the defendants having sold the property at a large profit to a company of which they were the solicitors, they must account for the profit. They cited:

The Bank of London v. Tyrrell, 27 Beav. 273; on appeal, 6 L. T. Rep. N. S. 1; 10 H. L. Cas. 26;

The Society of Practical Knowledge v. Abbott, 2 Beav. 559;

Gibson v. Jeyes, 6 Ves. 266;

Great Luxembourg Railway Company v. Magnay, 25 Beav. 586;

Foss v. Harbottle, 2 Haro 461;

Sir Richard Baggallay, Q.C., and Cottrell, for the defendants, contended that the defendants not having been the solicitors of the company at the time when they purchased the property, and having made no concealment as to their being interested in the property, could not be made accountable for the profit. The cases cited for the plaintiffs were distinguishable.

Lindley was heard in reply.

Feb. 8.—Lord ROMILLY, after stating the object of the suit and the facts of the case as above set forth, continued: This case is, I think, novel in most aspects, nor has any case been cited to me which supports the claim of the plaintiffs. The plaintiffs rely on *The Society of Practical Knowledge v. Abbott* (sup.) and also on *The Bank of London v. Tyrrell* (sup.) I will consider these cases, and their application to the present, separately. It is by the combined effect of both that the plaintiffs seek to support their claim to relief. I think that a great distinction exists between this case and that of *The Bank of London v. Tyrrell*. The distinction consists in this—first, in the fact that a fiduciary relation existed in that case at the time when the solicitor acquired an interest in the property sold to the company; and, secondly, in the fact that the whole of the members of the company existing at the time were aware of and sanctioned the transaction when it was entered into by the company. In *Tyrrell's* case Mr. Read and others had bought the property in question in Sept. 1864. Tyrrell had then no interest in it. Tyrrell was one of the promoters of the company in Dec. 1854, and applied to persons to become directors of the company, which was incorporated in July 1855; but on the 13th Feb. 1855, Tyrrell and his partner were finally appointed solicitors to the company, the functions of which were maladministered. The negotiations between Tyrrell and Read began on the 9th Feb., at a time when Tyrrell was, as was held by the House of Lords, and indeed as he plainly was, solicitor of the directors who were forming or endeavouring to form a company; he entered into the contract with Read expressly on behalf of the directors and to sell the property to them, and entered into another contract with Read to divide with him the profit to be obtained by the additional price obtained by Read above what he gave for it in the September previous, and all this was concealed from the directors. If Tyrrell had been a joint purchaser with Read in Sept. 1854, and the directors had known this, could they afterwards have disputed

ROLLS.]

DAVIES v. DAVIES.

[ROLLS.]

the right of Tyrrell to his share of the purchase money? I apprehend clearly not. And what could the shareholders have done? Could they have disputed the purchase and required the vendors Tyrrell and Read to refund the purchase money? I think that they could not, their remedy must have been confined to an attack on the directors to make them account for improvidently or fraudulently giving more for the property than it was worth. The great grievance in the case of Tyrrell was that he did not communicate everything to the directors; if he had done so and they had thought fit to complete the purchase, he would have been safe and could not have been called upon to refund. But this case is still stronger, for there were no shareholders other than the directors to whom to communicate the proposed transaction. Suppose there had been ten or twenty shareholders other than the directors at that time, and that they had all known of and sanctioned the transaction, could any subsequent shareholders have disputed it? And yet this is really what is attempted in the present case, for every shareholder in existence knew of it, and approved of it; it is true that all but two were interested in the transaction, but this also was known, and I apprehend that with this limit they were entitled and able to enter into any contract they thought fit. It is, in my opinion, impossible to import into this transaction the doctrine of the court which makes agents accountable to their principals for benefit derived by the agent while he was in that character engaged for the principal, and which benefits were not disclosed to and sanctioned by the principal. This is a suit by the official liquidator, that is, by the company, but the company knowingly entered into and sanctioned the transaction as the means of founding the company; how then can the company now complain of it? It is said that the company now consists of shareholders who were not members of the company at that time; but if this doctrine is to suffice to set aside a previous transaction known to and sanctioned by every member of the company, no contract with any company could safely be entered into. And no case has been, or indeed can be, produced that in the slightest degree sanctions any such doctrine. It is attempted to be supported by the decision of Lord Langdale in the case of *The Society of Practical Knowledge v. Abbott (sup.)*; but, in truth, on examining the case, the decision, so far as it has at any bearing on the present case, is against the doctrine advanced by the plaintiff. In that case which was a suit by a perpetual corporation which the members of it had no power to alter or terminate, Lord Langdale held that a transaction which materially altered the constitution of the corporation was illegal, that the members of it, though unanimous, had no power to make the alteration, and that any subsequent member of the corporation might complain of it, and might obtain redress and restitution. In fact the corporation there was like a charity or a municipal corporation. The members of it had no power to alter the character or foundation of the institution. But in this case the members had that power. The directors might have modified and converted the company as they pleased; they might have wound it up; they might have dissolved it; they might have given the whole of the property of it to any one of themselves; they might have doubled or halved the capital; their power over the corporation or company was absolute and unlimited, and no person not then a member of the company could complain. In such a case, Lord Langdale expressly says that if the members had possessed that power the transaction in that case could not have been questioned. Such is the case here, and the transaction, in my opinion, cannot be questioned. If the subsequent shareholders, that is, if the persons who

have been induced to take shares afterwards on the misrepresentations of the directors have been deceived in this respect, their remedy is either to be struck off the list of shareholders or to make the directors personally liable to them for the loss occasioned by such misrepresentations; but they cannot, in my opinion, open a purchase made by the company from an agent, however improvident or inadequate or excessive the price was, when there was no taint of fraud, and no species of concealment or misrepresentation on the one side, or of ignorance on the other side of what they were about. The result is that, in my opinion, this bill must be dismissed with costs, and this is another added to the numerous instances where in these liquidations cases arise which lead to waste of assets in useless costs. There are other considerations in the case arising from the absence of the three other directors who benefited by the contract and sale, namely, the two Keldays and Habershon, for which no excuse is given in the evidence; but it is unnecessary to dwell on that circumstance as on the merits, in my opinion, this bill cannot be supported.

Solicitors for the plaintiffs, *Mercer and Mercer.*

Solicitors for the defendants, *Nokes, Carlisle, and Francis.*

Feb. 15 and 21.

DAVIES v. DAVIES.

Infant—Voidable settlement—Reversionary interest—Married woman—Confirmation of settlement—Acquiescence.

A., an infant, on her marriage, executed a settlement of certain reversionary shares in personalty to which she was entitled, and she and her husband covenanted to execute a valid conveyance of certain real estate to the trustees upon the trusts of the settlement as soon as she should attain twenty-one. A conveyance was executed in pursuance of the covenant, and constituted a valid settlement of the real estate. The tenant for life of one of the personal funds having given up her life interest, A. directed her share of the fund to be transferred to the trustees of her settlement, and the dividends to be paid to her.

Held, that this evinced her intention to confirm the whole settlement, and that, taken with the execution of the conveyance, which was a partial confirmation of the settlement, it operated as a confirmation of the whole settlement.

By a settlement dated the 17th June 1818, and made on the marriage of William Small and Elizabeth Small (the mother of the plaintiff in the present suit) certain real estate situate at Wiley, in the county of Wilts, was conveyed to trustees to the use of the husband during his life, and from and after his decease to the wife during her life, and from and after the decease of the survivor of the husband and wife, to the use of all and every the child and children of the marriage in such shares, &c., as the husband and wife should by deed jointly appoint, or as the survivor of them should in like manner or by will appoint, and in default of appointment, to the use of all the children as tenants in common.

By his will, dated the 3rd March 1826, Thomas Perrior (Mrs. Small's father) bequeathed the residue of his personal estate to trustees, as to one equal third part thereof upon certain trusts in favour of Mr. and Mrs. Small during their joint lives and the life of the survivor, and after the death of the survivor of them, then upon trust for all and every the child and children of Mr. and Mrs. Small as they should by deed jointly appoint, or as the survivor of them should by deed or will appoint, and in default of appointment for all the children in equal shares.

ROLLS.]

DAVIES v. DAVIES.

[ROLLS.]

Thomas Perrior died on the 13th Sept. 1826.

By his will, dated the 5th Dec. 1835, William Small devised his real estate to the trustees of his marriage settlement upon the trusts of the settlement, and he bequeathed the residue of his personal estate to trustees upon trust, after the death or second marriage of his wife, for all his children in equal shares.

William Small died on the 5th Jan. 1841, without having exercised the joint powers of appointment given to him and his wife by their marriage settlement and by Thomas Perrior's will; he left him surviving his widow and six children, of whom Elizabeth Davies, the plaintiff (then Elizabeth Small) was one.

By two deeds poll, dated the 9th Sept. 1841, Mrs. Small appointed one-sixth part of the real estate comprised in her marriage settlement, and one-sixth part of one-third part of the residuary estate of her father, Thomas Perrior, subject to her life interest therein, unto and in favour of her daughter Elizabeth absolutely.

By an indenture, dated the 9th Sept. 1841, and made in contemplation of the marriage of the plaintiff with James Davies, the plaintiff, who was then an infant of the age of twenty, purported to assign her share in the residuary estates of Thomas Perrior and William Small, to trustees, upon trust for herself for life, for her separate use, without power of anticipation, and, after her death, upon certain trusts for James Davies for his life, and, after his death, in trust for the children of the marriage, as the husband and wife should jointly by deed, or as the survivor should by deed or will, appoint; and, in default of appointment, for all the children equally. And the settlement contained a covenant by the husband and wife that they would, as soon as the wife should attain twenty-one, make and execute a good and effectual conveyance of the wife's one-sixth part of the real estate comprised in her mother's marriage settlement, to trustees upon trust to sell, and to hold the proceeds of sale, upon the like trusts as were therein contained, of and concerning her shares in the residuary personal estates of Thomas Perrior and William Small.

This covenant was carried out by a deed dated the 1st June 1842, which was duly acknowledged by the plaintiff.

James Davies died on the 21st May 1846. There was only one child born of the marriage between him and the plaintiff, namely Elizabeth Small Davies, who attained her age of twenty-one, on the 9th March 1864, and died on the 12th Feb. 1865.

By an indenture dated the 12th March 1859, Mrs. Small appointed that, from and after her decease, two equal sixth parts of and in one equal third part of the residuary estate of Thomas Perrior, which then remained unappropriated, should be and remain in trust for her three children Robert Small, John Perrior Small, and Elizabeth Davies, the plaintiff. And about the same time she made a similar appointment of two equal sixth parts (then remaining unappropriated) of the hereditaments comprised in her marriage settlement and in her husband's will. She gave up her life interest in her husband's residuary estate, and Mrs. Davies directed her share of it to be transferred to the trustees of her settlement.

Mrs. Small died in July 1862, and the Perrior trust-funds and the other properties of which she was tenant for life fell into possession.

By an inquisition dated the 26th Nov. 1863, the plaintiff Elizabeth Davies was found to be a person of unsound mind, and not competent for the management of herself or her estate. The present suit was instituted by direction of the Lords Justices to determine whether the plaintiff's shares in the Perrior trust-funds and in the residuary estate

of William Small were subject to the trusts declared and contained by and in the indenture of the settlement of the 9th Sept. 1841, which was made when the plaintiff was an infant.

Jessel, Q. C. and Buchanan, for the plaintiff, contended that she had done nothing since she attained twenty-one to confirm the settlement of these shares and to bring them within the trusts of the settlement. They cited

Fitzroy v. The Duke of Richmond, 27 Beav. 190;
Childers v. Eardley, 3 L. T. Rep. N. S. 166; 28 Beav. 648;
Re Vizard's Trusts, 14 L. T. Rep. N. S. 815;
L. Rep. 1 Ch. App. 588; 35 L. J. 460, Ch.

Southgate, Q. C. and Busk, for persons claiming under the settlement, contended that the conveyance of the realty in pursuance of the covenant in that behalf contained in the settlement being a partial confirmation of the settlement after the plaintiff attained her age of twenty-one, amounted to a confirmation of the whole settlement; she had moreover acquiesced in it, and was bound by it. They cited

Re Blakely Ordnance Company, Lumsden's case,
19 L. T. Rep. N. S. 437; L. Rep. 4 Ch. 31;
Milner v. Lord Harewood, 18 Ves. 259;
Ashton v. M'Dougall, 5 Beav. 56.

W. W. Cooper appeared for the trustees of the settlement.

Jessel, Q. C. was heard in reply.

Feb. 23.—Lord ROMILLY.—In this case the question is, whether a share of the residue of the estate of a gentleman of the name of Perrior is included in a settlement made in the year 1859 by a lady of the name of Small. [His Lordship stated the facts of the case and continued.] The lady was an infant when she executed the settlement, and it was consequently voidable. It would require some act on her part to confirm it; but I think that the acts which she has done do amount to a confirmation of it, and on the authority of *Milner v. Lord Harewood*, (*sup.*), I think that they amount to a complete confirmation of the whole settlement, for she went to the trustees and directed the Small fund to be transferred into the names of the trustees of her marriage settlement, and the dividends to be paid to her as tenant for life. It is quite clear that in her view she intended to confirm the whole settlement, and I am of opinion that the partial confirmation operates as a confirmation of the whole, there being no act to the contrary, and it being her intention, I think, to do so. It is true that she became of unsound mind in the year 1863, as was found by an order under the inquisition of Nov. 1863. The result is that the property must go according to the settlement, and does not belong to her absolutely, as it would do if the settlement was not binding. Accordingly I will make a declaration for the purpose of carrying that into execution, but the costs of all parties must be paid out of the fund.

Solicitors for the plaintiff, *Venning, Robins, and Venning*, for *Cobb and Smith*, Salisbury.

Solicitors for the defendants, *Vizard, Crowder, Anstie, and Young*.

V.C. S.]

Re AN ARBITRATION BETWEEN EVANS, DAVIES, AND CADDICK.

[V.C. S.]

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

March 11 and 12.

Re AN ARBITRATION BETWEEN EVANS, DAVIES AND CADDICK.*Arbitration—Appointment of umpire by the court—Common Law Procedure Act 1854, sect. 12.**In order to constitute an arbitration under the Common Law Procedure Act 1854, there must be something in dispute between the parties.**Where, therefore, the validity of a notice to dissolve a partnership was disputed, and it was agreed that in order to avoid litigation one of the partners should retire, and that the value of his interest in the business, and the question of notice (if raised) should be decided by two valuers named in the agreement, or their umpire; and one of the valuers died before the valuation was made, and his successor neglected to join with the surviving valuer in appointing an umpire,**The court, upon the application of the outgoing partner, ordered an umpire to be appointed.*

This was an adjourned summons for an order that an umpire might (pursuant to 12th section of the Common Law Procedure Act 1854) be appointed in the above matter. The facts were these:—

By an agreement dated 13th Oct. 1869, and made between Richard Evans of the first part, David Davies of the second part, and William Henry Caddick of the third part, after reciting, among other things, that the said parties entered into articles of partnership in Feb. 1869, and that Davies and Caddick by notice dated the 31st Aug. 1869, claimed to determine the said partnership under the powers given by the said articles of partnership for the reasons stated in such notice, and that Evans disputed and denied the validity of the said notice, and that Davies and Caddick had any power to determine the said partnership in and by the said notice, but in order to avoid litigation it had been mutually agreed between the said parties that Evans should retire from the said firm, and that Davies and Caddick should purchase his share and interest in the partnership property and effects and all other his interests, if any, under the said partnership-deed (it being understood that the said valuers or umpire should incidentally decide the question if raised as to the effect of the said notice, or of a previous notice of the 19th Aug. 1869), upon the terms thereafter mentioned, the said Evans, Davies, and Caddick mutually agreed (among other things) that the partnership, so far as regarded Evans, should be dissolved, and that he should sell by valuation his share in the said partnership property and effects to Davies and Caddick; that the said valuation should be made by two valuers, David Peacock on the part of Evans, and Isaiah Hill on the part of Davies and Caddick, or in case of difference by their umpire to be appointed by the said valuers in writing before commencing the valuation, and the costs of the valuation and of the necessary documents should be borne by the parties in equal shares, unless the said valuers or umpire should otherwise order.

Shortly after the execution of the agreement, Peacock and Hill, appointed one Henry Johnson to be their umpire, but before any valuation or award had been made, Hill died. Upon his death Evans served a notice, expressed to be made in pursuance of the provisions of the Common Law Procedure Act 1854, upon Davies and Caddick, requiring them to appoint a new arbitrator or valuer, but they objected to do so on the following grounds: first, that they did not consider the agreement binding on them, and that even if it originally was so, it

had now by the death of Hill, become impossible of performance; secondly, that the agreement was one for sale and purchase by valuation, and not for a reference to arbitration, and that consequently the provisions of the Common Law Procedure Act 1854 did not apply. They, however, consented, subject to the above objections, to appoint a Mr. Bailey to act as valuer on their behalf.

Subsequently, Evans by a notice expressed to be made in pursuance of the provisions of the above Act, called upon Bailey to join with Peacock in appointing an umpire, and he having neglected to do so within seven days from the service of such notice, this summons was taken out by Evans.

Horsely, in support of the summons, submitted that the case came within the authority *Collins v. Collins*, 26 Beav. 306, as one for arbitration under the Common Law Procedure Act 1854. The 12th section of that Act enacted that if, in any case of arbitration, the parties failed or refused to appoint an arbitrator or umpire, or if any arbitrator or umpire refused, or became incapable to act, or died, a judge of any of the Superior Courts might appoint an arbitrator or umpire. He also cited:

Vickers v. Vickers, L. Rep. 4 Eq. 529.

Everitt, in opposition to the summons, contended that the agreement was not one for reference to arbitration, but for sale and purchase by valuation. Moreover, as one of the persons authorised by the agreement to value the property had died the valuation was impossible, and the agreement inoperative. He cited:

Wilks v. Davis, 3 Mer. 507;

Boss v. Helsham, L. Rep. 2 Ex. 73; 15 L. T. Rep. N. S. 481;

Parkes v. Smith, 15 Q. B. 305;

Chocolate Company v. Crystal Palace Company, 3 Sm. & G. 119.

The VICE-CHANCELLOR.—The Master of the Rolls has decided in *Collins v. Collins* (*sup.*), that in order to constitute what is considered an arbitration under the Common Law Procedure Act 1854 there must be something in dispute between the parties. He says: "If two persons enter into an arrangement for the sale of any particular property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price they say we will refer this question of price to A. B., he shall settle it, and thereupon they agree that the matter shall be referred to his arbitration, that would appear to be an arbitration in the proper sense of the term, and within the meaning of the Act, but if they agree to a price to be fixed by another, that does not appear to be an arbitration." The same view as that held by the Master of the Rolls, namely, that there must be a dispute, was taken by the Court of Exchequer in *Boss v. Helsham* (*sup.*). The question, therefore, in the present case is, was there any dispute between the parties? Now by the agreement it is expressly stated that the validity of the notice to dissolve the partnership was disputed, and I am therefore of opinion, upon the authorities I have referred to, that this is an arbitration within the Act. An umpire must therefore be appointed, in accordance with the provisions of the 12th section of the Act.

Solicitors, *H. G. Field*, for *H. and J. R. Underhill*, Wolverhampton.

V.C. M.]

Re GENERAL PROVIDENT ASSURANCE COMPANY; BRIDGER'S CASE.

[V.C. M.]

V. C. MALINS' COURT.Reported by G. T. EDWARDS and G. I. F. COOKE, Esqrs.,
Barristers-at-Law.

Nov. 6 and Dec. 21, 1869.

Re GENERAL PROVIDENT ASSURANCE COMPANY,
BRIDGER'S CASE.*Contributory — Winding-up — Collateral agreement —
Agent of the company.*

B., a district agent for an insurance company, being requested by the manager to apply for shares in the company in order that other residents in the district might be thereby induced to place confidence in the stability of the company, and to become shareholders, offered to apply for shares on condition that he should not pay either the application or allotment money, or any call that might be made in respect of the shares, but that all moneys payable in respect of the shares should be deducted out of his commission. The manager replied that B. would be allowed the privilege of paying up the shares as convenient. B. thereupon sent in a formal application for 100 shares, which were duly allotted to him, and the allotment notified to him, and he was registered as the holder of the shares. He paid no money on the shares, though he signed a proxy paper for voting at a general meeting, and attended other meetings of the company. His commissions were not sufficient to pay for his shares:

Held, on the authority of Elkington's case, 16 L. T. Rep. N. S. 442; L. Rep. 2 Ch. 522, that B., having agreed to become a shareholder of the company, and there being a collateral agreement as to the effect of his becoming a shareholder, he was liable as a contributory in respect of his shares.

This was a summons adjourned into court upon the question whether the name of William Bridger should remain upon the list of contributories of the General Provident Assurance Company (Limited), in course of winding-up by the Court of Chancery. Mr. Bridger's name had been placed on the list of contributories by the official liquidator in respect of 100 shares, and the summons had been adjourned into court at the instance of Mr. Bridger, the chief clerk having decided against him. The principal facts connected with the application were as follows:

Bridger was the district agent for the company at Southampton, being paid partly by a fixed salary, and partly by a commission on shares disposed of by him. On the 8th Sept. 1866, Bridger signed and sent in an application in the ordinary form for 100 shares; on the 26th of the same month the shares were allotted to him; and on the 3rd Oct. the allotment was notified to him. In July 1867, a certificate of the shares was sent to him, for which he signed and sent to the company the following printed receipt: "I, the undersigned, hereby acknowledge that I have received one certificate, numbered 336, for 100 shares in the above company, numbered from 7805 to 7904 inclusive." Bridger's name was entered on the register as the holder of 100 shares.

According to the evidence of Bridger, and of Mr. Heywood, the manager of the company, Heywood had requested Bridger to apply for shares in the company, in order that other residents in Southampton might be thereby induced to place confidence in the stability of the company, and to become shareholders, and Bridger had on the 5th Sept. 1866, written a letter to Heywood (which was not produced), offering to apply for shares on condition that he should not pay either the application or allotment money, or any calls that might be made in respect of the shares, but that all moneys payable in respect of the shares should be

deducted out of his commission. In answer to this letter, Heywood wrote as follows: "I shall be most happy to receive your application for shares, allowing you the privilege of paying them up as convenient." Bridger thereupon sent in his application for shares, and with it a letter, containing these words: "I inclose my own application for shares, which I propose to pay from my commission on shares as sold. My taking shares, I find, will strengthen my arguments in canvassing for business." Heywood, in a letter of the 10th Sept. replied as follows: "Yours of the 5th is to hand, containing your application for 100 shares. I hope your commission will soon amount up to enough to pay for them." There was no entry in the company's books of the agreement as to the payment of Bridger's shares, but Heywood stated that Bridger's proposal was agreed to by the directors; this, however, was denied by the secretary of the company.

Bridger did not pay any money on application or allotment, or any calls on the shares, and did not receive any dividend. In January 1867 he received from the company a circular, requesting payment of the arrears due in respect of his shares, and a letter from Heywood to the same effect; but upon his writing to Heywood a letter, reminding him of the above arrangement, Heywood wrote to inform him that the circular and letter were sent to him by an oversight.

In Feb. 1867 Bridger, at Heywood's request, signed and sent to Heywood a proxy paper for voting at a general meeting of the company; but he sent with it a letter stating that he would only sign it on condition that he did not thereby cancel the agreement, to allow him to pay calls from commission on shares sold. He also signed proxy papers in Sept. 1867 and Jan. 1868, and attended two meetings of the company, signing his name in the attendance book as the holder of 100 shares.

In July 1867 the company's solicitor wrote to Bridger demanding payments of arrears and threatening proceedings to recover them; but the secretary shortly afterwards wrote to say that the solicitors' letter was sent by an oversight. Bridger subsequently wrote several letters repudiating the shares, but his name remained on the register when the company was ordered to be wound-up. Bridger's commission was not nearly sufficient to pay for his shares.

Cotton, Q. C., and Higgins, for the official liquidator, contended that if there were any such agreement as alleged, it was not a condition precedent to Bridger's becoming a shareholder, but a collateral agreement as to the effect of his becoming a shareholder, and therefore came within the principle of the rule laid down by Lord Cairns in *Elkington's case, re Richmond Hill Hotel Company (infra)*. They cited

Pellatt's case, re Richmond-hill Hotel Company,
16 L. T. Rep. N. S. 84, 301; L. Rep. 2 Ch. 527;
Elkington's case, re Richmond-hill Hotel Company,
16 L. T. Rep. N. S. 442; L. Rep. 2 Ch. 511;
Thompson's case, 12 L. T. Rep. N. S. 590, 717;
Harrison's case, 11 L. T. Rep. N. S. 188; L. Rep. 3
Ch. 633;
Simpson's case, L. Rep. 4 Ch. 184;
Roger's case, 13 L. T. Rep. N. S. 437; L. Rep. 3
Ch. 633;
Langer's case, 18 L. T. Rep. N. S. 67.

Glasse, Q. C., and Alexander, for Bridger.—Before Bridger sent in his application there was a distinct understanding that the shares should be paid for out of commissions only, on his own part, and on the part of the directors. The letter which Bridger sent with his application must be taken as part of the application. If the directors had no power to allot the shares on the terms of the offer, the con-

V.C. M.]

Re GENERAL PROVIDENT ASSURANCE COMPANY; BRIDGER'S CASE.

[V.C. M.]

tract was void. In addition to the cases above cited, they referred to

Oriental Inland Steam Company v. Briggs, 4 De G. F. & J. 191; 4 L. T. Rep. N.S. 579;

Shackleford's case, re Rolling Stock Company of Ireland, 14 L. T. Rep. N.S. 752; L. Rep. 3 Ch. 577.

Cotton, Q. C., in reply,

The VICE-CHANCELLOR.—This is an application by the official liquidator to put the name of William Bridger on the list of contributories of this company for 100 shares. In order to bind a person as a shareholder or contributory of a company it is sufficient to show an application for shares, an allotment in consequence of such application, and a communication of the fact of allotment to the applicant. In the present case, Mr. Bridger, on the 8th Sept. 1866, signed an application for 100 shares in the ordinary form. In consequence of such application, 100 shares were allotted to him on the 26th of the same month, and the fact of the allotment was duly notified to him, and the usual certificate for the shares was forwarded to him, for which he signed and sent to the secretary of the company the following receipt: "I, the undersigned, hereby acknowledge that I have received one certificate, numbered 336, for 100 shares in the above company, numbered from 7805 to 7904 inclusive. These transactions are, in themselves complete for fixing Mr. Bridger as a contributory, and throw on him the burden of proving that they do not represent the real transaction between himself and the company. That burden he attempts to discharge thus; he says that he took the shares conditionally upon, or in consequence of, being appointed the agent of the company at Southampton, and that it was agreed that the shares were to be paid for by means of his commission upon the disposal of shares, and not otherwise: [The Vice-Chancellor then commented on the evidence.] Upon this evidence the same question arises which is stated by Lord Cairns in his judgment in *Elkington's case* (sup.) "Now it seemed to me, throughout the argument, that the real point for determination in this case might be said to be this: Did Messrs. Elkington intend and agree to become members and shareholders *in presenti*, with a collateral agreement as to what should be the effect of their so becoming shareholders? Or, on the other hand, did Messrs. Elkington agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders? To these questions a sufficient and conclusive answer to my mind would be given by the facts which up to this time I have referred to. It appears to me that it would be impossible to do otherwise than answer the first of these questions in the affirmative, namely, that Messrs. Elkington, whatever may have been the collateral agreement as to the effect of their becoming shareholders, did agree to become members and shareholders *in presenti*. It appears to me it would be impossible to hold, by any construction of the collateral letters, that persons who distinctly apply for shares, pay their deposit upon the application, receive the letter of allotment, pay the further sums due upon the letter of allotment, receive the share certificates, possess and retain those share certificates, and are returned upon the register in the usual returns made in the joint-stock companies' register office, can say afterwards, whatever may have been the collateral agreement, that they were not, and did not intend to become, shareholders *in presenti*. They were perfectly *domini* of the shares; they might have sold them in the market; they might have received profit, if profit there were upon them, and no

person could, I apprehend, have controlled their right to exercise in that way dominion over the shares." Here, the only ingredient wanting was the payment of the deposit and calls, and this has frequently been held to be unimportant where the other circumstances exist. I think *Thompson's case* (sup.) is nearly on all fours with the present case. There, Thompson, upon his appointment as agent to an assurance company, agreed to take shares upon the terms that the payment for them should be deducted from his commission as agent, and no deposit was ever paid by him upon them, but he was registered as the holder of the shares. The company very soon after his appointment dismissed him. On the winding-up of the company the question arose whether he was a contributory in respect of these shares. The Master of the Rolls thought that the agreement to employ him as agent was so mixed up with the agreement to take shares that he took his name off the list; but the Lords Justices took a different view, and held that there had been a binding agreement on Thompson's part to become a shareholder, and that the cancellation of the agreement to employ him as agent did not put an end to the agreement to take shares. *Harrison's case* (sup.) is much to the same effect. In *Langer's case* (sup.) it was held that the signature of a proxy, stating that the signatory was the owner of the shares, was decisive proof of his agreement to become a shareholder. Here also we have the signature of a proxy. These cases show that Mr. Bridger must, according to the rule laid down by Lord Cairns in *Elkington's case*, be considered as having intended and agreed to become a member or shareholder of this company *in presenti*, with a collateral agreement as to what should be the effect of his becoming so. I must add that the statement of Bridger himself as to the object for which he became, as he says, a nominal shareholder, disentitles him, in my opinion, to any relief. The deliberate representation to others that he was a shareholder, when, according to his own view, he was not really a shareholder, for the purpose of inducing them to take shares, was a false representation, according to his own statement of his case, which, as between him and the other shareholders, precludes him from the right to deny that he was what he represented himself to be. As to the authorities relied on by Mr. Bridger's counsel, *Shackleford's case* (sup.) was a clear case of conditional contract, so also were *Roger's case* (sup.), and *Pellati's case* (sup.), and *Oriental Inland Steam Company v. Briggs* (sup.), turned upon an absolute offer being accepted with conditions. Upon the whole case I think that Mr. Bridger's defence fails, and that he must consequently be put upon the list for 100 shares. I made a suggestion that his name should be taken off upon his withdrawing his claim against the company, and that he should neither pay nor receive costs. That suggestion was accepted by the liquidator, but was refused by Mr. Bridger. I should have been glad to spare him from paying costs, but upon principles of public policy, I think that people should be taught that they must not deceive the public, and on that ground I am disposed to make him pay costs. He has chosen to have the matter adjourned into court, and he must pay the costs of the adjournment into court.

Solicitors for the official liquidator, Kimber and Ellis.

Solicitor for the respondent, T. Emanuel.

V.C. J.] ATTORNEY-GENERAL v. THE WEST HARTLEPOOL IMPROVEMENT COMMISSIONERS. [V.C. J.]

V. C. JAMES'S COURT.

Reported by the Hon. ROBERT BUTLER, Barrister-at-Law.

*Thursday, April 21.***ATTORNEY-GENERAL v. THE WEST HARTLEPOOL IMPROVEMENT COMMISSIONERS.***West Hartlepool Improvement Act 1854—Application of rates to promoting Bill through Parliament—Injunction to restrain—Costs.**Where commissioners were empowered to do "all acts, matters, and things for promoting the health, comfort, and convenience of the inhabitants," and for that purpose applied the rates of the town to the promotion of a Bill through Parliament :**Held, that the words of the Act did not authorise such expenditure, and that the defendants must pay the costs.*

This was an information at the relation of William Saddler, William Metcalf Meredith, and John Wood, ratepayers of the Improvement Commissioners' district of West Hartlepool, whereby they sought to restrain the defendants from expending the rates and funds under their control, in payment of the costs and expenses incurred or to be incurred by them in the promotion of a Bill in Parliament, intituled "A Bill for extending the limits of the district under the authority of the West Hartlepool Improvement Commissioners, and for making better provision for the improvement and government of the extended district, and for other purposes," and that the defendants should pay the costs of the suit, but not out of any rates levied or to be levied by them, for the public purposes of the district.

The commission under which the defendants acted was established and its district defined by "The West Hartlepool Improvement Act 1854," which, among other things, enacted that the number of the commissioners should be twelve, and then, after reciting the various powers conferred on them, proceed to state that "they (the commissioners) shall and may do all acts, matters, and things, for promoting the health, comfort, and convenience of the inhabitants of the said town and township within the limits of this Act as they may deem or consider necessary, and for that purpose may exercise all the powers vested in them by this Act and the Acts incorporated herewith."

Subsequently to May 1859 the commissioners adopted the Local Government Act 1858, and became a local board under that Act.

In December 1869 the defendants caused the Bill now complained of to be introduced into Parliament, by which they sought to acquire additional powers, and to extend "The Improvement Act 1854" so as to comprise a further portion of the township of Stranton, and a portion of the township of Seaton Carew, and that they (the commissioners) should be authorised to borrow further sums for the purposes of this Act.

The commissioners incurred large expenses in promoting this Bill in Parliament, and the relators who were ratepayers of the district under the jurisdiction of the commissioners ascertained for the first time on the 9th March 1870 that the defendants applied the rates levied by them under their statutory powers, in payment of the costs incurred by them in the promotion of the Bill, and the information charged that the commissioners intended to expend further sums of money in the promotion of the Bill, and in paying the costs and expenses of certain opponents of the Bill on the condition of their withdrawing their opposition to the measure. The relators stated that all the rates and funds under the control of the commissioners were appli-

cable pursuant to the Act under which they were levied only to certain specific public purposes of which the promotion of this Bill was not one, that, therefore, the payment of these expenses out of the rates was unauthorised and illegal, and prejudicial to the interests of the ratepayers.

E. E. Kay, Q. C. and W. H. Bagshawe, in support of the information, cited *Attorney-General v. Andrews* (the *Northampton* case), 2 M. & G. 225, where, although it was admitted that the Act of Parliament for which the commissioners were applying would be very beneficial to the inhabitants of Southampton, an injunction was granted against the commissioners expending the money raised under an old Act in promoting a new one :

Attorney-General v. Corporation of Norwich, 2 Myl. & Cr. 406; 21 L. J. 139;

Attorney-General v. Eastlake, 11 Hare 205;

Attorney-General v. Corporation of Wigan, 23 L. T. Rep. 43.

R. P. Amphlett, Q. C. and W. W. Karslake, for the defendants.—In the cases cited the rates were for specific objects, and did not extend to promoting a Bill through Parliament. In this case the new district is a nuisance to the old one. The Government inspectors reported that it would be better for both that there should be only one district, and it is not disputed that it would be for the benefit of the old town. The words of the Act are sufficient to authorise what has been done. [The VICE-CHANCELLOR.—The Act does not authorise you to apply to Parliament for a Bill. The commissioners cannot apply the rates to the promotion of a Bill through Parliament.] If we are wrong, and do not get the Act passed, we shall have to pay back the moneys :

Attorney-General v. Corporation of Wigan, 23 L. T. Rep. 43;

Bright v. North, 2 Ph. 216.

The VICE-CHANCELLOR, without hearing a reply, said : I am of opinion that this case is really governed by the cases of the *Attorney-General v. Andrews* and *Attorney-General v. Eastlake*. It is impossible to draw, for any effectual purpose, any distinction between those cases and the present one. Mr. Amphlett has pressed upon me the words of the Act of Parliament, "And shall and may do all acts, matters, and things for promoting the health, comfort, and convenience of the inhabitants, and for that purpose may exercise all the powers vested in them by this Act." But it appears to me that, supposing this Act had been passed even years before those cases, it would be a very strained construction indeed upon those words, "the application of trust funds by trustees," to say that where trustees are to be surveyors of the highways, to do acts, matters, and things, for promoting the health, comfort, and convenience of the inhabitants, and to exercise certain powers given in certain cases for that purpose, that that would imply that they were to do all acts, matters, and things, including, if necessary, the application to Parliament for an enlargement or alteration of the powers thereby assigned to them; I mean if this had taken place before those cases; but of course one must read this with the light of those cases at the time the Act was passed, and at the time this Act was passed the Legislature, I presume, knew, at least all parties must be supposed to have known, that those cases had decided that as a general rule these bodies were not authorised to apply to Parliament for new Acts of Parliament—to apply, that is, in the sense of using the trust funds entrusted to them for that purpose. If it had been meant to have given them that power with regard to those decisions, the proper course would

V.C. J.]

FIELDEN v. THE NORTHERN RAILWAY OF BUENOS AYRES.

[V.C. J.]

have been to have followed the advice given by Wood, V. C., and to have had those words put into the Act of Parliament, as he said in the *Attorney-General v. Eastlake*, "including, if necessary, the power of applying to Parliament." That was the answer which he gave to an argument of mine, which I thought was a *reductio ad absurdum* of the old cases. I said if there was a slip in the Act of Parliament, they could not go and remedy that. He admitted that would be the result of the decisions; they could not have gone to Parliament to remove the slip. Then I am bound to say that, upon consideration of these things, I do not entertain any doubt that the decisions in the cases are very wholesome; because one cannot but feel that if there were an unlimited power for bodies of this kind to apply whenever they thought fit to Parliament at the expense of their constituents, one can easily see there would be a great deal of that kind of professional business got up which would be done at the expense of the ratepayers; and it is much better, as it seems to me, that persons who do seek to obtain Parliamentary powers should do it at the risk of satisfying Parliament it is right; and when they satisfy Parliament it is right Parliament always takes care to provide them with the funds for having done that which is right. Therefore I do not wish to be understood as throwing the slightest doubt upon the propriety of the decisions in these cases. Mr. Amphlett suggested that there are powers here of applying to the Court of Quarter Sessions, and I presume there would be the power of applying to have the rate quashed; I presume they could go to the Court of Queen's Bench by *certiorari*, if necessary, to restrain an illegal act. But the insufficiency of those remedies seems to me to be abundantly demonstrated by what has taken place here, because, having no power to levy a rate except for certain purposes which are to be specified beforehand, and there having been no estimate and no specification of any expenditure to be incurred in applying to Parliament, some one or other of these persons has been able to make an expenditure of upwards of 600*l.* for the very purpose of this Act of Parliament. It seems to me that that shows the necessity of applying to this court, and of the court retaining jurisdiction, which I think it can quite as satisfactorily exercise as the Court of Quarter Sessions would be able to do. Therefore the injunction will be as prayed.

Solicitors for the relators, *Van Sandau, Cumming, and Sons*, for *Belk*, Middlesbrough.

Solicitor for the defendants, *Crowdy*, for *W. W. Brunton*, West Hartlepool.

Saturday, April 23.

FIELDEN v. THE NORTHERN RAILWAY OF BUENOS AYRES.

Solicitor and client—Indemnity of plaintiff by his solicitor—Death of plaintiff—Petition to revive.

A suit was instituted by a shareholder on behalf of himself and other shareholders against the company. The solicitor of the plaintiff absconded. The plaintiff obtained the appointment of a new solicitor, who some time after gave the plaintiff a letter in which he undertook to hold him harmless from all costs.

The plaintiff died; and the defendants presented a petition that the plaintiff's executor might be ordered to revive the suit, or in default of obtaining the order, that the plaintiff's solicitor might be ordered to pay the petitioner's costs of the suit.

The court having regard to the circumstance that the plaintiff's present solicitor was not the instigator of the suit, and that it was evident that the letter was

not written for the benefit of the solicitor, declined to make the order.

Semble. If the solicitor had been the instigator of the suit, the dictum of Sir John Leach in *Cockle v. Whiting* would have been followed.

This was a petition that Henry William Fielden as the legal personal representative of the plaintiff in this suit, John Taylor Fielden might be ordered within fourteen days to revive the above suit, or in default that the amended bill and supplemental bill should stand dismissed, and that Benjamin William Jones might be ordered to pay all the costs.

The above-named company was registered and incorporated in July 1862, under the provisions of the Joint-Stock Companies Acts 1856 and 1857.

The original bill in this cause was filed on the 18th June 1866 by John Taylor Fielden on behalf of himself and all other the holders of deferred, preference, and ordinary shares in the above-named company against the company, Charles Seal Hayne, Sir John Campbell Lees, David Smith (deceased), George Nelson, and the secretary, Edmund Ayres, and prayed for an injunction to restrain the issue of certain certificates and the payment of dividends to the guaranteed preference shareholders save as therein provided. For an account of payments alleged to have been made to the guaranteed preference shareholders, and an account of the income and expenditure of the company. The bill was filed by Montague Richard Leverson as the plaintiff's solicitor.

The defendants filed their answer to the original bill on the 22nd Nov. 1866. In Dec. 1866 the plaintiff's solicitor, Leverson, absconded, and by an order of the 11th Jan. 1867 it was ordered that the plaintiff be at liberty to change his solicitor by appointing the respondent, Benjamin William Jones, as his solicitor.

The original bill was amended on the 20th Feb. 1867 by adding the name of George Nelson Strawbridge (who had been appointed a director) as a defendant. Interrogatories were filed and served upon the defendants, who obtained an extension of time for filing their answer. On the 30th May 1867, before such extended time had expired, Strawbridge and Ayres were arrested at the instance of the plaintiff and his solicitor Jones on the allegation that they were in contempt for not having put in their answer. On the 1st June 1867 the attachments were discharged with costs.

On the 7th June 1867, Strawbridge and Ayres commenced two several actions against the plaintiff and Jones for their wrongful arrest. On the motion of the plaintiff and Jones it was ordered that Strawbridge and Ayres be restrained from proceeding with the actions, and that there be an inquiry in chambers as to the amount of damage sustained by them. On the 23rd Sept. Jones gave to the plaintiff a written indemnity, in the following terms:—

London, 11, Old Jewry Chambers, 23rd Sept. 1867.

Dear Sir,—*Yourselves v. The Northern Railway of Buenos Ayres Company (Limited).*—You having given your consent to be plaintiff in this suit at the request of divers other shareholders, I undertake to hold you harmless from all costs on either side. You will hold this letter as private and confidential, unless any necessity should arise for its use.—

Yours truly,
To John Taylor Fielden, Esq.

BENJAMIN W. JONES.

On the 20th Nov. 1868, the question as to the damages to be awarded in respect of the arrest, having by consent been submitted to Vice-Chancellor Giffard (now Lord Justice), he awarded 25*l.* each to Strawbridge and Ayres, in addition to their costs. The plaintiff and Jones appealed upon separate motions against this order, but the appeals were dismissed with costs.

On the 25th May, 1868, the plaintiff instituted

V.C. J.]

ALLEN v. TAYLOR.

[V.C. J.]

another suit by supplemental bill, to which the defendant demurred, which demurrer was allowed.

The costs of Strawbridge and Ayres on the appeal motions were, upon taxation, found to be, as to the appeal by Jones, 34*l.* 1*s.*, and as to the appeal by the plaintiff, 35*l.* 15*s.* 8*d.* Being unable to obtain payment of these costs, Strawbridge and Ayres issued subpoenas against Jones and the plaintiff, and ultimately Jones paid the sum of 34*l.* 1*s.*, but before the subpoena issued against the plaintiff was served, the defendants' solicitors received notice from Jones that the plaintiff was dead, and that therefore the suit had become abated.

The plaintiff died on the 13th March 1869, having by his will dated 10th April 1868, appointed his brother (the respondent) Henry William Fielden, his sole legatee and executor. In November 1869 H. W. Fielden informed Ayres that his brother (the plaintiff) acted in these suits as the mere tool of others, and that he held the written indemnity of Jones against the costs of these suits, which had become abated by the death of John Taylor Fielden, and he as executor of his brother intimated to the petitioners that he had no intention of reviving the suits.

The petitioners alleged that these suits were frivolous and vexatious, and that they were not instituted *bona fide* in the expectation of a favourable decree of the court, but that they were instituted for the purpose of annoyance to the defendants, or of exacting money from the company, and that after Levenson absconded the litigation was continued at the instigation of a certain Alfred Elborough, a former secretary of the company, who ever since the transfer of the suit to Jones had acted as his clerk in the conduct of the suit.

The petitioners, therefore, having regard to all the circumstances, especially to the letter of indemnity, submitted that Jones was liable and ought to be ordered personally to pay to them all their costs, and also ought to pay to Strawbridge and Ayres 35*l.* 15*s.* 8*d.*, the amount of the costs of the appeal motion unpaid.

For the respondent it was submitted that he was not the instigator of the suit, that he had only undertaken it at the request of the plaintiff. That as to the attachments they had been issued by mistake, and not out of malice or through any vexatious disposition towards the petitioners. With regard to the supplemental bill it was filed by the respondent acting under the advice of counsel, and was merely for the better protection of his client. It was alleged that in consequence of the arrest of Strawbridge and Ayres, which the respondent considered to have been a mistake of his own, he gave the letter of indemnity of the 23rd Sept. to the plaintiff to secure him against all costs and damages which might arise in respect of the inquiry as to the attachments, and that it was not applicable to any other costs.

E. E. Kay, Q. C. and Locock Webb, appeared for the petitioners, and cited

Dungey v. Angove, 2 Ves. Jun. 304; and
Cockle v. Whiting, 1 Russ. & Myl. 43.

A. S. Eddis, Q. C. and E. Cooper Willis were for the respondent Jones.

A. Thomson was for H. W. Fielden.

The VICE-CHANCELLOR said he was of opinion that, having regard to all the circumstances of the case, he would not make any order on the petition. No doubt the solicitor, in consequence of the letter of indemnity which he had given to the plaintiff, ran a great risk of having to pay all the costs; and if he had been the instigator of the original suit, he would not have hesitated to have followed the

dictum rather than the decision of the Master of the Rolls (Sir John Leach) in *Cockle v. Whiting*. But in this case Mr. Jones was requested by the plaintiff to become his solicitor after his previous one (Mr. Levenson) had absconded. Shortly after becoming the plaintiff's solicitor, he had the misfortune to commit the very great blunder of wrongfully attaching Strawbridge and Ayres, two of the defendants in this suit. The plaintiff, becoming alarmed at the mistake which his solicitor had made, applied to him and obtained from him the letter of indemnity which upon the death of the plaintiff came to the knowledge of the defendants; and, considering the wording of that indemnity, it was not surprising that the defendants should have presented this petition; but as it was evident that the letter was given for the benefit of the client and not for that of the solicitor, he thought that the justice of the case would be met if there was no order on the petition, except that the respondent Jones should pay the costs.

Solicitor for respondent, B. W. Jones.

Solicitors for petitioners, Ashurst, Morris, and Co.

Thursday, May 5.

ALLEN v. TAYLOR.

Practice—Affidavit—Informality.

Where an affidavit commenced with the words "I say," instead of "make oath and say:"

Held, that such omission rendered the affidavit inadmissible, and that it must be resworn.

It appeared that some of the affidavits in the above-named suit commenced with the words "I say," instead of the words "I make oath and say," which is the usual formal commencement of affidavits. In all other respects the affidavits were in the usual form. The record and writ clerks having refused to file the affidavits, as being informal,

C. R. Freeling now applied to the court for leave to file the affidavits, notwithstanding the omission of the words "make oath and." He submitted that as the jurat was in the ordinary form, the omission at the commencement could make no real difference; secondly, he accounted for the omission by the fact that although the proper form of beginning in an affidavit is "I make oath and say," the form of beginning in an answer under the new practice is "I say."

H. F. Bristowe, Q. C., and Field submitted that the affidavits must be resworn, as it had been already decided by the Lords Justices that the omission rendered an affidavit inadmissible.

The VICE-CHANCELLOR said that although he could not see how the omission could make any difference, yet, as he supposed it was thought it might make a difference in case of perjury, the affidavits must be resworn.

Solicitors: Messrs. Field, Roscoe, Field, and Francis; Messrs. Torr, Janeway, and Tagart.

C. P.]

COCKLE v. SOUTH-EASTERN RAILWAY COMPANY.

[C. P.]

Common Law Courts.

COURT OF COMMON PLEAS.

Reported by M. W. MCKELLAR and H. H. HOCKING, Esqrs.
Barristers-at-Law.

Tuesday, May 10.

COCKLE v. SOUTH-EASTERN RAILWAY COMPANY.

*Negligence, evidence of—Invitation to leave carriage—
Part of train not at the platform.*

A train arrived at a station on a dark night, but as it stopped rather short, the last carriages were opposite the end of the platform, which there diverged from the line of rails so as to leave a space between it and the railway carriage. There was no light at this end of the platform, but there was light on the rest of it. The name of the station was not called out, nor were any of the doors opened. No other opportunity, however, was given to passengers to alight at this station. The plaintiff, who was in one of the end carriages could see (by the light in the carriage, and on the other end of the platform) that she was opposite to a platform, and not seeing that the platform did not come up to the carriage, she got out and fell down and was injured.

Held, per Bovill, C. J., and Brett, J., *dissentientibus* Keating and Smith, JJ., that there was evidence to go to the jury that the accident arose from the negligence of the company, and that the evidence of contributory negligence on the part of the plaintiff was not so conclusive as to oblige the presiding judge to withdraw the question from the jury.

This was an action to recover compensation for injuries sustained by the plaintiff, through the negligence of the defendants, while travelling on the defendants' line.

Plea. Not guilty.

The case was tried in London before Bovill, C. J., when it appeared that the plaintiff was a passenger from London to Deptford by the defendants' line. She was in the last carriage. On arriving at Deptford, the train was not drawn up as far as it might have been, so that the carriage in which the plaintiff was sitting was opposite to the extreme end of the platform. The platform at this point diverged from the line, so that there was a broad space between the platform and the plaintiff's carriage. There was no light at the end of the platform, but there was light at the other end, and an ordinary light in the plaintiff's carriage. This was the last train that night. Up to the time that the plaintiff had got out, no one called out the name of the station, and no one opened the doors of the carriages. On the other hand, no one told the passengers to keep their seats, and the train did not move on so as to give the passengers any better opportunity of alighting. The plaintiff knowing that she was at Deptford, seeing by the dim light that there was a platform opposite to her, but not seeing the space that existed between the platform and her carriage, opened the door of her carriage herself and got out, thinking she was getting out on to an ordinary platform; she fell down and was injured. On these facts the jury found for the plaintiff with 150*l.* damages.

O'Malley, Q.C., for the defendants, obtained a rule pursuant to leave reserved to enter a nonsuit or a verdict for the defendants on the ground that there was no evidence to go to the jury of negligence on the part of the company causing the accident, but that, on the plaintiff's showing, the accident arose from her own negligence.

Gibbons and Moir showed cause.

O'Malley, Q.C., and M. White, in support of the rule.

The following cases were cited in the course of the argument:

Siner v. The Great Western Railway Company, 20 L. T. Rep. N. S. 114; L. Rep. 4 Ex. 117; 38 L. J. 67, Ex.;

Plant v. The Midland Railway Company, 21 L. T. Rep. N. S. 836;

Harrold v. The Great Western Railway Company, 14 L. T. Rep. N. S. 440;

Foy v. The London, Brighton, &c., Railway Company, 18 C. B., N. S., 225; 11 L. T. Rep. N. S. 555.

The following cases which are unreported, some of which are still pending, were also alluded to in the course of the argument. *Bridge v. The North London Railway Company*, in which the plaintiff's carriage was still in a tunnel, when the rest of the train was at a station where the porters were calling out the name of the station. The plaintiff got out and was injured. At the trial before Blackburn, J. the plaintiff, on proof of these facts, was nonsuited, and the Court of Queen's Bench upheld the nonsuit. *Whitaker v. The Manchester, &c., Railway Company*, in which the plaintiff stopped on a bridge, the porters called out the name of the station, and the plaintiff got out and was injured, Willes, J. declined to nonsuit, and left it to the jury to say whether the calling out the name of the station was meant as an invitation to passengers to get out. The jury found in the affirmative, but *Davison, Q. C.* obtained a rule nisi for a new trial on the ground of misdirection. *Petty v. London and North-Western Railway Company*. Here the train drew up short of the platform, and it was shown that the ground opposite to the plaintiff's carriage looked like a platform. After verdict for the plaintiff, the case was sent down again for trial to ascertain whether, in stepping out, the plaintiff thought he was stepping on to the platform. *Prager v. The Bristol and Exeter Railway Company* was similar to *Whitaker v. The Manchester, &c., Railway Company* in its circumstances, unlike it in its event, for the plaintiff was nonsuited. The Court of Exchequer upheld the nonsuit, and the case is now pending in the Court of Exchequer Chamber.

BRETT, J.—I am of opinion that there was in this case evidence to go to the jury. The first step to take in any inquiry of this kind is to see what proposition the judge ought to lay down to the jury, and so to see what the plaintiff is bound to prove. The first proposition, then, would be, that the plaintiff must show the defendants to have been guilty of negligence, and that they alone have been guilty, for the plaintiff cannot succeed unless he establishes that. The second proposition would be, that the defendants have been guilty of negligence if they have done anything which, having regard to the reasonable safety of their passengers, they ought not to have done; and that the plaintiff has been guilty of contributory negligence if he has done what a reasonable regard for his own safety ought to have prevented him from doing. I feel strongly that a judge is not justified in intruding any further on the province of the jury, except that he may consider if the facts in evidence are such as would entitle a jury, acting on reasonable grounds, to find for one party or the other; and if he thinks that they are not such as to entitle the jury to find for the plaintiff, he ought to say that there is no case for the jury. The judge's power ought not to go beyond this, and he has no right, in my opinion, to say whether in his opinion the plaintiff has done what he ought or ought not to have done. Let us, then, take the facts primarily proved, and those which the jury had a right to infer from them. Assuming them to have been proved or inferred, is it contrary to reason to say that the defendants had done something which, out of a reasonable regard for the safety of their passengers, they ought not to have

C. P.]

COCKLE v. SOUTH-EASTERN RAILWAY COMPANY.

[C. P.]

done, and had omitted to do something which they ought to have done? It does not seem so to me. I cannot take upon myself to say that such a finding would be contrary to reason; so far am I from doing so, that if I were at liberty to import my own ordinary knowledge of railway matters, I should say that the defendants were guilty of negligence. Next, I come to the conduct of the plaintiff. It is said that she ought to have waited until the servants of the company gave her an invitation to get out, either by calling out the name of the station or by opening the door. It is said, too, that she might have called a porter. All this would be matter of strong comment before a jury; but how am I bound to conclude that it is contrary to reason to say that the plaintiff acted with ordinary caution? It is a question for the jury to decide. Unless, then, the case is concluded by authority, I should strongly think that a judge who non-suited the plaintiff in a case like this would be wrongfully acting on his own view of the case, and would be usurping the province of the jury. In looking through the authorities I cannot find one by which the Lord Chief Justice was bound to say that there was no evidence for the jury. In *Siner v. The Great Western Railway Company* it was broad daylight, and the plaintiff got out, knowing that she was not at the platform. *Bridge v. The North London Railway Company* is much more like the present case, because the night was very dark at the time of the accident; but it is quite consistent with the judgment that the plaintiff knew the carriage was not at the station, and that the decision of the court was grounded on that knowledge. The court there, however, took upon itself to say that calling out the name of the station was not an invitation to alight; but from what I have already said, it will be seen that I could not have agreed to that, as that is, in my view, a question for the jury. In *Whitaker v. The Manchester, &c., Railway Company*, where a train overshot the station, the name of the station was called out, and the plaintiff stepped out on to the parapet of a bridge and fell. Willes, J., declined to stop the case. In *Petty v. The London and North Western Railway Company*, some of the carriages drew up short of the platform on a dark night, and the name of the station was called out. Willes, J., who tried that case, refused to nonsuit, and left the case to the jury, with the question, amongst others, whether there was an invitation to alight. In this he was upheld by the Court of Exchequer, though the case was, for other reasons, sent down again for a new trial. I think, then, that this case is not concluded by authority, and that, for the reasons I have mentioned, this rule ought to be discharged.

M. SMITH, J.—I am of opinion that this rule ought to be made absolute. I am at a loss to see that there was any evidence of negligence on the part of the defendants; indeed it seems to me that the only evidence in the case was that the train drew up short. There is that simple fact. An invitation to get out may, it is true, be given in various ways; here it certainly was not given in the usual way of calling out the name and opening the doors. In *Siner v. The Great Western Railway Company*, Mellor, J. says:—"The mere fact of the carriage in which the plaintiffs were being beyond the end of the platform, proves no more than that there was less safety than otherwise there would have been; but it is notorious that the exigencies of traffic must sometimes require trains of such length as to go beyond the limits of an ordinary station platform." There is then no affirmative evidence of negligence, and there is no evidence that the platform was of improper construction, or the station of improper arrangement. As I understand the evidence, the plaintiff herself does not go

the length of saying she was deceived. As regards the charge of negligence against the defendants the case stands thus:—The station and the platform were not of improper construction, and the train was not drawn up in such a way as to invite the plaintiff to alight, but, on the contrary, there was an absence of the usual intimation. I think, however, that there is another ground on which the plaintiff ought to have been nonsuited. If there had been evidence to show that the defendants negligently left a trap for their passengers that would have been a sufficient cause of action; but then, only in the event of the damages flowing from such negligence and not being produced by any contributory negligence on the part of the plaintiff. Here, I think, the plaintiff did by her own negligence contribute to this accident. I go further and say that it was caused by her own negligence alone and not by any act of the defendants. There was no sort of invitation given to alight, yet the plaintiff opened the door herself and got out into a dark place. The fact that the further end of the platform was lighted ought to have led any reasonable person to conclude that the station was where she saw the lights and not where she was. The injury, therefore, was the consequence of her doing an imprudent act, and that is shown by her own evidence. It is clearly the province of the judge to see that there is evidence proper to be left to the jury, before he leaves a question to their decision. No doubt different judges take different views of the amount of evidence necessary to compel them to refer the case to the jury. Still a judge must exercise his own judgment in the matter, subject to the control of the court. I must say that I do not think there was in this case sufficient evidence to go to the jury of negligence on the part of the company, and if there was, I think that the damages clearly flowed from the contributory negligence of the plaintiff.

KEATING, J.—At the trial of this case, the Lord Chief Justice left it to the jury to decide whether the accident to the plaintiff was caused by any negligence on the part of the company, and also whether there was contributory negligence on the part of the plaintiff, reserving for the consideration of the court the question whether there was any evidence that he ought properly to have left to the jury. No doubt a series of decisions, of too long standing to be now questioned, have decided that the question whether there is evidence to go to the jury on which they could reasonably and properly find a verdict, is one for the judge, to be exercised by him under the control of the court. Having stated that proposition, I may add, that the necessary consequence of it has been, that a conflict of opinion has arisen as to the amount of evidence necessary to oblige the judge to leave the question to the jury. For the question whether or no there is such evidence, leaves to the court itself the duty of weighing and considering the facts. Had this been *res integra*, I should have thought that in the present case there was sufficient evidence to go to the jury; but I feel that the case is concluded by authority, and therefore think that this rule ought to be made absolute. The authorities on this question are numerous, and although they may differ in slight particulars, yet there is no substantial variance between them. The first question we have to ask, in considering whether there was evidence of negligence on the part of the company in this case is, whether there was anything in the nature of an invitation to the plaintiff to descend. I think, so far as I can abstract any rule from the decisions, that the rule is, that if there is no invitation given to alight, a person doing so does it at his own risk. That is the general rule. Was there then in this case anything equivalent to such an

C. P.]

COCKLE v. SOUTH-EASTERN RAILWAY COMPANY.

[C. P.]

invitation? The train drew up, and the carriage in which the plaintiff was was on a slope at some distance from the platform. There was evidence that the light at this part was imperfect. There was no cry of the name of the station, and there was an absence of anything, that I can see, in the shape of an invitation beyond the mere fact of the train stopping. It has been held that even the stopping of the train, coupled with the cry of the name, is not an invitation to descend, and it therefore seems to me that the absence of the latter fact in this case conclusively negatives the idea of an invitation. No doubt, as is remarked by my Lord, there is a point worthy of consideration in this case, that there was an amount of imperfect light, which might have made the plaintiff suppose that she was opposite an ordinary platform, and not one which sloped away from the carriage. But the platform was not shown to be of improper construction, and I do not think that the mere fact of the peculiar construction of this platform or the effect which circumstances produced on the mind of the plaintiff, could be held to change that into an invitation which would not otherwise have been one. I come now to the question whether there was contributory negligence on the part of the plaintiff. Here the plaintiff opened the door of the carriage herself as soon as the train came to a standstill, and stepped out short of the platform. Ought she to have kept her seat under such circumstances? The decisions say that she ought, and if she ought to have done so and did not, she was guilty of contributory negligence. I feel constrained by the decisions to arrive at these conclusions; though, if the matter were *res integra* I should feel disposed to say that there was evidence in this case to go to the jury.

BOVILL, C. J.—I very much regret that the court should be equally divided on this case. The difficulty, to my mind, arises from the judges having to draw inferences of fact. I cannot find any definite rule laid down to govern this case, and I think that the difference of opinion that exists shows very strongly that all these cases ought to depend on the view that the jury may take of the facts laid before them. For example, what is evidence in one case may not be sufficient in another, and a slight variation in the evidence given in two cases may enable and justify a jury in coming in one case to a conclusion different to that at which they arrive in the other. What, for instance, constitutes an invitation to alight? In some cases the name of the station is called out. That alone may or may not be an invitation to alight, according to circumstances—the position of the train or the nature of the station. If the name is called out, as the train approaches the station, no one would say that that was an invitation. If the train stops at a station, and the porters pass along crying out the name of the station, that might be equivalent to an invitation. In each case it is a matter for the jury to determine, and it would be usurping the province of the jury if the judge were to say that calling out the name of the station was or was not equivalent to an invitation. There may be circumstances constituting an invitation, when the train stops and the name is not cried out. For example, when a train stops at a place where it ordinarily does not stop, the stoppage cannot be construed into an invitation. If, on the other hand, a train arrives at its destination, and stays there for some seconds, then such mere fact of arriving and staying may be equivalent to an invitation to alight. Whether it is so or not, under the particular circumstances, is a question for the jury. So in the case of a station between the termini the nature of the traffic and other circumstances must determine whether the mere stoppage of the train constitutes

an invitation or not. The question again is one for the jury; it is impossible to say, as matter of law, whether such stoppage is an invitation or not. Here, there was no calling out of the name of the station, and, in that sense, no invitation to alight; but the train drew up at the place where it usually stopped, and the name of the station was not called out. In point of fact, the train did not draw up at the proper place. The evidence of the inspector showed that the accident arose from the train not drawing up at the proper place. The station was large, and the platform long; for the greater part of its length the train was parallel with the platform, but at the end where the plaintiff was, the platform diverged from the line. With regard to the question whether there was evidence that the company was guilty of negligence, I think it clear that there was evidence of negligence on the part of the driver in not bringing up the train to the place to which he ought to have brought it. But it was also necessary to show that there was evidence of negligence which caused the accident. On the part of the plaintiff it may be said, that all that we need now determine is that there was evidence of such negligence to go to the jury. It is not necessary for us to decide that there was conclusive evidence. At the trial I thought there was evidence, and I accordingly left the question to the jury. Mr. White has argued the case as though the negligence which caused the accident was to be sought for in some one particular point of the defendants' conduct; but I think we ought to look at all the circumstances in determining the question. In the first place, it is not suggested that the platform was of improper construction, or that the rails were improperly laid. It is necessary, in all cases, that there should be different lines of rails for the traffic, and also that, in some cases, there should be a divergence of the platform from the ordinary line, just as there was here. But the driver, who brought up the train, must be taken to have been aware of the peculiar construction of this platform. He must have known that, if he brought up the train so that the whole length of it should be parallel with the platform, the passengers could alight with safety, and that if he did not bring it up far enough, persons at the end of the train might be deceived into the belief that their carriage was close to the platform, whereas a dangerous chasm would intervene between them and it. The circumstances were also peculiar as to the time of day, as it was late at night. When the driver came to this station, which, as we have seen, was peculiar in construction, he could see that one part was well lighted and the other not. He also knew that there was a light of a particular description in the carriages, and the accident seemed to me at the trial, and seems to me now, to have arisen from the circumstance of the train having drawn up at an improper place, where the dim light disclosed a platform, but did not show the space that intervened between it and the carriage, so that the plaintiff was led to believe that she was at an ordinary platform, and got out and fell down accordingly. All that it is now necessary for us to decide is, whether there was evidence that the accident occurred in that way, if so, whether that was negligence on the part of the company's servants; and those questions being answered in the affirmative, the further question arises, whether there was evidence from which an invitation might be inferred to get out at the place where the train stopped. I think there was evidence from which it might be inferred that the passengers were invited to alight at the place where the train stopped. The train did not afterwards draw up any further, and it is not suggested that this was a mere temporary stoppage, but it was undoubtedly a permanent stoppage to enable the

C. P.]

CASTLE AND OTHERS v. PLAYFORD.

[Ex.]

passengers to alight. If, then, there was an invitation, it was an invitation to alight at a place of great danger, which the servants of the company knew of, and of which the plaintiff was ignorant. I come, therefore, to the conclusion that there was evidence from which the jury might properly conclude that there was negligence in bringing up the train at this place under the peculiar circumstances, and that there was an invitation to descend. I arrive at this conclusion from a consideration of all the circumstances—the time of night, the state and position of the lights, the construction of the platform, the way in which the train was brought up, and the general character of the stoppage. There is still another question, whether there was evidence of contributory negligence on the part of the plaintiff so clear and conclusive that the jury were bound to say that the accident arose from the plaintiff's own negligence. This question seems to me to be much mixed up with the question of whether there was negligence on the part of the company. For, if the train were brought up for the purpose of passengers alighting, the plaintiff was justified in thinking that she might descend. As a matter of fact, it is clear she did think so, so that there is an element in this case, which was wanting in *Petty v. The London and North-Western Railway*, where the Exchequer Chamber sent the case down again for a new trial, in order to ascertain whether, as a matter of fact, the plaintiff thought she was stepping on to the platform. Still, the fact that, in this case, the plaintiff did think so is of course of no consequence unless there be evidence that she was led by the company to think so. I am of opinion that there was evidence in this case, both that the plaintiff thought she was stepping on to the platform, and that she was led to that belief by the defendants' negligence. Many cases have been cited relating both to negligence on the part of railway companies and contributory negligence on the part of passengers, but I think that they are all distinguishable from the present, and that there is no one of them which is exactly like it, or which ought to govern it. In *Plant v. The Midland Railway Company* (*ubi sup.*) the plaintiff knew he was descending where there was no platform. He knew that there was danger, and that caution was required, and consequently had only himself to blame for not taking proper care. In *Bridge v. The North London Railway Company* the train had stopped in a tunnel, and not at the platform. It was dark at the time, and there was nothing to induce the plaintiff to think that he was getting out on to the platform. There is that distinction between that case and this. In *Harrold v. The Great Western Railway* the plaintiff knew he had overshot the platform, and still got out. In *Siner v. The Great Western Railway Company* the same thing happened. The plaintiff knew there was no platform, but still got out, thinking to take her chance of doing so with safety, and trusting to the assistance of her husband. She probably thought there was no risk in the matter. All these cases, then, I think, are clearly distinguishable from the present, and I am at a loss to find any authority that lays down any principle which rendered it necessary to withdraw this case from the jury. My view at the trial was, that it was for the jury to decide this question, and that opinion remains now unshaken. As my brother Brett concurs in my judgment, this rule must be discharged.

White asked whether it was not usual, where the court was evenly divided, for the junior judge to withdraw his judgment. If that were done in the present case, the rule would be made absolute.

BOVILL, C. J.—That question incidentally becomes

of importance as a question of costs and also as regards the right to appeal. We will consider the matter, taking care not to prejudice your right to appeal by our decision.

May 11th.—BOVILL, C. J.—There is a case cited in Day's C. L. P. Acts, p. 221, 2nd edit., in which this point was decided by the Court of Queen's Bench (*Levi v. Green*, 1 E. & E. 669; Day's C. L. P. Acts, last edit. p. 240.) Following that case, we shall treat this rule as discharged, so that if the case is carried further, the defendants will be the appellants.

Rule discharged.

Attorney for the plaintiff, H. Harris.

Attorney for the defendant, E. P. Cearn.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Wednesday, May 4.

CASTLE AND OTHERS v. PLAYFORD.

Vendor and purchaser—Contract—Vendors to ship cargo and forward bills of lading—On receipt of bill of lading purchaser to take all risks and dangers of the sea, &c.—Agreement to buy and receive cargo on arrival—Payment on delivery at so much per ton "weighed on board during delivery"—Loss of cargo—Liability of purchaser to pay—Insurable interest—Construction of contract—Conditions precedent.

The plaintiffs, in their declaration, set out an agreement in writing between them and the defendant in the following terms, "It is mutually agreed between the plaintiffs as vendors, and the defendant as purchaser, the said vendors agree to ship with every dispatch, and in the customary manner, a cargo of freshwater ice in square blocks (say 170 register tons) in good and clean condition, the vessel to be dispatched direct to any port captain likes best, for orders to unload at any safe place in the United Kingdom, the vendors forwarding bills of lading to the purchaser, and, upon receipt thereof, the purchaser takes upon himself all risks and dangers of the seas and navigation of whatever nature or kind soever; and the plaintiff agrees to buy and receive the said ice on its arrival at ordered port, and to pay for the same in cash, on delivery, at the rate of 20s. per ton weighed on board during delivery; paying half-price for small ice, pieces under 56lb. in weight to be considered small ice." They then averred due shipping and dispatch of the ice, and forwarding of a bill of lading to the defendant and receipt thereof by him, and the subsequent loss of the cargo "by risks and dangers of the sea within the meaning of the agreement," and assigned as the said breach, non-payment by the defendant of the value of the said cargo at the rate aforesaid; and as the second breach that the defendant did not take upon himself the risks and dangers of the seas, according to the said agreement, whereby the value and benefit of the cargo became wholly lost to the plaintiff, and there was a second count for goods bargained and sold.

The defendant pleaded to the first breach readiness, &c., to buy and receive the said ice on its arrival at ordered port, and to pay for the same on delivery, but the same did not before suit arrive, &c., nor were the plaintiffs ready or willing to, nor did they, deliver the said cargo according to the said agreement.

There were cross demurrers to the first count of the declaration and to the plea, and on the argument thereon, it was

Held, by Martin and Channell, BB. (Cleasby, B. dissentiente).—The contract between the parties was not a contract for insurance, but of purchase, and,

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CASTLE AND OTHERS v. PLAYFORD.

[Ex.]

under the terms of it, the arrival of the cargo at ordered port, and the ascertainment of the weight on board during delivery, were conditions precedent to the liability of the defendant to pay the price or value of the ice, and consequently the defendant was entitled to judgment.

By Cleasby, B., contra.—The declaration is founded, not on an agreement to pay money, but rather on the loss of goods through the defendant's neglect to take on himself the risks and dangers of the sea, which he contracted to take. Upon receipt of the bill of lading, the property passed to the defendant as purchaser, and the cargo was at his risk, and insurable by him. The declaration discloses a sufficiently good cause of action.

This was an action for breach of contract, and the declaration charged that, by an agreement in writing, bearing date the 25th March 1869, it was agreed between the plaintiffs and the defendant in the words and figures following, that is to say:—

It is this day mutually agreed between T. Castle and Co., of Grimsby, as vendors, and H. H. Playford as purchaser, the said vendors agree to ship, with every dispatch, during this month, and in the customary manner, a quantity of freshwater ice, in square blocks, say cargo per result, 170 register tons, more or less, at vendors' option, all in good and clear condition, and on the same being duly shipped the vessel to be dispatched, with all speed, direct to any port captain likes best, for orders to unload at one safe place in the United Kingdom; twenty-four hours allowed for waiting orders, lay days to count; the said vendors forwarding bills of lading to the purchaser, and, upon receipt thereof, the said purchaser takes upon himself all risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever; and the said H. H. Playford agrees to buy and receive the said ice, on its arrival at ordered port, or so near therunto as the vessel may safely get. Purchaser taking the said ice from alongside the vessel, at his risk and expense, at the rate of twenty-five tons per running day (Sundays excepted), and to pay for the same in cash on delivery at and after the rate of 20s. sterling per ton of 20cwt. weighed on board during delivery (paying half price for small ice, pieces under 56lb. in weight to be considered as small ice). Should the said purchaser detain the vessel or vessels in discharging above the time above stated, we agree to pay demurrage at the rate of four pence per register ton per day to the vessel.

Averments:

That the plaintiffs are the persons, parties thereto, called "H. Castle and Company," and the vendors; and the defendant is the person, party thereto, called the purchaser. That the said ship with the said cargo of ice on board thereof, amounting to 234 tons of block ice, the same being duly shipped, was despatched with all speed on the said voyage, and that the plaintiffs did forward a bill of lading of the said cargo to the defendant, and that he duly received the same, and afterwards, whilst the said ship with the said cargo on board thereof was proceeding on the said voyage, and during the continuance of the said risks and dangers, the said cargo was wholly lost by risks and dangers of the seas, within the meaning of the terms of the said agreement; and all conditions were fulfilled, &c., to entitle the plaintiffs to be paid by the defendant for the said cargo, and to sue the defendant in respect of the matter hereinafter stated. Yet the defendant has not paid the plaintiffs the value of the said cargo, at and after the rate aforesaid, nor any part thereof, and the same still remains wholly due to the plaintiffs.

Further breach:

That the defendant did not nor would take upon himself the risks and dangers of the seas and navigation, according to the said agreement, whereby the value and benefit of the said cargo became and was wholly lost to the plaintiffs, and they were deprived of the profits they would have derived had the defendant kept the said agreement on his part.

The second count was for goods bargained and sold, and for money due on accounts stated.

By his sixth plea, the defendant, as to the said first alleged breach of contract in the said first count, said that he was always ready and willing to buy and receive the said cargo of ice, on its arrival at the ordered port, or so near thereto as the said vessel could safely get, and to pay cash for the said cargo of ice on delivery thereof at the rate aforesaid, and in all things to perform the said agreement on his part; but that the said cargo of ice, so shipped as aforesaid, did not, before this suit, arrive at the said ordered port; nor were the plaintiffs, before this

suit, ready or willing to, nor did they, deliver the same cargo there or elsewhere to the defendant according to the said agreement.

The defendant also demurred to the first count in the declaration, on the ground that the arrival and delivery of the cargo of ice at the ordered port were conditions precedent to the defendant's liability to pay for the cargo; and that a total loss of the cargo does not render the defendant liable to be sued as for a breach of the provision to take upon himself all the risks and dangers of the seas, &c.

By their replication, the plaintiffs joined in the said demurrer to their declaration; and they also demurred to the said sixth plea, on the ground that, by the terms of the contract, delivery by the plaintiffs to the defendant, and receipt by him of the bill of lading was equivalent to a receipt by the defendant of the cargo so as to entitle the plaintiffs to be paid by the defendant for the same.

The defendants joined in demurrer to the sixth plea.

The following were the points of argument for the plaintiffs:—First, that the delivery to and receipt by the defendants of the bill of lading, after the dispatch of the vessel with the cargo duly shipped, was the only condition precedent to the plaintiffs' right to be paid for the cargo; secondly, that the receipt of the bill of lading by the defendant is equivalent to the receipt of the cargo, under the terms of the contract; thirdly, that the defendant's liability arose upon the receipt by him of the bill of lading, and that the facts averred in the plea do not avoid such liability; fourthly, That the arrival of the ship at the ordered port is not a condition precedent to the plaintiffs' right to have the defendant take upon himself all the risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever; fifthly, that the matters mentioned as excusing, or in denial of, the defendant's liability, are matters which, on the true construction of the contract, fall to the defendant alone, and do not affect the plaintiffs; sixthly, the plaintiff will also contend that the first count of the declaration is good in substance, on grounds similar to those on which they insist that the sixth plea is bad.

Points of argument for the defendant:—First, that the first count of the declaration is bad because it does not show that the cargo arrived at the place at which the defendant was to purchase and receive the same; secondly, that it shows that such cargo never did arrive at such place; thirdly, that such arrival was, by the terms of the contract between the parties, a condition precedent to the plaintiffs' right to sue the defendant for the matters alleged as breaches of his contract; fourthly, that the defendant, by the terms of the contract, was not liable to pay for the cargo until it arrived at the ordered port, or to take upon himself the risks and dangers of the seas and navigation, unless the said cargo so arrived; fifthly, that the said first count, so far as it relates to the said breach, is insensible, because the cargo, having been lost before the same reached the defendant or the ordered port, he cannot be liable to the plaintiffs, unless he took upon himself the said risks and dangers; sixthly, that the provision as to the defendant taking upon himself the risks and dangers of the sea was not intended to impose upon the defendant the doing or performing of any act for the not doing or performing of which he was to be liable to be sued by the plaintiffs, but as a mere condition or limitation of the plaintiffs' contract; seventhly, the defendant will also contend that the sixth plea is good also, on the ground that, under the circumstances stated in that plea, the defendant never became liable to pay the value of the cargo; eighthly, that the arrival of the said cargo at the

[Ex.]

CASTLE AND OTHERS v. PLAYFORD.

[Ex.]

said ordered port was a condition precedent to the plaintiffs' right to be paid the value of the same.

In the margin of the said contract declared on, there was the following memorandum: "The vessel bringing the cargo to be addressed to H. H. Playford, if to London; and to his agent if to an out-port."

Littler (with him was *R. E. Webster*), for the defendant, in support of the demurrer to the declaration, and also in support of the plea.—The defendant is not liable to pay. Taking the whole scope of the declaration the intention was, the cargo being a risky one and the voyage from Norway dangerous, that the defendant the vendee should have no right of action against the vendors the plaintiffs, except on delivery. The agreement was to buy the ice on arrival, &c., and as soon as the plaintiffs have done all they can by loading and despatching the cargo, then the defendant will take the risk of the voyage on himself, and will not sue in case of loss. He agrees to buy and take the cargo on its arrival at the ordered port, and to pay for it on delivery a certain price per ton, weighed on board, &c. The provision in the contract, that the weight is to be ascertained "on board during delivery," and "half price to be paid for small ice," shows that this must be so; for if it had turned out to be all "small ice," then only half price would have to be paid for the whole of it; or, if all the cargo had melted away during the voyage, could it be said that the defendant would have then had to pay anything all? The amount and price could not be ascertained until arrival and delivery, which are conditions precedent to payment. The defendant has done all that was intended by the contract for him to do, namely, to protect the vendors from any action in case of loss by sea. It is only by taking the whole agreement together that it can be made clear, consistent, and comprehensible. The defendant does not deny that the plaintiffs did all they could. His contract was not simply to buy, but to buy and receive, and the plaintiffs had no insurable interest in the goods. [CHANNELL, B.—Your argument does not render insensible the words in the contract relating to "risks," for the goods might have arrived *deteriorated*, and that would have been at the defendant's risk.] Just so. The case of *Paynter and others v. James*, in the Common Pleas (15 L. T. Rep. N. S. 660; L. Rep. 2 C. P. 348), though not quite in point, has some bearing on the present case in the defendant's favour. [CLEASBY, B.—You say that saying the purchaser is to take upon himself all risks is the same as saying that the vendors are not to be responsible for any risks?] Quite so. The second breach involves the same question, for if "risks of the seas" here mentioned are and mean what the defendant contends they are and mean, then he, the defendant, did take them upon himself. [MARTIN, B.—These words are no part of the contract at all.] Here there are two concurrent acts contemplated, viz., delivery by the vendors and payment in cash by the purchaser, but the arrival and delivery of the cargo are contracts precedent to the liability to buy and pay for it.

Huddleston, Q.C. (*A. M. Channell* was with him), *contra* for the plaintiffs in support of the declaration, and of the demurrer to the plea.—Contracts such as this are well known and usual in the ice trade. The whole must be looked at together. What is it that is to be done? The vendors are to ship the cargo, and, on the same being shipped, they are to forward bills of lading, and, upon receipt thereof, the purchaser is to take upon himself—what? not that he will not sue, as has been said on the other side, but "all risks and dangers of the seas, rivers, and naviga-

tion of whatever nature or kind soever." That can only mean that, when the purchaser receives the bills of lading, he may insure and so protect himself. Immediately on the receipt of the bills the property in the cargo vested in the consignee, and gave him an insurable interest, and he became liable to indemnify the plaintiffs against the specified risks:

Dutton v. Solomonson, 3 Bos. & Pul. 582;

Meredith v. Meigh and others, 22 L. J. 401, Q. B.; 2 E. & E. 364;

Brown v. Hare, 27 L. J. 372, Ex.; 3 H. & N. 484; (in error), 29 L. J. 6, Ex.; 4 H. & N. 822.

The effect of the latter clause of the contract is this: The purchaser will take whatever ice *does* come, and pay for it at a certain rate. The intention of the parties is apparent on the face of the instrument. Suppose the goods to be taken by some person wrongfully, who would bring trover? [CHANNELL, B.—There is no actual contract for sale and purchase until arrival.] The defendant is liable for the value under the contract to insure against risks, though not for the price. The vendors, of course, could not insure, then who is to do so? The contract provides for it. If the court hold with the defendant then there is a loss which the plaintiffs could not provide against. [CLEASBY, B.—It is said that these words relieve the vendors from liability, but suppose the words were not there would they be under any?] The pleader has carefully and properly in the declaration distinguished between value and price, the first breach assumed being that the defendant has not paid the value of the cargo at and after the agreed rate. The declaration, it is submitted, is good, and the plea bad. He referred also to

Maude and Pollock on Law of Merchant Shipping, p. 234.

Littler, in reply.—The question is what is the responsibility on the vendee? [CLEASBY, B.—Were there not two events contemplated? You must not assume that the defendant had not an insurable interest.] The insurance office would say to him, "You have no interest." Suppose the cargo lost by running down, no one but the plaintiffs could sue. The contract is not divisible. It is no part of the agreement that the defendant is to pay for the goods if they are lost. A distinction cannot be drawn here between value and price. The contract is one of purchase and sale, and the vendors' interest continues until that of the purchaser begins, and that begins on arrival. [CLEASBY, B.—Does not the contract say, in the plainest possible terms, that, upon and after the receipt of the bills of lading, the goods are to be at the risk of the purchaser?] I submit that an action would lie even in the absence of these words, and if they be put in *ex majori cautela*, to protect him, why should that make the defendant liable?

MARTIN, B.—I am of opinion that the defendant is entitled to the judgment of the court. The case depends of course entirely on the meaning of the contract into which the parties have entered, and which is set out in the declaration. The words in the margin of the document, as to the address to which the vessel was to be directed, have no bearing on the subject. The contract was this: "It is this day agreed between J. Castle and Co., of [redacted], as vendors, and H. H. Playford, as purchaser." It then goes on to state what the vendors are to do, and it says that they are to "ship with every despatch, and in the customary manner, a cargo of freshwater ice, in square blocks, say per result 170 register tons, all in good and clean condition, and on the same being duly shipped the vessel is to be despatched with all speed direct to any port captain likes best, for orders to unload at one safe place in the United Kingdom, twenty-four

[Ex.]

PIERCE v. THE JERSEY WATERWORKS COMPANY (LIMITED.)

[Ex.]

hours allowed for waiting orders, lay days to count." Up to this point all is clear. It then proceeds thus: "*The said vendors forwarding bills of lading to the purchaser, and upon receipt thereof the said purchaser takes upon himself all risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever.*" The real question in this case is, what is the true meaning of these words? In my opinion, the plaintiffs did not undertake to deliver the goods at the port of discharge, but to *forward bills of lading*, and that the defendant on receipt of them would have an insurable interest. I believe the true meaning to be that, on their doing that, any liability which they might be under with regard to the cargo should cease; but not that the purchaser (the defendant) was to take all these risks and pay for the cargo, at all events, whether lost or not—that is not said. And here ends the part of the vendors in the matter, and then begins the part of the purchaser. Now, what does the contract proceed to say as to that? Why this—"and the said H. H. Playford agrees to *buy and receive the said ice on its arrival at ordered port, or as near thereunto, &c., the purchaser taking the said ice from alongside the vessel at his risk and expense, &c., and to pay for the same on delivery at and after the rate of 20s. sterling per ton of 20cwt. weighed on board during delivery* (paying half price for small ice, pieces under 56lb. in weight to be considered as small ice)." When, and what then, is the defendant to pay for the ice? Why, *on delivery*, at the specified rate per ton *weighed on board during delivery*. In my opinion, the property in that ice would not pass to the defendant until it was so weighed on board. The arrival of the ice at the ordered port, and its being weighed on board during delivery, are conditions precedent to the liability of the defendant to be sued for the price or value of the ice. If it was meant that the defendant was to pay for the ice, even though it should be lost by perils of the sea, that is not expressed in the contract.

CHANNELL, B.—I am of the same opinion. The question is entirely what is the proper construction of this agreement, which is a contract of purchase, and not of insurance. I agree in thinking that this is not a contract for insurance, but of purchase. The defendant here is sued for nonpayment of the price, and the question is whether or not he has broken his contract with regard to the payment of the price. [His Lordship here read the contract from the commencement down to and inclusive of the clause relating to the *risks and dangers of the seas, &c.*, and then proceeded as follows.] The question is whether these latter words, as to the purchaser's taking these risks upon himself, introduce the construction contended for by the learned counsel for the plaintiffs. They cannot, I think, be struck out of the agreement, looking at the place where they are introduced; but down to them I see no contract binding on the defendant. There is a contract on the part of Castle and Co. to ship a cargo of ice, and to forward bills of lading. Then the defendant agrees to buy and receive the said ice *on its arrival at ordered port, &c.* Now from that time he (the defendant) stands in the place of the proposed purchaser. The clause as to the risk of the seas removes from the defendant any right to sue the plaintiffs for non-arrival of the ice by perils of the sea. Attention has very properly been called by Mr. Huddleston to the distinction between *price* and *value*; and though I was at first somewhat inclined to think that, though the goods never arrived, and therefore the plaintiffs would not be entitled to sue for the *price* of them, yet they might nevertheless be entitled to sue for their *value*, yet on reconsideration I think

that substantially they mean the same thing, and that the distinction between them, if any, does not alter the terms of the agreement between the parties as to the time of payment, which is fixed by such agreement to be on the arrival of the cargo at the ordered port. I agree therefore with my brother Martin in thinking that our judgment in this case must be for the defendant.

CLEASBY, B.—I am always exceedingly sorry to differ in opinion from the rest of the court, and especially in a case like the present, involving questions of mercantile law, in which my learned brothers have had so much experience. In my judgment, however, the declaration in this case is founded, not on an agreement to pay money, but rather on the loss of goods, and in effect it charges that the defendant by his conduct has not taken upon himself the risk of loss by dangers of the sea, &c., which he had contracted to take. Now this agreement contemplated two events. It contemplated first of all the event of the cargo being lost by the perils and dangers of the sea, and secondly the event of the vessel arriving at the ordered port. But we cannot apply one part of the agreement having especial reference to one alternative, to another part of it which relates to another and entirely different alternative; but we must look strictly at that part of the agreement which has reference to that event which has occurred, namely, *the loss of the goods at sea*. Now, what are the words of the contract with reference to that event? They are these—"the said vendors forwarding bills of lading to the purchaser, and upon receipt thereof, the said *purchaser takes upon himself all risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever.*" I believe that the object and intention of this was to show whose duty it was to insure the goods, and that it was the intention of the parties that, as soon as the property in the goods was so transferred by the transmission and receipt of the bills of lading, from the vendors to the purchaser, the purchaser was to insure the goods, and to undertake all future risks of loss by perils of the sea. If he did insure, and got their value, then, as between himself and the plaintiffs, he was not to make a profit. The object was that neither party should be a loser. What has the clause reference to? Not to the vessel, but to the cargo. The vendors have done all that they could do. I can only read the clause thus: as soon as ever you, the purchaser, receive this bill of lading, from that moment the goods are in you and at your risk. I think the declaration discloses a sufficiently good cause of action, and that judgment should therefore be for the plaintiffs.

Judgment for the defendant.

Attorneys for the plaintiffs, *Lumley and Lumley* 15, Old Jewry-chambers, E.C.

Attorneys for the defendant, *Morley and Sheriff*, 59, Mark-lane, E.C.

Tuesday, May 10.

PIERCE v. THE JERSEY WATERWORKS COMPANY (LIMITED.)

Joint-stock company—Articles of association—Allotment of a certain number of shares—Condition precedent to existence of the company—Contract—Work and labour—Companies Act 1862.

A joint-stock company was registered under the Companies Act 1862, with articles of association. The articles provided that, when and so soon as 3000 shares in the company should have been subscribed for

[Ex.]

PIERCE v. THE JERSEY WATERWORKS COMPANY (LIMITED).

[Ex.]

and allotted, the members of the company for the time being should be and continue associated for the objects of the company, and the regulations for the management thereof should be in force and binding on such members in like manner as if the whole of the shares into which the capital was divided had been subscribed for and allotted. The plaintiff was employed by the directors at a time when only 350 shares in the company were subscribed for and allotted, and brought this action to recover salary due in respect of such employment :

Held, that the effect of the articles was that, until the allotment of 3000 shares, the defendant company did not become associated for the purposes thereof, nor had the persons named as directors by the articles any authority to bind the company, and that therefore the plaintiff was not entitled to recover.

Declaration for money payable by the defendants to the plaintiff for work done, journeys performed, attendances bestowed, and materials provided by the plaintiff as an engineer and otherwise, for the defendants at their request, and for goods sold and delivered by the plaintiff to the defendants, and for money paid by the plaintiff for the defendants at their request, and for money lent by the plaintiff to the defendants, and for interest upon money due from the defendants to the plaintiff, and forborne at interest by the plaintiff to the defendants at their request, and for money found to be due from the defendants to the plaintiff on accounts stated between them.

Pleas :

1. Never indebted. 2. That the defendants were an incorporated company with liability limited by shares formed and registered under the Companies Act 1862, and that certain articles of association were duly made and registered with their memorandum of association, which were the articles of association and regulations of the company and of the members thereof, according to the provisions of the Companies' Act 1862, at the time the plaintiff's claim is alleged to have accrued; and by the said articles of association it was, amongst other things, prescribed and agreed as follows:—1. None of the regulations of table A. to the Companies Act 1862 annexed, shall apply, except such as are embodied in these articles. 2. When and so soon as 3000 shares in the company shall have been subscribed for and allotted, the members of the company for the time being shall be and continue associated for the objects of the company, and the regulations for the management thereof shall be in force and binding on such members, in like manner as if the whole of the shares into which the nominal capital is divided had been subscribed for and allotted; and after the directors shall have allotted any number less than the whole of the shares, they shall have power to allot the remainder thereof, or any part of the same, from time to time as they shall think fit, and on such terms and conditions as the members shall, by a resolution passed at a general meeting either ordinary or extraordinary direct, and if no such direction shall be in existence, then upon such terms and conditions as the directors shall determine. All premiums which may be realised in the issuing of such shares shall be the property of the company. And the defendants further say that at the time at which the claim in the declaration and every part thereof is alleged to have accrued to the plaintiff the said articles were in full force, and binding on the company and its members, and 3000 shares in the defendants' said company had not been subscribed for and allotted, and the said claim and every part thereof was incurred in respect of other matters than those which the defendants were then by reason of the premises empowered to transact, and in respect of business which the company and the directors thereof were not, by reason of the premises, then empowered to carry on, of which the plaintiff then had notice, and is a claim which the said company could not then, by reason of the premises, contract to be liable for, and were not liable to pay.

Replications:—1. Joinder of issue; 2. To the second plea—

That certain of the said articles of association in the said plea mentioned, and which it is in the said plea alleged bound the company at the time the plaintiff's claim is alleged to have accrued are in the words and figures following:—“56. No person shall be appointed a director unless he shall hold not less than fifty shares in the company. 60. The directors may, by resolution, and without any writing under the seal of the company, hire, appoint, and employ, such person or persons to be secretary, solicitor, clerk, manager, or servants of the company, either in this

country or in Jersey, to assist in carrying out the purposes of their undertaking, or any of them, and that at such salary or other remuneration as they shall think fit. They shall also have power to remove any such officer or servant by resolution of a majority of their number, and to appoint any other person or persons in his place or stead, and so from time to time when and so often as they shall deem necessary, or proper, or convenient. The said directors shall also have power to delegate to their secretary, or to any other officer of the company, authority to enter into, on behalf of the company, all contracts in Jersey which they shall deem necessary or convenient for the purposes of the company. The directors shall also have power to pay or appropriate to any secretary, manager, clerk or other officer or servant of the company, or give him power over any sum or sums of money which they shall deem necessary or convenient for payment of wages or other small outgoings on behalf of the company. 61. The directors shall have full power to apply to the Legislature or to any other authority or authorities in the Island of Jersey, competent to grant the same, for all and every or any such act or acts of the state, licence or licences, powers or authorities, as the directors shall at any time or times, or from time to time, think necessary or proper or convenient for the purposes of the company, and also to pledge the company to the performance of all such acts, matters or things as shall be prescribed as conditional on the grant of any such act or acts, licence or licences, powers or authorities, and for all or any one or more of the purposes aforesaid, the directors shall have full power to authorise any one or more of their number, or to direct any one or more of their officers (except the solicitor) to procure any such licence or licences, power, or authorities to be obtained in his or their names. The directors shall, out of the funds of the company, indemnify any director or directors, manager, or other officers against all losses and liabilities which he or they shall incur in the performance of his or their respective duties, or in carrying into effect the order of the directors, or of any general meeting. 62. In all other respects the business of the company shall be managed by the directors, who shall, when and so soon as 3000 of the shares shall have been subscribed for, pay to the said Messrs. Easton, Amos, and Sons, the sum of 2000*l.* as before mentioned, and the directors may also exercise all such powers of the company as are not, by the Companies' Act 1862, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the foregoing Act, and to such regulations (being not inconsistent with the aforesaid regulations or provisions) as may be prescribed by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulations had not then been made. 63. Subject to the restrictions herein expressly contained the directors shall have power to do all acts and things which they may consider proper or advantageous for the carrying on of the business of the company, and for this purpose they may from time to time and on such terms and conditions as they may think advisable, enter into and accept and perfect such purchases, sales, mortgages, contracts, leases, licences, and agreements, as they may think fit, and may from time to time carry out, vary, modify, abandon, or surrender, any such contracts, loans, licences, and agreements, and enter into and perfect any other or others in substitution or place thereof. 64. The directors may, for the business of the company, borrow money on bonds of the company, or on mortgage or other security of the company's property, at a rate not exceeding 5 per cent. per annum, but so, nevertheless, that the liabilities to be contracted by all such means shall not at any time exceed in the whole an equal fourth part of the total subscribed capital for the time being of the company, and it shall be competent for any of the directors to make advances to the company on such bonds, mortgages, or other securities.” And the plaintiff says that the said claim alleged in the declaration accrued to him, and was incurred in respect of matters and businesses which the plaintiff had been hired, appointed, and employed by the directors of the said company, by resolution of the said directors, to transact and perform in this country and in Jersey to assist in carrying out the purposes of their undertaking, and which matters and businesses were preliminary and necessary to enable the defendants to commence and carry on the general business of the said company, and for moneys paid and liabilities incurred by him on behalf of the defendants for a like purpose in performance of his duties in carrying into effect the orders of the said directors, and that the said matters and businesses were transacted and performed, and the said moneys were paid and liabilities incurred by the plaintiff as aforesaid for the purposes aforesaid, and for the sole use and benefit of the defendants, and that the said defendants have had and enjoyed, and still have and are enjoying, the sole use and benefit accruing from the same respectively. 8. Repeating the allegation in the second replication, and alleging that neither at the time at which was so hired, appointed, and employed as aforesaid, nor at the time when the said claim in his said declaration mentioned accrued, had the plaintiff notice that 3000 shares in the defendants' said company had not been subscribed for and allotted.

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PIERCE v. THE JERSEY WATERWORKS COMPANY (LIMITED.)

[Ex.]

Issues thereon.

The trial took place before Bramwell, B. at the sittings in London after Hilary Term, when the facts appeared to be as follows:—

The defendants were registered as a company, with memorandum and articles of association, on the 19th June 1863. The memorandum stated that the name of the company was the Jersey Waterworks Company (Limited); that the registered office of the company would be situate in England; and that the objects for which it was established were the procuring in the Island of Jersey of a supply of water for the use of St. Heliers, and the other towns or places in such island, and for that purpose the doing of all such acts as the directors are authorised to do by the accompanying articles of association of the company.

The articles of association recited that certain persons had interested themselves in the promotion of the company, and had expended moneys and incurred liabilities for that purpose; that it would become necessary that before the company was fully carried out further moneys should be expended and liabilities incurred for the purpose of procuring from the Legislature of Jersey an Act to enable the company to carry out the objects of their undertaking; and that it was deemed reasonable and just by those who had agreed to join in the promotion of the company that the sum of 2000*l.* should be paid to Messrs. Easton, Amos, and Sons, who had undertaken to receive the same on behalf of the aforesaid promoters as the full and unqualified remuneration for the moneys which had been and would be expended, and the liabilities which had been or would be incurred, and the time and labour which had been or would be employed by or on behalf of the said promoters, as before mentioned, in full discharge of their said claims, down to and including the expenses of the registration and incorporation of the said company, and of obtaining the said Act of State, and other powers as aforesaid, and the procuring to be subscribed an amount of capital in the said company to the extent of 3000 shares therein at the least, and also the remuneration of the directors, until such time as there should be a profit arising from the undertaking. After these recitals were contained *inter alia* the provisions set out in the pleadings. The plaintiff was an engineer, and had been employed as the company's engineer by a resolution of the directors in the year 1868. At the time of his employment only 350 shares were allotted. It was found by the jury that he had no notice that this was so. The present action was brought for salary and expenses alleged to be due to him.

It was objected by defendants' counsel that the 3000 shares never having been allotted, the company never came into existence, and therefore no liability could have been incurred by them to the plaintiff. The learned judge directed a verdict to be entered for the defendants reserving leave to plaintiff to move to enter a verdict for 500*l.*, the amount found to be due to him by the jury.

A rule *nisi* was obtained to enter a verdict pursuant to the leave reserved, and also for a new trial on the ground that the learned judge had misdirected the jury in directing them to find for the defendants on the issue on the second replication, but inasmuch as it clearly appeared that there was substantially no evidence for the jury that the plaintiff's claim was in respect of necessary preliminary expenses, so much of the facts and arguments as related to the misdirection, are omitted as immaterial to the report.

Powell, Q. C., and Shaw, now showed cause.—It is admitted that the 3000 shares were never subscribed, but it is also found that the plaintiff had no

knowledge of the fact. His ignorance of it is immaterial, for, by the articles, it is a condition precedent to the coming into existence of the company at all that the 3000 shares should have been subscribed for and allotted. The terms of the clause altogether preclude the supposition that any company was to exist until that condition was fulfilled. Till then it was plainly intended, as may be seen by reference to the preamble or recitals to the articles, that the company should be in a state of promotion merely. In the *North Staffordshire Steel, &c., Company v. Ward*, L. Rep. 3 Ex. 172; 18 L. T. Rep. N. S. 445, where a clause in the articles of association provided that in case the whole of the shares into which the nominal capital of the company was divided should not be subscribed for or allotted, the registered members of the company for the time being should, if the directors should, by resolution so declare, be and continue associated for the objects thereof, it was held that until the whole of the capital was subscribed for or allotted, or the directors had passed a formal resolution for carrying on the company, the directors had no power to make a call. The only difference between that case and the present is that there the question arose between the company and a shareholder, here it is between the company and third persons. That can make no difference in the result. It is clear that the plaintiff was bound to take notice of the provisions of the articles of association. In *Ernest v. Nicholls*, 6 H. of L. 401, Lord Wensleydale says, "All persons must take notice of the deed and the provisions of the Act. If they do not choose to acquaint themselves with the powers of the directors it is their own fault; and if they give credit to any unauthorised persons, they must be content to look to them only, and not the company at large. The stipulations of the deed which restrict and regulate their authority are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole company of shareholders for whose protection the rules are made, unless they are strictly complied with." The class of cases which may be relied on, on the other side, are of an altogether different character. They are cases where the directors, having general powers of management, and intending to act in the exercise of such powers have omitted to comply with some formal preliminary required by the articles of association. The failure to comply with these merely preliminary and directory provisions, inasmuch as it could not reasonably be expected that the party dealing with the company could have any knowledge of it, has been held not to invalidate the contract. See:

Royal British Bank v. Turquand, 5 E. & B. 248, 6 E. & B. 327;

Agar v. Athenæum Assurance Society, 3 C. B., N. S., 725;

Prince of Wales Assurance Society v. Harding, 1 E. B. & E. 183.

In the case of a joint-stock company, the general clauses of the Companies' Act 1862 and the memorandum and articles of association all taken together are equivalent to the special Act of a company, like a railway company incorporated by Act of Parliament. The effect is that this clause of the articles is not a merely directory provision, but it is like a clause in a special Act enacting that no company should come into existence until the requisite number of shares had been subscribed, and therefore the subscription for and allotment of these shares was an essential requisite to the very existence of this company. They also cited:

The Ornamental Pyrographic Woodwork Co. v. Brown, 8 L. T. Rep. N. S. 506; 1 H. & C. 63;

[Ex.]

PIERCE v. THE JERSEY WATERWORKS COMPANY (LIMITED).

[Ex.]

Fountain v. The Carmarthen Railway Company,
L. Rep. 5 Eq. 316;
*Taylor v. The Chichester and Midhurst Railway
Company*, L. Rep. 2 Ex. 356; 16 L. T. Rep.
N. S. 703;
*East Anglian Railway Company v. The Eastern
Counties Railway Company*, 11 C. B. 775;
*Mayor of Norwich v. The Norfolk Railway Com-
pany*, 4 E. & B. 445.

Clarke, Q. C. (with him J. Edward Wilkins), supported the rule.—It is submitted that this provision is merely effectual as between the directors and the shareholders. It is inserted in accordance with a suggestion thrown out by Wilde, B. in the *Ornamental Pyrographic Woodwork Company v. Brown*, for the protection of the shareholders against any attempt on the part of the directors to carry on the company, though the requisite capital may not have been subscribed for. No doubt the directors might, under such circumstances, be restrained by injunction; but the case is altogether different as regards third parties, and so the *North Stafford Steel, &c., Company v. Ward* is not in point; third persons cannot possibly have any notice whether the condition has been complied with. They are bound, no doubt, to take notice of the deed or articles of association, and if it appears from the terms of that instrument that the contract is *ultra vires*, they cannot enforce it; but they are not affected by the existence or non-existence of preliminaries, of which they can have no knowledge; they are entitled to presume their existence. See the *Royal British Bank v. Turquand*, 6 E. & B. 327. Here the plaintiff could not be expected to know whether the requisite number of shares had been allotted; he had no right to inspect the register, and his possibility of knowledge could only depend on the company's making the prescribed return half yearly to the registrar of joint-stock companies. The reasonable inference to be drawn from the opinion expressed by the court in the case of *Ex parte Ward, re The North Stafford Steel Company (sup.)*, is that a company, even where there is a clause such as this in the articles of association, does not fail to exist for all purposes. In that case the court refused to strike the applicant's name off the register on the ground that there might be preliminary expenses, for prospectuses, rent, and clerks, which the company might well incur, even though ultimately the requisite capital would not be subscribed for, and the company fail to become established. The result is, that such a clause is not a condition precedent to the coming into existence of the company, but only to its being ultimately permanently carried on. Under these circumstances, the plaintiff was justified in assuming that it was properly and fully established, and is entitled to recover. The question of *ultra vires* is quite a different one as between shareholders and the company and strangers and the company. The confusion in the use of the term is regretted by Blackburn, J. in his judgment in *Taylor v. The Chichester and Midhurst Railway Company (sup.)* [BRAMWELL, B.—“*Ultra vires*” supposes some “*vires*,” here there seem never to have been any.] They cannot deny their existence as a company. They are registered under the Companies Act upon which incorporation is complete, and their existence is admitted in the pleadings. If the provisions of their articles are contrary to the statute, the articles must yield; they cannot deny their existence in the face of the registration. They also cited

Orr v. The Glasgow Railway Company, 2
L. T. Rep. N. S. 550; 3 McQueen, 799.

MARTIN, B.—I think this rule must be discharged. In my opinion, according to the terms of the articles of association, this company did not come into

existence or become associated for the purposes of the memorandum of association until 3000 shares were subscribed for and allotted. That, in my judgment, is the true construction of the second article. Till that condition was fulfilled there was no company which could enter into such a contract as this as a corporation, although the directors might as individuals. If, as Mr. Wilkins says, there were anything in the Companies Act contrary to this provision of the articles of association the case would be different. But I can see nothing of the sort. The Act expressly provides that the articles of association to be registered with the memorandum shall govern the constitution of the company. Under these circumstances there was no company able to make the contract at the time the contract with the plaintiff was made, though it may be that there existed a body of directors capable of contracting. I should be very much surprised if any contract could be binding on a company which was made before it came into existence for the purposes of its incorporation. In the cases of special Acts it has been often provided that preliminary expenses incurred by the promoters should be borne by the company, but then the liability does not truly arise upon contract, but upon the express provision of the statute.

CLEASBY, B.—I have come to the same conclusion. By sect. 14 the memorandum of association, when registered, may, in the case of a company limited by shares, be accompanied by articles of association, signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum shall deem expedient. These articles form the very constitution of the company. The judgment of Wilde, B., in the *Ornamental, &c. Woodwork Company v. Brown*, shows this, for he says: “The Act of Parliament substantially provides for this: seven men may, if they like, form a sort of partnership, and they may do it by signing a memorandum of association, and they may, if they like (and the Act of Parliament invites them to do it), add to the memorandum of association a set of regulations, and amongst these regulations they may, if they like, add a condition that the business shall not be commenced till a definite amount is subscribed.” What would be the good of such a condition if the company could afterwards be made responsible, as the plaintiff now seeks to make them?

BRAMWELL, B.—I am of the same opinion, and for the same reasons. It appears to me very right that the law should be so. The person who prepared these articles no doubt intended to make the shareholders absolutely safe against the directors, and that no liability should be incurred until the whole number of shares had been taken up. It is most desirable that the law should give validity to such an arrangement if possible. When we look at the recitals, it seems clear that the company was not to become associated for the purpose of commencing business until this condition was complied with. The preliminary expenses are all provided for, and then it is provided that so soon as the 3000 shares are taken up, the members shall be associated for the purposes of the company. Are they then to be associated before for those purposes? Certainly not. The only difficulty has been referred to by my brother Cleasby, namely, that by the 6th section of the Companies Act 1862 (25 & 26 Vict. c. 81), on registration a corporation is formed. But what are the words of the Act? “Any seven or more persons associated for any lawful purpose, may by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registra-

C. CAS. R.]

REG. v. SVEN SEBERG.

[Q. B.]

tion, form an incorporated company with or without limited liability." They may do so, and if they had chosen to do so here, they might have become immediately a company fully established and associated for the purposes of the company. But I think, on the other hand, it was quite competent for the defendants to enter into an arrangement of the sort they have entered into, and that there is nothing in the Act to prevent them. If somehow or other an incorporated company existed immediately upon the registration, still the persons who engaged the plaintiff were not directors of the defendants' company, or entitled to bind the defendants, for previously to the taking up of the three thousand shares, *quoad* the defendants' company, they stood merely in the position of promoters, and not directors at all, inasmuch as till then there was no association for the purposes of the company, and therefore no authority to anyone to act *quod* director.

Rule discharged.

Plaintiff's attorneys, *Williams, Blyth, and Marsland.*

Defendants' attorneys, *Allen, Colley, and Edwards.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 30.

(Before BOVILL, C. J., WILLES, BYLES, HANNEN, and CLEASBY, JJ.)

REG. v. SVEN SEBERG.

Offences on high seas.—British ship—Proof—17 & 18 Vict. c. 104, s. 106.

The prisoner maliciously wounded B. on board a ship on the high seas. Oral evidence was given that the ship was a British ship of the port of Shields, sailing under the British flag, but no proof of the ship's register or ownership was given;

Held, that the courts of this country had jurisdiction to try the offender.

Case reserved for the opinion of this court by Hannen, J. :—

At the spring assizes for Cornwall, upon an indictment which charged the prisoner with maliciously wounding one W. — Bedlington, with intent to do him grievous bodily harm,

It was proved at the trial that the prisoner was a sailor on board the barque *Statesman*, and that while on the high seas on a voyage from Alexandria to Falmouth he inflicted on W. — Bedlington, the mate of the vessel, a dangerous wound with a knife.

The master, the boatswain, and one of the crew of the *Statesman* all stated that the vessel was a British ship of Shields, and that she was sailing under the British flag, but no proof of the register of the vessel or of the ownership was given.

It was objected on behalf of the prisoner that this evidence was not sufficient to establish that the ship was a British ship, and that without proof of the ship having been registered as a British ship, the prisoner could not be convicted.

I reserved the point for the consideration of this court.

The jury found the prisoner guilty, and he was sentenced by me.

JAMES HANNEN.

BOVILL, C. J.—We think the conviction in this case was correct. The evidence was, in our opinion, sufficient to prove that the vessel was a British ship, without proof of her having been registered; and, even if it had appeared that she had not been

registered, we think the prisoner ought still to have been convicted, first, because there is nothing in the Merchant Shipping Act to take away the criminal jurisdiction of the court; and next by reason of the provision at the end of the 106th section of the Merchant Shipping Act (17 & 18 Vict. c. 104), (a) which provides that as regards the punishment of offences committed on board such a ship, she shall be dealt with in the same manner as if she was a recognised British ship. The conviction will therefore be affirmed.

Conviction affirmed.

COURT OF QUEEN'S BENCH.

Reported by T. W. SAUNDERS and J. SHORTT, Esqrs.,
Barristers-at-Law.

Thursday, May 12.

THE WEST LONDON EXTENSION RAILWAY COMPANY (apps.) v. THE ASSESSMENT COMMITTEE OF THE FULHAM UNION AND THE OVERSEERS OF THE POOR OF THE PARISH OF FULHAM (resps.)

Order of reference—12 & 13 Vict. c. 45—Award—Costs.

By sect. 13 of 12 & 13 Vict. c. 45, it is enacted that "it shall be lawful for any court of general or quarter sessions of the peace before which any appeal . . . shall be brought, to order, with the consent of the parties, . . . that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner and on such terms, as the said court shall think reasonable and proper."

An appeal having been entered at sessions against an assessment for the relief of the poor, the sessions ordered that the "matter in dispute" should be referred to arbitration. The order of reference was silent as to costs. The arbitrator made his award, and ordered "that the said appeal be dismissed, and that the appellants do pay to the respondents their costs of the said appeal."

Held, that although it was in the power of the justices at quarter sessions to have conferred upon the arbitrator an authority to award costs, yet they had not given him such authority by ordering only that the "matter in dispute" should be referred. The arbitrator had therefore exceeded his power, and the award must be sent back to him to be amended.

Rule calling on the respondents to show cause why an award should not be set aside or be referred back to the arbitrator on the ground that he had no power to award costs.

The West London Extension Railway Company having appealed to quarter sessions against a rate or assessment made for the relief of the poor of the parish of Fulham, the sessions, by consent, referred the consideration of the matter in dispute to an arbitrator, under 12 & 13 Vict. c. 45 (Baines' Act), s. 13. The material part of the order of reference was as follows :—"It is further ordered, by and with the consent of counsel on both sides, that the matter in dispute between the appellants and respondents herein shall be referred to John Gray, Esq. . . . to inquire into and arbitrate thereon, the said

Whenever it is declared by this Act that a ship to any person or body corporate, qualified according to this Act to be owners of British ships, shall not be recognised as a British ship, such ship shall not be entitled to any benefits, privileges, advantages, or protection usually enjoyed by British ships, and shall not be entitled to use the British flag or assume the British national character; but so far as regards the payment of dues, the liability to pains and penalties, and the punishment of offences committed on board such ship or by any persons belonging to her, such ship shall be dealt with in the same manner in all respects as if she were a recognised British ship.

Q. B.] WEST LONDON EXTENSION RAIL. CO. v. ASSESSMENT COMMITTEE OF FULHAM UNION, &C. [Q. B.]

several parties agreeing and consenting to abide the report of such his arbitration; and that an order in concurrence therewith should be drawn up accordingly. And it is further ordered that notice in the meantime be given unto the assessment committee of the Fulham Union, and the churchwardens and overseers of the poor, that they and all persons concerned do attend the court at the said Guildhall at Westminster on Friday, the 30th April next . . . to hear and abide by the judgment and determination of the said court touching the said appeal."

In the order of reference no mention of costs was made. The arbitrator heard the case, and made his award, which concluded in these terms, viz.:—

Now I do make my award of and according to the premises as follows:—I do award and order that the said appeal be dismissed, and that the appellants do pay to the respondents their costs of the said appeal, to be taxed by a proper officer of the court of quarter sessions in the usual manner.

Huddleston, Q. C., and *Murphy* showed cause. It is contended by the other side that as the order of reference is silent as to costs, the umpire had no power to award them. The question here is whether this is a reference under the 13th section of Baines' Act (12 & 13 Vict. c. 45), or whether it is merely a reference by the court under the power which it always had, not to delegate its authority, but to order a previous adjustment by consent of the parties to be determined finally by the court. If the reference was under Baines' Act there would be no necessity to adjourn the appeal, for sect. 13, after giving a power of referring matters of appeal to arbitration, enacts that "the award of the arbitrator . . . may on motion by either party at the sessions next or next but one after such award . . . shall have been finally made and published, or after the decision of the Court of Queen's Bench on any motion for setting aside the same, be entered as the judgment of the court of general or quarter sessions in the appeal, and shall be as binding and effectual to all intents as if given by the said court." They make the order of reference with the consent of the parties, and the award is entered as the judgment of the court—a mere ministerial act. The court say they adjourn the hearing and determining the matter of the appeal, but refer the matter in dispute. The words "matter in dispute" mean something more than the hearing of the appeal, they mean the hearing of the appeal and the question of costs. They adjourn the question of appeal, but refer the whole question over which they have jurisdiction, viz., the appeal and the costs, to the determination of the arbitrator. This is analogous to the ordinary case of a reference. In the text books it is laid down that where in an order of reference nothing is said about costs, the arbitrator has implied authority to deal with that subject, although no power to deal with the costs of the award:

Watson on Awards, p. 123;

Russell on Awards, 5th edit., p. 359.

So here, when the quarter sessions adjourns the hearing of the appeal, but refers to an arbitrator the matter in dispute, they include not only the hearing of the appeal, but the costs which are a matter in dispute: (*Firth v. Robinson*, 1 B. & C. 277.) [*COCKBURN*, C. J.—In that case the cause and all matters in difference were referred, but here, the cause and the "matter in dispute" only.] In *Roe d. Wood v. Doe*, 2 Term Rep. 644 it was held that an arbitrator may award costs without any express authority for that purpose. [*COCKBURN*, C. J. referred to *Reg. v. The Justices of the West Riding of Yorkshire*, 12 L. T. Rep. N. S. 880, 580; 6 B. & S. 531.] When the court delegates the "matter in dispute," it delegates all its power. [*MELLOR*, J.—That is just my difficulty. Do not the terms of the order mean that the sessions keep

to themselves the final judgment as to the costs of the appeal? *BLACKBURN*, J.—Suppose a cause referred *simpliciter* without anything said about costs; do not the costs follow the verdict, whether the arbitrator says anything about them or not? Under the 13th section of Baines' Act, the sessions might well have said the costs should be determined by the arbitrator, but they abstain from saying that in their order of reference: (*Leggo v. Young*, 16 C. B. 626.) *MELLOR*, J., cited *Reg. v. The Justices of Staffordshire*, 7 E. & B. 935.] There is a distinction between the state of things at the time of the appeal to quarter sessions and afterwards. At the time the quarter sessions came to make the order, costs had been incurred to a considerable amount, and there was a substantial question of law. In addition to that, further costs have to be incurred, and thereupon the quarter sessions direct "that the matter in dispute between the appellants and respondents herein shall be referred." Does the analogy to a case referred at Nisi Prius hold or not? The grounds of appeal to quarter sessions are like pleadings. [*COCKBURN*, C. J.—Is not the difference this, that in the case of a cause referred, if one party obtains a verdict, he is victor, and gets costs; but does not the Act here make this distinction, that it does not make costs depend on success, but leaves them in the discretion of the court? *BLACKBURN*, J., referred to *Bell v. Postelthwaite*, 5 E. & B. 695, deciding that "an arbitrator appointed under the Common Law Procedure Act 1854, s. 3, has no power over the costs either of the cause, reference, or award, unless the rule or order appointing the arbitrator gives it to him; and where the rule is silent, the successful party under such a reference can have no costs. But in a case where it appeared that the parties had drawn up the rule in a general form under the mistaken belief that, nothing being said, the costs would abide the event, the court, after the award had been published, amended the rule of reference, so as to make it express the intention of the court." Is not that a strong case against you?] It certainly is, but in that case the other decisions were not referred to. [*MELLOR*, J.—As Lord Campbell suggests, the next Court of Quarter Sessions may be differently constituted. *COCKBURN*, C. J.—And yet have to decide the question of costs on the merits, whereas the justices at the next quarter sessions, being different, are not in the same position as those at the former court to determine the costs.]

Field, Q. C. and *Carter*, for the appellant, were not called upon to support the rule.

COCKBURN, C. J.—The rule must, I think, be made absolute on the ground that all that is referred by the justices at quarter sessions to the arbitrator, is a power of deciding the matter in dispute between the parties to the appeal. Now if the decision of the matter in dispute had necessarily come again before the quarter sessions to which the appeal was, I should have been disposed to think that, in referring the matter in dispute to the arbitrator, they referred inferentially the power to award costs; but it appears that the right to costs was not the necessary consequence of success in the appeal, for by the Act of Parliament the power to grant costs by the court of quarter sessions is discretionary. Therefore it does not follow that because the matter in dispute is decided one way or another the costs are to abide the event; and I take it that, where the power to award costs is discretionary, in order to give an arbitrator to whom the matter in dispute is referred authority to give costs there must be a power to exercise a discretionary authority. Here the order of quarter sessions is silent as to costs. The cases of *Bell v. Postelthwaite*, as well as *Reg.*

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

v. *Justices of West Riding of Yorkshire*, contain a point which is much like the present one, although not exactly the same. I ground my decision on this, viz., that it is discretionary in the quarter sessions to give costs or not to give them, notwithstanding they decided the appeal either way, and that power was not in the terms of the order for reference given to the arbitrator.

BLACKBURN, J.—I am of the same opinion. The quarter sessions, when sitting on appeal in an ordinary matter, can give costs at their discretion, and they have to decide whether costs are to be allowed or not. Then by Baines' Act (12 & 13 Vict. c. 45) s. 13, it is enacted that "it shall be lawful for any court of general or quarter sessions of the peace before which any appeal . . . shall be brought to order with the consent of the parties . . . that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner and on such terms, as the said court shall think reasonable and proper." Under that section I have no doubt in my mind, and there is none, that the quarter sessions might make an order awarding in terms either that the costs of the appeal should abide the award, or that the costs of the appeal should be in the discretion of the arbitrator; either the one or the other they might do. Then comes the question, have they referred it in these terms: "it is further ordered by and with the consent of counsel on both sides that the matter in dispute between the appellants and respondents herein shall be referred to John Gray, Esq., . . . to inquire into and arbitrate thereon, the said several parties agreeing and consenting to abide the report of such his arbitration?" On that, can it be said the quarter sessions referred it to the arbitrator to give these costs, where it was in the power of the quarter sessions to say "he should decide it." They have used these words, out of which I cannot gather, even in a case where the costs would follow the event, an authority to the arbitrator to award them. Very similar words are made use of in *Bell v. Postelthwaite* (sup.). There the arbitrator was appointed under the Common Law Procedure Act 1854, s. 3, in which the word "costs" is expressly named, whereas in Baines' Act the words are merely general. In the above mentioned case a rule had been drawn up by mistake and was entirely silent as to costs, the parties supposing the costs would abide the event, and this court amended the rule by adding that the costs should abide the event. I think this is a stronger case, and we cannot say that the quarter sessions gave power to the arbitrator to give costs. That being so, he has added something to his award which he ought not to have done. I think, therefore, the award should be sent back to him.

MELLOR, J.—I entirely agree in the conclusion at which the court has arrived. It is clear it must be conceded that the quarter sessions have power to refer the question of costs. In many sessions it is even the rule not to give costs and let parties go without. There are matters in which references are without costs, and I am by no means sure that in this case it was not the intention of the parties that the reference should be without costs. If a power over them was to be given to the arbitrator, it should have been so stated. The parties may consent to his determining the question of costs, or may not consent, and it appears to me that, so far as can be ascertained from the order of reference, they have not done so.

Rule absolute.

Attorney for appellants, *W. Heggerty*.
Attorney for respondents, *J. Alley Jones*.

Nov. 16, 1869; Jan. 18 and Feb. 21, 1870.

TURNOR v. CAMERON.

Landlord and tenant—Demise of land, with option of taking more—Distress—Fixtures—Railway sleepers and rails.

Where there is a demise of land, with an option given to the lessee to take additional land from the lessor upon certain conditions; on the exercise by the lessee of that option the additional land is to be considered as taken under the original demise, and not as constituting the subject-matter of a new demise.

A lease of lands empowered the lessee to construct upon a certain portion of the lands, which was specified in the lease, such railways and other works as should be proper for the working of certain mines on the lands, and also to build upon any other part not exceeding fifty acres, which should be approved in writing by the lessor, such buildings, &c., as might be required for the working of the mines then or thereafter to be opened. A railway having afterwards been constructed on a part of the lands, other than the portion originally specified in the lease, which was approved of by the lessor, but not in writing:

Held, that the subsequent assent of the lessor to the construction of buildings, &c., on this portion of the land did not amount to a new demise, so as to make a joint distress on both portions of the land illegal; and that the stipulation as to the lessor's assent being in writing, being one intended for his benefit, might be waived by him, and was waived by his verbal assent to the construction of the railway on the new portion of land.

Rails and sleepers forming a railway used for the purpose of working a colliery, which are laid upon a level surface, the rails being nailed to the sleepers, and the sleepers kept dry and in position by quantities of hard and dry material, called ballast, placed under and about them, which prevents the sleepers being removed without its previous displacement, and without holes being formed by its falling in, are not distrainable for rent, even though they are in practice shifted about from time to time to meet the requirements of the colliery.

1. This was an action brought to recover damages for the breaking and entering a mine of the plaintiff situate under certain land called Tyr-y-Crenin, and the seizing, severing, and carrying away the plant, machinery, and other fixtures, tools, goods, and chattels of the plaintiff therein and thereon, and the selling and disposing of the same by the defendant to his own use, whereby the plaintiff lost the same and the security of the said plant, machinery, fixtures, tools, and chattels, which he had under a bill of sale from John William Jeffery O'Donoghue for securing 2000*l.*, and interest then owing to him the plaintiff, and for breaking and entering a close called Clement's Field, and the seizing and carrying away goods and chattels of plaintiff therein, and for seizing, taking, carrying away, and disposing of (among other things) several fixtures, buildings, rails, sleepers, railways, tramways, waggons, weighing machines, implements of manufacture, tools, machinery, timber, and materials, and for converting to defendant's own use goods and chattels of the like description as those last mentioned, and wrongfully depriving plaintiff thereof. To this declaration the defendant pleaded not guilty (by stat. 11 Geo. 2, c. 19, sect. 21), on which plea issue was joined.

2. At the last spring assizes for the county of Glamorgan a verdict was found by consent for the plaintiff for the amount claimed, subject to a case to be stated for the opinion of this court; and the arbitrator was by the order of reference empowered to find what damages, if any, the plaintiff was

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

entitled to, and to assess damages upon each separate head if he should consider them divisible. The following case was stated by him.

3. Nathaniel Cameron, father of the defendant, by indenture dated 15th Sept. 1859, demised to Thomas and John Burge, their executors, administrators, and assigns, for the term of eighty-five years, all the veins, mines, and seams of coal and other minerals upon or under the lands within the hamlet of Tyr-y-Crenin, containing 1300 acres (which lands were mapped on the back of a skin of the indenture) with the usual powers to work the mines, and take and carry away the coal and minerals, and to put up machinery necessary or convenient for working the mines, and to appropriate such part of the said lands as were coloured pink on the map, either under ground or on the surface, which might reasonably be required for depositing and keeping the coal and the minerals, and the earth dug up in raising them, and to set up, take down, remove, and rebuild, on such parts of the land as might reasonably and conveniently be appointed for such purpose, any house, sheds, engines, or other works, machinery, material, or buildings, and to do all other things necessary for the more effectually making and getting the coal and minerals, and all shafts, pits, houses, and buildings in, under, or upon the said lands coloured pink, and to use or construct upon any part of the lands coloured pink, all such railways and other roads and cottages for workmen, engines, or other buildings necessary or proper for any purposes connected with the said mines and the sale and delivery of the materials, and to build upon any part to be approved of in writing by Nathaniel Cameron or his assigns of the said lands not exceeding in the whole 50 acres, such dwelling-houses, smelting or other houses, cottages, hovels, lodges, hedges, sheds, and other buildings, as should be necessary and proper as well for effectually or conveniently working the mines then opened as others which should thereafter be opened, or otherwise in and about the exercise of the powers aforesaid, but not for any other purpose; and with such other usual necessary and proper powers, not requiring in the whole more than 50 acres of surface land, which might be necessary or convenient for any of the purposes aforesaid; doing as little damage as possible to the said Nathaniel Cameron and his assigns, and fencing, and inclosing all parts of the lands taken and occupied for any of the said purposes; reserving also to the lessor and his assigns power to make or carry on any tramroad or other road, canal, trench, or channel, made or to be made by the lessees or the survivor, their or his assigns, yielding and paying certain royalties per ton of coals or other minerals; and also paying at the rate of 30s. per statute acre for all such parts of the said lands, which should by the said lessees and their assigns be taken, used, and occupied in the exercise of any of the powers and privileges aforesaid. The lessees also thereby covenanted at the end or sooner determination of the term to yield up to the lessor or his assigns all the buildings and other premises thereby demised, and all removable machinery, works, articles, and things which the lessor or his assigns might elect to purchase at a price to be determined as therein mentioned.

4. In April 1860, Nathaniel Cameron died, and the reversion of and in the premises demised thereupon became vested in Nathaniel Pryce Cameron, the defendant.

5. By divers mesne assignments, and ultimately by an indenture dated 30th Dec. 1861, the premises, powers, and privileges granted by the said lease became vested in the Coalbrook and Broad Oak Company (Limited), for the residue of the said term of eighty-five years, subject to the payment of the rents and royalties, and the performance of the

covenants, conditions, and agreements reserved and contained in the said indenture of lease.

6. By an indenture of the 9th May 1865, made between the said Nathaniel Pryce Cameron of the one part, and the Coalbrook and Broad Oak Company (Limited) of the other part, certain alterations in the mode of paying the royalties reserved by the said lease were adopted, and power was granted by the company to the said Nathaniel Pryce Cameron so often as the rents and royalties should be in arrear for thirty days to enter upon the premises demised by the said indenture of lease, and to distrain for the rents and royalties and costs incurred by the non-payment thereof, and dispose of the distresses in due course of law, as landlords may do in respect of distresses for rent reserved on leases.

7. By an indenture dated the 25th April 1866, the Coalbrook and Broad Oak Company, in consideration of the sum of 1200*l.* paid to them by John William Jeffery O'Donoghue, assigned to O'Donoghue, his executors, administrators, and assigns, the plant, shares, tools, implements, and things comprised in the schedule to that indenture, and demised to O'Donoghue, his executors, administrators, and assigns for the term of fourteen years from the 25th March 1866, all the mines, veins, and seams of coal, culm, and other minerals and ores, in, upon, or under the lands and hereditaments within the hamlet of Tyr-y-Crenin, lying to the east of the Big Coalbrook Fault (shown by a blue dotted line on the plan endorsed on the last skin of the said indenture), which lands were known as the Coalbrook Slant, with power for the lessee, his executors, administrators, and assigns, to work the mines, and to take and carry away all the coal, culm, and other minerals to be found in, upon, or under the said land, and to dig, sink, drive, and use pits, shafts, levels, gutters, and sumps, and make such gates, headings, stables, soughs, levels, and drains, and to erect so many fire engines, machine, and other works as might be necessary or convenient for making, raising, and working the mines, or any new mines which might be opened, and for drawing off and discharging the water, and to appropriate such part of the land coloured pink on the map endorsed on the lease of 1859, as hereinbefore mentioned, either under ground or on the surface, which might reasonably be required for depositing the coal, culm, and minerals, and keeping the earth dug up, and to erect, take down, and rebuild, on such parts of the land as reasonably and conveniently might be appointed for such purposes, any houses, sheds, engines, machinery, or buildings, and to do all things necessary for more effectually working the coal and minerals, and to use all shafts pits, houses, and buildings, under or upon any part of the said land coloured pink, and also to use or construct upon any part of the said land coloured pink, all such railways, roads, cottages for workmen, engines, and other buildings, as should be necessary for any purposes connected with the enjoyment of the mines, and the sale and delivery of the minerals, and liberty of ingress, egress, and regress into and from the appropriated parts of the land, with horses, waggons, or otherwise as should be necessary, for carrying away and selling the coal and minerals by such roads and railways, and to erect on any part, to be approved in writing by the company or their assigns, of the said lands not exceeding in the whole five acres, all such dwelling-houses, and other houses, stables, buildings, and engines as should be necessary and proper for making the mines, or otherwise in the exercise of the power thereby given, and such other usual necessary and proper privileges, not requiring more than five acres of surface land, which should be necessary or con-

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

venient for any of the purposes therein mentioned, yielding and paying certain royalties per ton of coal and other minerals to be raised, and also the rent or sum of 30s. per acre for all parts of the surface of the lands in upon or under which the minerals expressed to be thereby demised were situate, as might be taken by the lessee, his executors, administrators, or assigns, in the exercise of any of the powers therein contained; and it was thereby declared that, whenever the rent and royalties thereby reserved should be in arrear, the said company or their assigns might enter and distrain and sell, in the same manner as landlords may for rent in arrear the coal, culm, minerals, engines, machinery, railway plant, cattle, implements, utensils, gear, and chattels belonging to the lessee, his executors, administrators, or assigns upon any part of the premises thereinbefore expressed to be thereby demised. And the lessee thereby covenanted (among other things) that he would erect and keep in repair a proper weighing machine, and that he would within six months from the 25th March 1866 lay down and finish fit for traffic, and afterwards keep in repair, a railway upon the surface of the land comprised in the said indenture, in manner and between the points therein mentioned, and would allow the said company to use the said railway in a manner therein expressed, and would at the expiration or sooner determination of the said term deliver up to the said company or their assigns in good repair all buildings, pits, shafts, and other premises thereby demised, together with all removable machinery, articles, and things which the company or their assigns might elect to purchase. The said company thereby covenanted that they or their assigns would permit the lessee, his executors, administrators, or assigns, within six months after the expiration of the said term of fourteen years, to take up and carry away all the rails, sleepers, iron, wood, and materials which should be laid and fixed by him or them in the lands comprised in the said indenture, unless the company should purchase the same, which they were thereby empowered to do.

8. The lands, mine, and premises comprised in the last stated indenture of lease were part of the lands, mine, and premises demised to the Burges by the lease first hereinbefore stated.

9. By an indenture dated 15th May 1866 the said John William Jeffery O'Donoghue, in consideration of the sum of 2000*l.* paid to him by the said Richard Turnor the plaintiff, demised unto the said Richard Turnor the veins, mines, and seams of coal, and all other the premises comprised in and demised by the said indenture of the 25th April 1866 for the residue of the term of fourteen years thereby granted, except the last three days thereof, subject to a proviso for redemption on repayment of the sum of 2000*l.*; and he also assigned to Turnor (among other things) the plant, chattels, and things comprised in the schedule thereto, and all fixtures, buildings, railways, weighing machines, engines, steam engines, gins, works, implements of manufacture, tools, machinery, timber, goods, and chattels which then were and should at any time during the said continuance of the said security thereby created be erected, constructed, or brought upon the premises thereinbefore expressed to be thereby demised, including the plant and material of which the said railway did or should consist, which the said William John Jeffery O'Donoghue had by the covenant thereinbefore mentioned, agreed to construct upon the premises by the said indenture now in recital demised, together with all necessary powers, by distress or otherwise, for recovering payment of the same rent by the said Richard Turnor, but subject to the provisos and covenants contained in the said indenture of lease of the 25th

April 1866, and to the proviso for redemption hereinbefore mentioned. And it was thereby provided and agreed that if the said sum of 2000*l.* should not be paid conformably to the proviso for redemption therein contained, and the said Richard Turnor should give to the said John William Jeffery O'Donoghue notice in writing under the hand of the said Richard Turnor, demanding payment at the expiration of six calendar months after giving such notice as aforesaid; and if the said principal money and interest should not be paid at the expiration of six months, or if the said sum of 2000*l.* should not be paid conformably to the aforesaid proviso or covenant for payment of the same, and one quarter of a year's interest for the same, or so much thereof as should remain due, should at any time afterwards be in arrear for more than three calendar months, it should be lawful for the said Richard Turnor absolutely to sell and dispose of the said premises, thereby demised and assigned respectively, or such of them or such part or parts thereof as he should think necessary, in manner therein expressed.

10. The last recited indenture was duly registered under the Bills of Sales Acts. At the date thereof all the things hereinafter mentioned as having been distrained were on the demised premises, except the rails of the new railway hereinafter mentioned.

11. The several indentures partly hereinbefore stated, are to form part of this case.

12. Default having been made by O'Donoghue in payment of the said sum of 2000*l.*, the plaintiff gave him notice that unless he should be paid that sum with interest and costs at the expiration of six months, he should exercise the power of sale and all other powers reserved to him by the said indenture of mortgage.

13. On the 16th Oct. 1867, the plaintiff accordingly sent Joseph Smith Fairly to take possession on his account, and Fairly took possession of all the plant, goods, and chattels, in and about the mine, moving a greater part of the movable things partly to the house of one Isaac John, and partly to a field, which he took for the purpose of depositing them, called Clement's Field.

14. The plaintiff placed men in possession to watch these things as well as those at the mine, and gave notice both to the said company and to the defendant that he had seized the plant, machinery, and removable fixtures in and upon the household premises demised to O'Donoghue by the said lease of 25th April 1866.

15. Up to the time of this removal the colliery was in good working order and was in full work, but the working was thereupon stopped.

16. The plaintiff at the time of his seizure also took possession of the engine and railway, and raised and sent away by their means the coal already worked, but no additional coal was worked after that time.

17. In the ordinary course of working, the water in the pit is raised by the engine and carried off so as to leave the coal capable of being worked. On a stoppage of the working the water increases rapidly in the pit. A few days after the seizure the plaintiff resumed the working so far as relates to raising and conveying off the water, and continued to keep the pit clear of water until the 6th Nov. then following. During that time the regular working could have been resumed on a few hours' notice.

18. On the said 6th Nov. the defendant distrained for the half year's rent, which had become due to him from the said company on the 29th Sept. preceding, amounting to 600*l.*, and took possession of and subsequently sold under such distress the goods, chattels, and things following (being the whole of the goods, chattels, and things therein and about

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

the mine and grounds adjoining occupied therewith), that is to say: A. Water trams within the mine. B. Smith's tools, carpenter's tools, wire rope, iron, timber, train grease, utensils, and stores within the yard or enclosure hereinafter mentioned. C. A railway within the mine. D. A railway within the yard. E. A weighing machine in a building within the yard, and also a winch frame and certain tipping stages and coal screens within the yard. F. A railway extending from the end of the yard through its length, and thence along a common, part of the waste of a manor of the defendant, to a junction with the Llanelly Railway, at a place called the Rhydymardy or Gorseinon Junction.

19. The several railways, and the weighing machines, winch frame, tipping stages, and coal screens were sold by the defendant, on the terms that they should be taken up and removed by the purchasers, which was shortly afterwards done, except as to part of the underground railway which was inaccessible by reason of the accumulation of water within the mine; and such part is still in the mine.

20. The defendant also entered the close called Clement's Field, claimed possession of the things deposited there, and included them within his notice of distress, but did not remove or interfere except as aforesaid with any of such things.

21. The action was brought for taking and selling the things beforementioned as sold, and the entry into Clement's Field.

22. The plaintiff contends that the distress was wholly illegal, and that he, the plaintiff, was entitled under the bill of sale to the things sold, and to sue for the taking and selling them; first, because all the things sold were tools of trade, and therefore privileged from distress; secondly, as to things above referred to as C, D, E, and F, that they were fixtures annexed to the soil, and not liable to distress; thirdly, as to all the things sold except A and C, that they were on land not part of the demised premises.

23. The defendant contends, first, that the bill of sale does not contain sufficient power to seize and take possession of after acquired property, and, therefore, was inoperative as to the new railway, which was not on the premises when it was given; but that, if it does, no sufficient possession to vest the property in the plaintiff was in fact taken. Secondly, that the things taken were not tools of trade, but if they were so that they were not privileged, unless there was enough property without them to satisfy the distress, which was not the case. Thirdly, that all the articles distrained were, under the circumstances of the case, distrainable chattels. Fourthly, that except the goods in Clement's Field, which were abandoned shortly after being nominally taken possession of, and except as to a small portion of the railway mapped hereinafter mentioned, the things taken were all on the demised premises, "the yard" having been originally taken for the purposes of the colliery, and that all the ground occupied by the railways (except as above mentioned) having been taken under the powers contained in the original lease of 1859, and so having become parcel of the demised land, though no consent of the lessor in writing was proved, yet such consent must, if necessary, be presumed; or else that as such approval was a condition introduced for his benefit, it was one which might be waived by him, and that the land having been taken possession of with his permission, a tenancy was created entitling him to distrain.

24. The water trams within the mines were of the value of 9*l*.

25. The movables within the yard were, to the value of 55*l*. 5*s*., things necessary for the carrying on the business of a coal mine, but were not in

actual use when distrained. These things were partly in a shed, stable, and other buildings within the inclosure, and partly on the ground within the same; the remainder of such moveables taken were coal, old iron, and manure.

26. The inclosure or "yard" had been fenced in by the first lessees of the colliery, from the surrounding common, which was part of the waste of a manor of the lessor, and had been continuously used for the purposes of the colliery from that time, but no approval in writing by the lessor of such inclosure was proved, nor the payment of any additional rent for such inclosures beyond that paid for the mine. The original lessees of the colliery had built on another part of the same waste several houses for labourers, and they and the successive lessees of the colliery received rents from the tenants of these houses for the occupation thereof, but no express devise or written assent by defendant or his predecessors in title to said occupation of the land was proved.

27. The railway throughout the mine was in width 3*ft*. 4*in*., made of small rails fixed by iron nails to transverse sleepers, which were slabs of oak or pine laid at intervals of about a yard apart; these slabs resting on the ground, and the whole structure being kept in position by its own weight, so as not to shift when trucks passed over it. The part of this railway sold and removed was of the value as removed of 230*l*.; to replace it with similar materials to those removed would cost 280*l*.

28. The railway in the yard was of similar construction and materials. As removed it was of the value of 45*l*. To reinstate it would cost 60*l*. The rails of this portion had in fact been from time to time shifted about to different parts of the yard according to the requirements of the colliery.

29. The weighing machine was inclosed within a stone-built building in the yard, and was fixed on cast iron brackets built into the opposite walls, and could not be taken out without removing parts of the walls of the building, which, in fact, was done on its removal. The coal screens and tipping stages were fixed by O'Donoghue in the yard, for the purpose of tipping the coal into the trucks of the railway made by him, as hereinafter mentioned, the screens and stages being fastened to timbers let into the walls of a siding made by him for the same purpose; and the upright timbers of the structure were let into the ground, and were removed with the screens and stages. The winch frame was also fixed into the ground within the yard. The weighing machine detached was of the value of 5*l*. 10*s*. To replace it would cost 14*l*. The coal screens, tipping stages, and timbers detached were worth 3*l*. To reinstate them would cost 7*l*. The winch frame detached was worth 1*l*. To replace it would cost 2*l*.

The railway, called the new railway, was that made by O'Donoghue pursuant to his agreement contained in the lease hereinbefore recited. It began at the end of the yard hereinbefore mentioned, and ran in a deep cutting through the yard for about 80 yards, and thence over the waste or common hereinbefore mentioned for about 900 yards, to a point where it entered (as to one of the lines of rail thereof) on land of one William Rees, from which point it ran in the same manner for a space of 40 yards (as to one rail) on the land of the said William Rees, the other line of rail continuing on the said waste, and the said space of 40 yards terminated on the ground of the Llanelly Railway, adjoining the Gorseinon Station aforesaid.

A rent was paid by O'Donoghue to William Rees for the strip of his land which the new railway ran over in manner aforesaid.

The last mentioned railway was made on the waste with the verbal assent of the defendant; but

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

it was not proved that he gave any written assent thereto.

The whole quantity of land taken for the railway was less than five acres in extent.

30. The new railway was 4ft. 8in. wide, and of heavier material than those of the other railways hereinbefore mentioned, but in other respects similarly constructed. The sleepers rested on ballast, which was necessarily disturbed by removing them, but the original underlying soil was not thereby interfered with.

31. All the said above mentioned railways were convenient and necessary for the carrying away the coals and minerals from the mine.

32. Railways of all the above classes are in practice slewed and shifted about from time to time to meet the convenience of working collieries, but the mode of their construction does not differ from that of the main trunk lines, which are capable of being shifted in like manner, that is by "breaking a joint"—i.e., cutting through one rail and sleepers with that object.

33. The railway in the yard was worked by weight of trucks, being on an incline; the new railway by horse power.

34. The value of the whole of the new railway, with the sleepers and materials as detached, is to be taken as 320*l.*, but as replaced it would cost 385*l.*, materials of equal value with those taken being supplied in all replacements hereinbefore referred to.

If the value of the sleepers on the said land on 15th May is to be found separately it is to be taken at 32*l.* as detached and 35*l.* as reinstated.

35. The part of the railway on Rees's ground is to be taken as of the value of 13*l.* detached or 17*l.* replaced.

36. The cessation of working has caused an accumulation of water in the mine which it would cost 500*l.* to remove and repair the effects of, but which damage I do not conceive to be in issue in this action.

37. As to the entry into Clement's Field, and alleged taking therein, I find that the plaintiff is entitled to 1*s.* damages in respect thereof, and no more.

38. The questions for the opinion of the court are (1), whether the plaintiff is entitled to sue the defendant for the other trespasses above mentioned, or any and which of them; and (2) whether the said several things distrained by the defendant, or any and which of them, were legally distrainable. If the court shall be of opinion that the plaintiff is so entitled to sue, then the verdict in his favour is to stand for the value of such things so distrained by the defendant as aforesaid, as the court shall be of opinion were wrongfully taken under the circumstances aforesaid, in addition to the said sum of 1*s.*, or is to be otherwise varied as to the court shall seem fit.

Giffard, Q.C. (with him *J. W. Mellor*), for the plaintiff.—There has been no demise of the land referred to in the case as coloured pink, and the relation of landlord and tenant did not exist. There is nothing from which such a relation can be inferred, and the distress was therefore bad. Again, the distress was bad as being a joint distress for two separate demises. [*LUSH, J.*—Is it not one demise where the agreement is that the tenant may enlarge the extent of the demised premises but on payment of an increased rent?] In *Rogers v. Birkmire* Cas. Temp. Lord Hardwicke, p. 245, a joint distress for two distinct messuages at two distinct rents was held bad under similar circumstances. Lord Hardwicke said, "Defendant justifies for a joint distress for two separate rents; for though he made but one lease to the plaintiff, yet in that lease there are two different terms and two different reservations, one

upon the stable and the other upon the messuage; the term in the messuage and the rent thereof are to commence immediately; whereas the term in the stable was not to commence till Lock's surrender, and a different rent is reserved; so that although this be all by one deed, yet they are two as distinct demises as if they had been by two deeds, and likewise for two distinct terms; the consequence whereof is that there must be distinct reversions, and if so then they are distinct rents, and then the question is whether in trespass a joint distress out of several premises without distinguishing how much in one and how much in the other can be justified;" and the court held that the distress could not be justified; a decision which appears to govern the present case. [*COCKBURN, C. J.*—In that case there were two distinct terms. In the present case there is only one demise, the time for exercising the option of taking additional land only being deferred; but the power and the right to take it, the instrument under which it is to be taken, is one and the same.] That the instrument is one makes no difference according to Lord Hardwicke, who says, "Though this be all by one deed, yet they are two as distinct demises as if they had been by two deeds." [*HANNEN, J.*, referred to *Daniel v. Gracie* 6 Q.B. 145, where the proprietor of a house and of a marl pit and brick mine demised the house by unwritten agreement to a tenant from a day named; and it was at the same time agreed between them that the tenant should take the marl pit and brick mine, and should pay quarterly a certain sum per solid yard for all the marl that he got, and per thousand for all the bricks that he made; and the tenant having taken the marl and made bricks and paid the stipulated amount for a certain time, fell into arrear; the court held that the agreement for the marl pit and brick mine was a demise of the land from year to year at a rent capable of being ascertained with certainty, and for which, therefore, the lessor might distrain.] The rent here has a different beginning in each case, and the case, it is submitted, falls within the decision in *Rogers v. Birkmire*, where there was an absolute demise. The proviso for re-entry contained in the lease of 1859 was confined to the land then demised, and cannot affect that afterwards taken. In the next place, the things distrained by the defendant are not subject to distress: they are trade fixtures attached to the soil which the landlord cannot remove. Whether machines fixed to the freehold become parcel of it is, according to the judgment of the Court of Exchequer in *Hellawell v. Eastwood*, 6 Exch. 312, "a question of fact depending on the circumstances of each case, and principally on two considerations: (1) the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, and whether it can easily be removed, *intégrè, salvè et commodè*, or not without injury to itself or the fabric of the building; (2) on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usus causâ*, or in that of the Year Book, *pour un profit del inheritance*, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*." On this principle the railways, trams, and other things distrained in the present case must be held part of the freehold, and therefore not liable to distress. If these are part of the freehold, and would go to the heir, then the machinery which is used by them would follow the same rule. In *Fisher v. Dixon*, 12 Cl. & Fin. 312, it was held that where the absolute owner of land, for the purpose of better using that land, erected upon and affixed to the freehold certain machinery, in the absence of any disposition by him of this machinery, it would go to his heir.

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

as part of the real estate; and that if the *corpus* of such machinery belonged to the heir, all that belonged to that machinery, though more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir. The decision of Comyns C.B., holding a cider mill fixed in the ground to be personal property, can hardly be considered an authority at the present day. Lord Brougham thus speaks of it in *Fisher v. Dixon* (*ubi sup.*): "It is a remarkable circumstance that of that case we have only a very indistinct and unsatisfactory report. We have really nothing that can be called a record of that case. It was cited in the case before Lord Hardwicke, and I must also say that if the cider mill case is to be taken as it is represented to us, as regards the substance of the case, and in its result, my mind goes not at all with that decision. It is contrary undeniably to the general principles of our law upon the subject; and if the same question were to arise to-morrow, with the circumstances which are represented to have attended that case, it would not, in my opinion, lead to the same result." The railway distrained in the present case was really a road. [HANNEN J.—But it is found in the case that it was usual to remove it from place to place] That is for the convenience of the tenant, and the same thing is true of many fixtures which are nevertheless held to form part of the freehold. [MELLOR J.—Mr Amos (On Fixtures, p. 2) says: "It is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land or to some substance previously connected with the land. It is not enough that it has been laid upon the land and brought into contact with it. The definition requires something more than mere juxtaposition; as that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented or otherwise fastened to some fabric previously attached to the ground."] It is found as a fact in the present case that the railway cannot be removed without disturbing the ballast, which is as much part of the soil as the earth itself. In *Climie v. Wood*, L. Rep. 3 Ex. 257; 18 L. T. Rep. N. S. 609, it was held that trade fixtures which have been annexed to the freehold for the more convenient using of them, and not to improve the inheritance, and which are capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold to the mortgagee. An authority to the same effect was *Cullwick v. Swindell*, L. Rep. 3 Eq. 249, and *Boyd v. Shorrock* L. Rep. 5 Eq. 72; 17 L. T. Rep. N. S. 197, seems inconsistent with *Hellawall v. Eastwood* (*ubi sup.*). As to the weighing machine described in paragraph 29 of the special case, it must, on the authorities, be regarded as parcel of the freehold. It was inclosed within a stone building, and fixed on cast iron brackets built into the opposite walls, and could not be taken out without removing parts of the walls of the building, which in fact was done on its removal. Then as to the damages. The arbitrator has found that the mine has become unworkable, and, owing to the accumulation of water, that 500*l.* would be required to remove the water and repair the effects of the damage, though he thinks that damage is not in issue in the present action. But it is submitted that that damage is in issue; that it is not special damage, and therefore did not require to be alleged in the declaration. If a pump is used for emptying a mine of water, and it is taken in distress, the accumulation of water in the mine is the immediate consequence of the removal of the pump, and the damage is directly proximate. The present case is similar, as the trams, by which alone the water is

drawn out of the mine, have been taken under the distress.

Grove, Q.C. (with him *Hughes*) for the defendant.—It will not be contended on the part of the defendant that he is not liable for the entry into Clement's field and the alleged taking therein, as to which the arbitrator has found that the plaintiff is entitled to 1*s.* damage. Neither will it be contended that the defendant is not liable for the further damage which the arbitrator has assessed at 14*l.* But as to the distrainability of the rails and sleepers, it has never been decided that a thing which rests on the land merely by its own weight, becomes part of the freehold. A fixture is not a thing which is merely laid upon the soil. The finding of the arbitrator, as stated in paragraph 27 of the case, amounts to a finding that the railway was not a fixture. It is found to have been made of small rails fixed by iron nails to transverse sleepers which were slabs of oak or pine, laid at intervals of about a yard apart, these slabs resting on the ground, and the whole structure being kept in position by its own weight, so as not to shift when trucks pass over it. The whole thing might be taken up easily and placed on any other portion of the land, and paragraph 32 of the case finds that railways of the kind are in practice slewed and shifted about from time to time to meet the convenience of working collieries. Further, in the lease of 25th April 1866, the railways are treated as removable and distrainable, the proviso for re-entry being that whenever the rents and royalties reserved should be in arrear, the Coalbrook Company or their assigns might enter and distrain and sell in the same manner as landlords may for rent in arrear the engines, machinery, railways, &c. [HANNEN, J.—This is a contract between the lessee and a sub-lessee. Can that alter the character of the thing as between the lessee and the original lessor?] The original lease, too, treats the railways as removable plant, though it does not expressly give a power of distress. [COCKBURN, C.J.—There is nothing in the original lease to extend the power of distress beyond the ordinary things. The parties may treat certain things as removable for particular purposes, but it does not therefore follow that they are to be so taken for all purposes.] In *The Duke of Beaufort v. Bates*, 31 L. J. 480, Ch.; 5 L. T. Rep. N.S. 546, where a lease of coal mines and iron works contained a covenant by the lessee to yield up to the lessor at the expiration or other sooner determination of the term all "ways and roads" in or under the demised hereditaments in such good order, repair, and condition as that the said coal and iron works might be continued and carried on by the lessor, one of the vice chancellors considered that tramways fastened to iron or wooden sleepers, which were not let into the ground, but rested thereon, were protected by the covenant, and granted an injunction restraining the taking up, sale, or removal of such tram plates by a judgment creditor of the lessee; but on appeal the Lords Justices held that the movable chattels were not included in the terms "works," or "ways," or "roads," and that the injunction must be dissolved. "The evidence," said Knight Bruce L. J., "convincing me that the sleepers and tramways in question are not fixed to the freehold, but are to all intents and purposes, subject to any question that the terms of the lease may raise, the goods and chattels in our legal phrase, of the tenant, the defendant at law, and therefore liable to be seized by the sheriff under the execution against him. As for the stone sleepers and the tram plates lying on them, they may be placed out of the case, for, as I understand it, the defendant here, the plaintiff at law, is willing to undertake that he will not, and that the sheriff

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

under his execution shall not interfere with any of the stone sleepers, or with the tram plates lying on them. Neither under the word "works," nor under the word "ways," nor under the word "roads," nor under all three together, are, in my opinion, movable chattels of this kind comprised, nor were they, as I consider, the instrument intended to be comprised. It may be the duty of the tenant at the end of the term to leave the roadway in good order, and condition. That is not the question. Is it his duty according to this lease, leaving the road in good repair and condition, to leave upon it the sleepers and tram plates, movable as they are, without which I agree it cannot be conveniently used, or cannot be at all used as a tramroad or railway? That in my opinion is not the meaning of the covenant." Turner, L. J., said, "If they were not affixed to the freehold they were trade personal chattels of the lessee, belonging to him, brought by him upon the demised premises, continuing to belong to him, and would be removable by him during the term according to the general law. And if, therefore, they were trade personal chattels it would be incumbent upon the landlord to prove a custom to prevent the tenant from removing them, and certainly there is no evidence of any such custom, if such custom there could be." [LUSH, J.—Lord Coke lays it down generally that things which cannot be restored in the same plight and condition cannot be distrained for rent. See Co. Litt. 47.] Lord Justice Turner thought it clear upon the evidence in the case before him that the trams and sleepers were not affixed to the freehold. "The evidence," he says, "upon the subject seems to me to be all one way; for though we have two witnesses on the part of the plaintiff who speak of them as affixed to the freehold, it is perfectly plain when the evidence of those witnesses is examined, that what they mean by affixed to the freehold is that they are sunk in the soil by the pressure of the waggons passing over the trams. There is no affixing to the freehold in any other sense." That case goes even further than the present, for the sleepers were there laid on stones which were fixed in the soil; in the present case the sleepers are not even laid upon the soil, but upon ballast placed over the soil. *Hellawell v. Eastwood* (*ubi sup.*) is an authority in favour of the defendant, for their mules used for spinning cotton, which were fixed by means of screws, some into the wooden floors of a cotton mill and some by being sunk into the stone flooring and secured by molten lead, were held distrainable for rent. The machine in the present case is clearly within the decision in that case. [COCKBURN, C. J.—You contend further that the railway, though it must be taken to pieces in order to remove it, is also distrainable.] It would suffer no injury by removal, and that it would be necessary to take it to pieces, is no objection. Parke, B. says of the machines in *Hellawell v. Eastwood*: "They are not of a perishable nature, and would not suffer by a careful removal. If it were necessary to take some to pieces in order to remove them, that circumstance would make no difference; for that might occur with chattels with respect to which there is no question, as for instance, post beds; they could not be carried to the pound without being first taken to pieces, and the distrainee would have no reason to complain that they were restored to him in the disjointed state at the pound where he must attend to receive them. Nor does it make any difference that the distrainee would be obliged to incur the expense of refixing the machinery. Precisely the same objection might be made to the distress of any article which it required expense to carry back from the pound, and to restore to its former position. The distrainee at common

law must be at the trouble and expense of taking back his goods from the pound. This practical inconvenience is now obviated by the power of impounding on the premises." As to the question of damages, the plaintiff himself stopped the working of the colliery, see paragraphs 14, 15, and 16 of the case. Finally, as to the new railway, whether it is to be considered as part of the original demise. [COCKBURN, C. J.—We all think it is part of the demised premises].

Giffard, Q. C., in reply.

COCKBURN, C. J.—I do not think we are in a position to give our ultimate judgment upon this case; but I think there are one or two things which are clear, and as to which we might disembarass our minds and the minds of those who are interested in the decision of this case at once without taking further time for consideration. And the first question is, whether there has been any such demise of that part of the railway as to which Mr. Grove, for the defendant, maintained the right of distress, upon the ground which is not coloured pink upon the plan. Mr. Giffard, as I understand, maintains that there has been no such demise; at all events, that there has been no such demise under the present lease, which is necessary in order to make this distress good. Now the reason, he says, that there has been no such demise, and that, if the relation of landlord and tenant has been created with regard to that land it arises from a subsequent demise, is this: By the terms of the original lease from Mr. Cameron, the father of the present defendant, and the original lessor, the lessee was to have the right of laying down and constructing a railway upon the land coloured pink on the plan annexed to the lease; but the lease contained a further power to the tenant to erect buildings and machinery, and other things essential to the working of the mine, over an extent of fifty acres, to be fixed by the consent of the landlord in writing; and there was a further power over a similar extent of fifty acres, which for the present purpose I will take to mean the identically same fifty acres, to use over that area such privileges as should be necessary and convenient for the working of the mine. Now, a part of this railway—that part as to which this question arises—is not upon the land represented by the pink colour upon the plan. It appears that as to the part in question, the landlord's consent, as required by the terms of that clause in the lease to which I have referred, was obtained, but not in writing. It was a verbal consent to the appropriation of the land in question for the formation of the railway; and Mr. Giffard therefore says that, assuming there was a demise of the landlord to the tenant of the land upon which this railway has been constructed (that part of the railway not upon the pink), it was a distinct and separate demise. I think it was not. It is true that the consent of the landlord was required, and was required to be in writing. That provision is intended for the protection of the landlord, and I think that if the landlord, instead of insisting on his consent being as required by the lease in writing, chose to give a verbal consent, and allowed the construction of the railway to take place with his acquiescence, he has waived the stipulation which was intended in his favour and for his protection, and what has taken place is quite equivalent to the consent in writing which was required by the lease. Then comes the question whether, such consent having been given and the land subsequently taken, it forms part of that which was comprehended in the original demise. I think it was so comprehended, that where you have a demise of so much land with an option to the lessee to take more upon certain conditions, an option in the matter

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

being given to both lessor and lessee that by common consent other land shall be added to that which was the subject matter of the primary and original demise, if that option is exercised, the land which is to be taken must be considered as taken under the original demise and not as constituting the subject matter of a new demise. I think, therefore, that that difficulty is got over; that the relation of landlord and tenant did exist in regard to this part of the land so taken, and that consequently it was subject to distress. But then comes the question whether the railway which was taken under this distress was properly subject to that proceeding on the part of the landlord. Now, the first question which presents itself here is one upon which I do not think we have the materials for forming a definitive judgment. It is, on the one hand, said that the sleepers and the rails which rest upon the sleepers are not at all fixed in the soil, or attached to the soil, but that they simply rest upon the surface of the ground by the effect of their own weight. If that were all that was found in the case, I should think that no difficulty presented itself. A thing which is removable by the hand, or by any substitute for manual power, and which is capable of being removed without injury to itself, or without injury to or displacement of the soil, is a movable chattel and as such is subject to be distrained. But then, although it is said that these rails rest upon the ground by the effect of their own weight, there is a difficulty created by the introduction of the statement that ballast is used for the purpose of forming this railway; because if the ballast is added to the natural ground and becomes part of the soil, and then either the sleepers and the rails are imbedded in the ballast, or the ballast is piled up round them, so as to prevent the sleepers and the rails from being removed without tearing open the soil by which they have been surrounded, then if that from which they have thus been detached by this sort of disruption is a part of the original soil, these sleepers and the rails are attached to the original soil, have become part of the freehold, and cannot be removed for the purpose of distress. I think, therefore, the case, as far as regards that part of it, must go back to the arbitrator for a clear and definite finding and statement as to how far these sleepers and rails which have been removed by this distress were or were not attached to the soil, so as to have become part of the freehold. Another question presents itself—viz., whether, inasmuch as, with a view to their removal for the purpose of distress, it was necessary that these rails should be taken to pieces, they would under those circumstances be the proper subject-matter of distress. I think that is altogether disposed of by the very luminous judgment of Lord Wensleydale in *Hellawell v. Eastwood*, in which he points out that this is merely—as the matter stood at common law—that things which were not distrainable at common law cannot now be distrained; that instead of taking a thing as a pawn or pledge you can now take it in liquidation of the rent, which you could not do at common law, but still that you must look at the thing as it would have been before the statute on that subject was passed, and that it by no means followed, but the contrary, that because a thing, in order to be taken to the pound, as it must have been in ancient times, from its position or from its nature required to be taken to pieces, in order to enable the distrainer so to deal with it, he was therefore deprived of the remedy to which he was entitled in the shape of distress in the removal of the chattel which he took away in pledge; and that although it might so be that when the tenant came to redeem the pledge or pawn by paying the rent, as a security for which it was taken, he found it from the very nature of things

separated into different parts, and the consequence might be that an expense would be entailed upon him to restore it to its former condition; yet that was neither more nor less than a consequence of his own default in the payment of the rent, which occasioned and justified the distress on the part of the distrainer. The distrainee, therefore, although he might suffer that injury, would have only himself to blame for the consequence of his own default in not paying the rent. Applying, then, that argument here, suppose the sleepers and rails of the railway—part of the railway—are liable to be distrained, it does not follow that because they must be taken to pieces, or because in order to put them together again if they should be removed, on payment of the rent, it would be necessary for the tenant to go to an expense in restoring them to their former position,—it by no means follows, on the authority of that case, that this would be any reason why such articles should not be taken for the purpose of distress. I should, therefore, be disposed to hold that this distress was right as to those parts of the case in which Mr. Grove admits there must be a verdict for the plaintiff in respect of them; and also as to the distraining this railway, I should be disposed to hold that the defendant was right, and the distress could be made, with the exception of the one point to which I have referred, upon which, I think, the court should have more information before we decide it. It will not therefore be necessary, as far as it appears to me, to come back hereafter to those points we have disposed of now; but we reserve it to ourselves to deliver our final judgment on the one point, viz., how far the railway was attached to the soil of the freehold, so as to make it form part of it, and therefore not distrainable.

MELLOR, J.—I would only just say with reference to the ballast, that what I am a little perplexed about is this: I understand the arbitrator finds that the attachment could not be dissolved or got rid of without displacing the ballast. I do not quite know what he means by that. If he means that the ballast is something which itself would be distrainable and different from the earth on which it is placed, I am not prepared to agree with him. At present I am inclined to think that when ballast is placed there, it is placed only for the purpose of substituting one earth for another earth, viz., something that is porous and likely to be dry and easily drained for the soil that would not probably be so easily drained, and, therefore, it forms part of the very earth itself, and could not be removed for the purpose of distress, nor would an action of trespass lie for it. I think when it is once spread over the embankment it becomes as it were part of the embankment or part of the cutting just as much, it appears to me, as the soil on which the ballast is placed. Now, when the arbitrator says that this railway could not be removed without displacement of the ballast, does he mean to say he confines the displacement in this way to some minute or small effect produced by the removal or lifting off the rails from the ballast? If it is nothing more than that, I think the doctrine of *Hellawell v. Eastwood* would apply, and that it would be distrainable; but my mind would certainly be very much affected by any opinion of the arbitrator as to the extent and character of the displacement to which he refers.

Grove, Q.C.—The word the arbitrator uses is “disturbance.” He says the ballast would be no way disturbed by removing them.

MELLOR, J.—That would make a difference; but it is very minute. The arbitrator seems to me sometimes to speak of the ballast as if it were something different from the earth. That is what I want to know.

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

LUSH and HANNEN, JJ., concurred.

Judgment accordingly.

The case having been referred back to the arbitrator for further information on the question whether the sleepers and rails removed under the distress were or were not attached to the soil, fresh evidence was taken, and the following additional facts were submitted to the court.

1. Generally as to all the railways distrained—the mode of their construction was as follows: The ground was brought to a dry and uniform surface by spreading thereon such hard and dry materials as the soil afforded; some further material of the same nature, such as broken stone and cinders, being brought from elsewhere wherever the natural soil was moist, or its surface depressed so as to require such aid to make it dry and level.

2. On the surface thus levelled the sleepers were laid, for the most part transversely, at equal distances.

3. The rails were then laid along the sleepers and fastened to the surface of them by dog nails, which are long and strong nails, either driven through holes in the rails prepared for that purpose, or made with a flat head projecting over the foot of the rail and grasping it closely when hammered down, the sharp end of the nail being in either case driven into the sleeper as deeply as the wood will admit, and thus firmly fixing the rail thereto.

4. After these steps had been taken, large quantities of the above-mentioned dry and hard material called ballast, was brought along the line and packed under and about the sleepers, with the twofold object—first, of keeping them dry, and thus preserving them from decay; and, secondly, of keeping them by its support beneath and at the sides, in the position in which they had been placed.

5. The rails were clear of the ballast.

6. After the railways had been used for traffic, the ballast packed under and about the sleepers became more solid than when first deposited; the sleepers also became more deeply embedded in the ballast.

7. The rails and sleepers were thus removed: the dog nails were commonly wrenched out of the sleepers with a bar or pick, but in many cases the flattened head of the nails before mentioned was merely knocked aside when it did not pass through a hole in the rail, the rail being thereby released. Many of the nails were left sticking in the sleepers when the latter were removed. It was impossible to ascertain the relative numbers of the rails detached from the sleepers in these different modes.

8. The rails being thus set free were carried off. Then the ballast about the sleepers was partly removed or loosened by a pick where they had become firmly embedded, and next a lever or bar was driven under the sleeper through the remaining or loosened ballast (as the case might be), and by means of such lever or bar the sleeper was raised above and detached from the remaining ballast, so as to be easily carried away.

9. As to the railway in the mine, referred to at paragraph 27 of the case, the sleepers of this railway were all embedded in the soil to the depth of 2 in., and continued so at the time of the distress, with the exception of about 200 yards in length of the railway in the slant, where the sleepers (which were here laid longitudinally) had recently been washed bare of ballast by the action of water running down the slant, and merely rested on the ground, being kept in position by stays, that is pieces of wood driven between the wall or side of the pit and the sleepers. When this portion of sleepers and rails were removed there was no disturbance of the soil, except a slight displacement of earth from the side of the pit, arising from the removal of the wedges.

10. The value of the rails and sleepers of this denuded part, in case it ought to be ascertained separately, is to be taken at 18% as removed, and 22% as replaced, being part of the respective amounts of 230% and 280% referred to at paragraph 27.

11. The railways in the yard had the sleepers completely embedded in the ballast, such sleepers being from an inch and a-half to two inches deep.

12. The new railway mentioned in the case had sleepers of larger dimensions than the others above mentioned. These sleepers were of the depth of four and a-half inches, and were laid transversely. In the centre, between the rails of this line, which was worked with horse power, ballast was packed to a level with the tops of the sleepers in order to make a level surface for the horses to work on. The ballasting continued to the line of the rails packed about the sides of the sleepers, but with a decreasing depth of ballast towards the outside. The extreme ends of the sleepers were for the most part visible, but the sleepers were covered with ballast to their whole length in some places, and especially at the curves of the line. Some of these sleepers were round at the lower end, and some of them square.

13. As to all the railways. The hollow places left by the removal of the sleepers were distinctly visible, and in all of them, except in the denuded part of the slant above mentioned, some displacement of the ballast under and about the sides of them necessarily took place when they were removed, first from the use of the pick and bar as before stated, and next from the falling in of the ballast into the holes caused by the removal of the sleepers. Where the sleepers were round, such falling in was considerable; where they were square it was to a less extent. The sleepers were in general round bottomed, but no account was kept of the relative numbers of these respective shapes.

14. At the hearing of the additional evidence called to enable me to find the above facts it was contended that the rails might be considered liable to distress, though the sleepers might not be subject thereto. It case it should become necessary to ascertain the value of rails and sleepers separately, I find that the value of all the sleepers distrained was as follows: In the underground railway the sleepers removed, exclusive of the denuded part, were worth as removed 3%—inclusive of that part, 3% 10s.; but to replace them with like materials would cost 9% and 12% respectively, such sums of 3% or 3% 10s. being included in the sum of 230% mentioned in paragraph 27; and the sums of 9% or 12% being included in the sum of 280% there mentioned.

15. The sleepers in the yard were of the value of 1% ; but it would cost 3% to replace them, such sums of 1% and 3% being part of the sums of 45% and 60% respectively, mentioned in paragraph 28 of the case.

16. The value of the sleepers of the new line was 63% as detached; but to replace them with like materials would cost 70%, such sums being respectively included in the sums of 320% and 385%, mentioned in paragraph 34 of the case.

Jan. 18, 1870.—*Giffard*, Q.C. (*J. W. Mellor* with him) for the plaintiff, contended that the additional facts found by the arbitrator showed that the rails and sleepers became part of the realty, and were therefore not distrainable for rent; and they referred to the cases already cited in the previous argument.

Grove Q.C. (with him *Hughes*), for the defendant, contended that the placing of the sleepers and rails on a foreign substance called ballast, and allowing them to rest on it by their own weight, could not

Q. B.]

TURNOR v. CAMERON.

[Q. B.]

deprive them of their character of distrainable chattels. They also referred again to the cases previously cited.

J. W. Mellor in reply.

Our adv. vult.

Feb. 21, 1870.—The judgment of the court was now delivered as follows by MELLOR, J.—This case was argued before the Lord Chief Justice, my brother Lush, my brother Hannen, and myself. The only question not determined on the first argument in this special case was the liability of the railways therein described to be distrained for rent. The facts then stated by the arbitrator were not sufficient in our opinion for the satisfactory decision of that question, and we sent the case back for a further finding and statement of the exact mode in which the railways had been constructed, and how far and in what manner they were attached to the freehold. Upon the further statement of the arbitrator we are satisfied that such railways are not liable to be distrained for rent. It now appears that the ground on which they were laid was brought to a dry and uniform surface by spreading thereon, wherever the natural soil was moist or its surface depressed, such hard and dry materials as the soil afforded, with some further material of the same nature, such as broken stone and cinders brought from elsewhere so as to make it deep and level. On this surface so prepared the sleepers were laid and the rails were fastened to the sleepers by long and strong nails either driven through holes in the rails or made with a flat head projecting over the foot of the rail, and grasping it closely when hammered down, the nails being driven into the sleepers as deeply as the wood would admit, and thus firmly fixing the rails thereto. Large quantities of such hard and dry material called ballast were then packed under and above the sleepers with the double object of keeping them dry and preventing their decay, and secondly of keeping them by its support beneath and at the sides in the position in which they had been placed. On being used for the purposes of the colliery, the ballast under and above the sleepers became solid, and the sleepers became more deeply imbedded in the ballast. In order to remove the rails from the sleepers, the usual mode was to wrench the nails out of the sleepers by bars or picks, and many of the nails were left sticking in the sleepers. To remove the sleepers the ballast was first loosened by picks, and then levers or bars of iron were driven under the sleepers. The railway called the new railway was fixed with sleepers of larger dimensions, and laid deeper in ballast, which was packed to a level with the tops of the sleepers, in order to make a level surface for the horses to work on. In all the railways the removal of the sleepers caused hollow places and holes to be formed by the falling in of the ballast, and wherever round sleepers were used, such falling in was considerable. The facts so found by the arbitrator appear to us satisfactorily to show that the railways in question were not distrainable for rent, and that our judgment must therefore be for the plaintiff. The question to be determined is whether the rails and sleepers forming the railways under consideration continued to be personal chattels, or whether by reason of their annexation to the freehold as above described, they became fixtures. The following is the definition of a fixture given in the treatise of Messrs. Amos and Ferrand, part 1, c. 1, p. 2, "It is necessary in order to constitute a fixture, that the article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land and brought into contact with it. The

definition requires something more than mere juxtaposition, as that the soil should have been displaced for the purpose of receiving the article, or that the chattel should be connected or otherwise fastened to some fabric previously attached to the ground." In the present case we have not to consider the law which is applicable to fixtures as between the different descriptions of representatives of the same owner of the inheritance; neither have we to consider under what circumstances fixtures may be removed, either under express contract or in favour of trade, or what fixtures may be taken in execution under a writ of *fiery facias*; but the simple question, did these railways, notwithstanding such annexation as is described in the case, retain the character of personal chattels; for, if they did not, they were not liable to be distrained for rent. It is a general rule that things adhering to the freehold cannot be taken under a distress for rent, the reason being as stated by Gilbert, C. B. (Gilbert on Distress, pp. 34, 48), "that a distress was anciently no more than a pledge in the hands of the lord, to compel the tenant to pay the service or perform the duty for which it was taken. It results from the nature of a pawn or pledge that upon payment of the money for security whereof it was given, it ought to be restored to the owner in the same plight and condition in which it was delivered, and whatsoever is part of the freehold cannot be distrained, for what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal." Consequently, that cannot be a pledge which cannot be restored in *statu quo* to the owner. In determining whether the thing distrained is a personal chattel or a fixture, it is important to consider the mode and degree of annexation to the soil or fabric; that is, whether it can easily be removed *integre salve et commode*, without injury to itself or to the fabric of the building, and in the next place whether it was for the permanent and substantial improvement of the freehold or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel (per Park, B. in *Hellawell v. Eastwood*, 6 Ex. 312.) We think that it must be taken as a fact that the railways in question were constructed for the better enjoyment of the colliery, and were so far permanent that they were intended to remain on the premises as auxiliary to the working of the mines, at least until the expiration of the term, and were so constructed and fixed, not for the purpose of steadying them for their better use as chattels, but as a substitute for the natural surface of the ground along which it would have been impracticable to have worked the trains. It is expressly found by the arbitrator that they were so fixed and attached to the freehold as not to be capable of being removed without considerable violence and wrenching by means of picks and iron bars, so that in their removal considerable holes were left in the surface by the falling in of the ballast material. The rails were wrenched from the sleepers by the use of similar instruments, leaving large nails sticking in the sleepers, and in the new railway the ballast was so placed and packed as to form a roadway for the horses drawing the trucks over the railway. Now this is a great deal more than attaching the railways slightly so as to be capable of removal without the least injury to the surface or to themselves: (Per Parke, B., in *Hellawell v. Eastwood*, 6 Exch. 312.) The argument in favour of the defendant mainly rested upon the decision of the Court of Exchequer in *Hellawell v. Eastwood*, 6 Exch. 295, and upon the judgment of the Lords Justices in *The Duke of Beaufort v. Bates*, 31 L. J. 481, Ch. The case of *Hellawell v. Eastwood* has been frequently cited in support of propositions to which it was not applicable; but it has been recognised in this court in *Waterfall v.*

Q. B.]

JONES (app.) v. WHITAKER (resp.)

[Q. B.]

Penistone, 6 E. & Bl. 876, and was referred to and distinguished in the judgment of this court in *Longbottom v. Berry and another*, 22 L. T. N. S. 385, and contains, as it appears to us, a true exposition of the law as applicable to the particular facts upon which it proceeded. In that case the things distrained were mules used for spinning of cotton, fixed to the floor of a mill by screws, or let into stone and secured by molten lead, and Parke, B., in delivering the judgment of the court said, "they were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object and purpose of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." Can this be said to describe the condition of the railways in the present case? On the contrary, the works in that case were more like the trams and trucks used on the railway in the present than the railways themselves, which appear to us to have been more analogous to the floors of the mill. Mr. Grove's argument assumed that, inasmuch as some of the ballasting material was brought from a distance to fill up the depressed places, and to pack the sleepers, it did not become part of the soil or ground upon which it was placed. It does not appear to us to make any difference that the natural soil alone was used where the earth was dry and porous, and afforded hard material, but additional material was combined with it, where the conditions were different, and the natural earth was moist. The case of the *Duke of Beaufort v. Butes* (*ubi sup.*), which was referred to for some expressions of the Lords Justices, has no application to the present. It turned upon the construction of covenants in a mining lease, and whether some trams and sleepers, merely laid upon the ground which had become indented by their mere user, were liable to be seized in execution as personal trade chattels. The execution-creditor in that case having undertaken not to seize other trams fastened to stone sleepers, the injunction which was granted by a Vice-Chancellor was dissolved by the Lords Justices. The other cases which were cited on the argument did not relate directly to the question in this case, but affected it incidentally only. It is not necessary, therefore, to advert to them. The result will be that judgment will be entered for the plaintiff for the sums assessed by the arbitrator with reference to all the railways in question, as replaced in *statu quo*.

Judgment for the plaintiff.

Attorneys for plaintiffs, *Clowes, Hickley, and Stewart*.

Attorneys for defendant, *J. and M. Pontifex*.

Wednesday, June 8.

(Before MELLOR, J. and PIGOTT, B.)

JONES (app.) v. WHITAKER (resp.)

Billiard licence—Supplying beer to players—Beer not an exciseable liquor—Beerhouse keeper, having also a billiard licence.

Beer is not an exciseable liquor. Where, therefore, A. was licensed under the 8 & 9 Vict. c. 109, s. 10, to keep billiard tables, which licence forbids the party licensed to "allow the consumption of exciseable liquors," and A. notwithstanding, permitted beer to be drunk by those frequenting his billiard tables, whereupon he was convicted of an offence against the tenor of his licence:

Held, that the conviction was wrong.

Semble, that a person who is licensed under the 3 & 4

Vict. c. 61 to sell beer upon certain premises, and who is also licensed to keep billiard tables upon the same premises, is not prohibited from selling beer to those who frequent the house to play billiards.

This was a case stated under the 20 & 21 Vict. c. 43, by the stipendiary magistrate for Manchester, upon a conviction of the appellant, who had a licence to keep a billiard table, for an offence against the tenor of his licence, for allowing exciseable liquors to be consumed on his premises. It appeared that the appellant, at the time of the alleged offence, had a licence under the 3 & 4 Vict. c. 61, to sell beer to be consumed upon the premises in question. He had also obtained a licence under the 8 & 9 Vict. c. 109, s. 10, to keep billiard tables upon the same premises. The foregoing section enacts that the justices in every division shall, at their annual meetings for the licensing of alehouses, have authority "to grant billiard licences to such persons as the said justices shall in their discretion deem fit and proper to keep public billiard tables, bagatelle boards, or instruments used in any game of the like kind . . . and every such billiard licence shall be in the form given in the third schedule annexed to this Act," &c.

The form of the licence, as given in the said third schedule, contains several restrictions, as follows, "and do not wilfully or knowingly permit drunkenness or other disorderly conduct in the said house, and do not knowingly allow the consumption of exciseable liquors therein by the persons resorting thereto, and do not knowingly suffer any unlawful games therein," &c.

It appeared that the appellant, on the day when the alleged offence was committed, supplied persons who were playing billiards in the billiard-room with certain quantities of beer for consumption there, which was the offence charged.

Ambrose appeared for the appellant. The appellant was wrongly convicted—First, because his licence as a beerhouse keeper, under the 3 & 4 Vict. c. 61, enabled him to sell beer to anyone in the house, and is not controlled by the restriction contained in the billiard licence, which only applies to cases where there is a licence for billiards only. The prohibition in the licence, moreover, did not intend to prohibit the sale of all liquors, otherwise it would not in terms have forbidden drunkenness. Secondly, Beer is not an exciseable liquor. There is now no excise upon beer, although it is still necessary to take out an excise licence to sell it. That, however, does not constitute beer an exciseable liquor. By the 11 Geo. 4 & 1 Will. 4, c. 51, s. 1, "all the rates, duties, allowances, drawbacks, and bounties now payable on beer or ale brewed or made in Great Britain (except the said hereditary duties of excise on cider, beer, and ale, granted to his said Majesty King Charles the Second, and hereinafter more particularly specified), shall be repealed, cease, and determine, and be no longer levied or collected, paid or payable." And by the 2nd section it is enacted that the said hereditary duties shall not be collected during the King's reign, which provision has been continued in the present reign. The 64th chapter of the same reign regulates the sale of beer, and provides for a licence being taken out. In *Reg. v. Lancashire*, 7 Ell. & Bla. 839, it appeared that by the 9 Geo. 4, c. 61, s. 18, a penalty is imposed on any person who shall, without a licence, sell any exciseable liquor by retail, to be drunk on the premises; and by sect. 37 "exciseable liquor" is to include sweets or wines which now are or hereafter may be charged with duty, either by customs or excise. By stat. 4 & 5 Will. 4, c. 77, s. 9, the excise duty on sweets or made wines is repealed; but by sect. 10 the duty on licences to be taken out

Q. B.]

JONES (app.) v. WHITAKER (resp.)

[Q. B.]

by retailers thereof is continued, and all such licences shall still be taken out. It was held that a person who, since the stat. 4 & 5 Will. 4, c. 77, sold sweets or made wines by retail, &c., without a licence, could not be convicted under sect. 18 of the 9 Geo. 4, c. 61, sweets and made wines being no longer exciseable liquors within the meaning of that Act. Lord Campbell, C. J. said, in giving judgment, "The only question submitted to the court is, whether sweets or made wines are exciseable liquors within the meaning of sect. 18 of the 9 Geo. 4, c. 61. If they are, the conviction is to stand; if they are not, it is to be quashed. In my opinion they are not exciseable liquors within the meaning of that statute. They are not exciseable liquors unless they are liable as liquor to pay an excise duty. They were formerly liable as liquor to such duty; but now they are not. That duty is repealed by stat. 4 & 5 Will. 4, c. 77. Sweet and made wines are now no more exciseable liquors than is water." Coleridge, J., also says, "But for the fact that my brother Erle differs from the rest of the court I should have said there was no difficulty in the case. The clause to be interpreted is a penal one, and to be construed according to the ordinary applicable rule. The question is, whether sweets or made wines are now exciseable liquors within the meaning of the clause. It is not disputed that they were so when stat. 9 Geo. 4, c. 61, was passed, but the question is, whether they are now so since the passing of stat. 4 & 5 Will. 4, c. 77. By the interpretation clause in stat. 9 Geo. 4, c. 61, the phrase 'exciseable liquor' is made expansive according to the circumstances which may arise in the future. In stat. 4 & 5 Will. 4, c. 77, there is a distinction carefully made in sects. 9 and 10 between a duty in the liquors and on the licences to sell them. By sect. 9, those which were before exciseable liquors are made not to be so; but by sect. 10 it is declared that though the liquors are no longer exciseable liquors, no person shall sell them by retail without taking out the same licence as before. That seems to me to show distinctly that the liquors in question are no longer exciseable liquors; and if so, I am clearly of opinion that sect. 18 of 9 Geo. 4, c. 61, is not applicable." Crompton, J. says, "I cannot see that that part of the conviction is made out in fact which alleges that the said wine is 'an exciseable liquor in respect of which a duty of excise was then and there by law charged.' Throughout the Acts there are two different duties imposed, one on certain liquors, and another on the licences to sell them. In the first Act (6 Geo. 4, c. 37) a duty of excise was imposed on the liquors which thereby became exciseable liquors. In the same year, by 6 Geo. 4, c. 81, another duty was imposed on another thing though relating to the same liquors, which duty was a duty upon the licences to sell the liquors, which licences were to be granted by the Excise. By 9 Geo. 4, c. 61, another licence was to be taken out, namely, a licence to be granted by justices to any person keeping or about to keep inns, &c., to sell exciseable liquors by retail to be drunk or consumed on the premises. By 4 & 5 Will. 4, c. 77, the duty on the liquors in question is repealed, but the necessity of taking out the excise licence is preserved and so is the duty on such licence. The licence to be granted by justices is not mentioned, and I should suppose designedly so; because such licence is no longer necessary or applicable, the liquors in question being no longer exciseable liquors. If sects. 10 and 11 be confined to excise licences, the whole Act is sensible. If I had agreed with my brother Erle as to his view of the present state of the law, I should have thought this conviction wrong in form, that a new form was necessary, or that there should have been an indictment. I am of opinion that the conviction cannot be supported."

Erle, J. differed from the rest of the court, but for reasons which hardly touch the present case. This case is conclusive upon the point, and as therefore beer was not exciseable liquor, it was not against the tenor of his licence for the appellant to sell it on his premises.

Hopwood for the respondent.—Beer has always popularly been considered and treated as an exciseable liquor. By the 9 Geo. 4, c. 61, it is enacted by sect. 37, that the words "exciseable liquor" shall be deemed to include any ale, beer, or other fermented malt liquor, sweets, cider, perry, wine, or other spirituous liquor which now is or may hereafter be, charged with duty either by customs or excise. [MELLOR, J.—At that time beer was an exciseable liquor.] In the recent statute the 32 & 33 Vict. c. 27, beer is recognised as an exciseable liquor. Sect. 16 imposes a penalty upon any licensed person if he "is convicted of keeping his house open for the sale of or of selling beer, cider, wine, spirits, or any other exciseable liquor." [MELLOR, J.—The words "or any other exciseable liquor," must be taken to apply to the word immediately preceding, namely, "spirits."] There would be a great inconsistency in holding that a person who by his billiard licence is prohibited from selling beer, should nevertheless be enabled to do so under his beer licence. [MELLOR, J.—If the magistrates thought it objectionable, they could have refused the billiard licence.] The Legislature has itself stepped in, and said, that beer shall not be drunk upon premises licensed for billiards. It has itself given a form of licence in which this prohibition is found. The case of *Reg. v. Lancashire* stands by itself, and was decided upon its own peculiar facts. Sweets were not considered exciseable, whilst beer always has been.

MELLOR, J.—Upon the authority of the case in 7 Ell. & Bl., we ought to hold that beer does not fall within the description of an exciseable liquor. It has been argued that the 16th section of the late Act recognises beer as an exciseable liquor, inasmuch as it uses the words "beer, cider, wine, spirits, or any other exciseable liquor;" but I think the argument fails, because the rule of construction is, that general words of this kind apply to the last antecedent. If, indeed, the words had been "wine, spirits, beer, or any other exciseable liquor," it might have been different, and would have indicated that the Legislature considered beer to be an exciseable liquor. Now, I really cannot see any difference between the present case and *Reg. v. Lancashire*. It appears that in that case the excise duty upon sweet wines had been repealed, and the majority of the court were, therefore, of opinion that such wines no longer remained exciseable liquors. The only fact which at all distinguishes this case from that, is that of the excise being nominally continued as a portion of the hereditary revenues of the Crown, though in effect they are abolished. But I think it would be strange to say that where no duty is imposed yet, because the duty is not absolutely abolished, that this remains an exciseable liquor; and I certainly cannot hold, that because it requires an excise licence to sell beer, that therefore it is an exciseable liquor. The court held, in *Reg. v. Lancashire*, that the taking out a licence to sell an article does not constitute it an exciseable article. Under these circumstances, we are certainly warranted in holding that the beer which the appellant was convicted for selling was not an exciseable liquor, and the conviction, therefore, should be quashed.

PICOTT, B.—I quite agree with my brother Mellor. We have to say whether or not this selling has been unlawful. I think that the case of *Reg. v. Lancashire*, in which it was held that a liquid

CHAN.] *Re* COUNTY LIFE ASSURANCE CO.; THE BRITON ASSURANCE SOCIETY'S CASE. [CHAN.]

is not an exciseable liquor unless it is liable to the excise, is exactly in point; and that the beer sold in this case was not an exciseable liquor. If any mischief is likely to arise from beer being sold in this way in a house licensed for billiards, the magistrates have the remedy of not licensing.

Conviction quashed.

Attorneys for appellant, *Cobbett and Wheeler, Manchester.*

Attorneys for respondent, *Higson and Son, Manchester.*

Equity Courts.

COURT OF APPEAL IN CHANCERY.

Reported by T. BROOKSBANK and E. STEWART ROCHE, Esqrs.,
Barristers-at-Law

Jan. 26 and 28.

(Before Lord Justice GIFFARD.)

Re THE COUNTY LIFE ASSURANCE COMPANY;

THE BRITON ASSURANCE SOCIETY'S CASE.

Assurance company—Persons assuming to be directors—Contract with—Issue of policy by—Observance of all formalities—Laches of de jure directors—Company held bound.

In contracting with an insurance company, incorporated under the Companies Act 1862, a stranger must be taken to have read that statute and the articles of association of the company, but nothing more; and if he knows nothing to the contrary, he has a right to assume, as against the company, that all matters of internal arrangement have been duly complied with.

Where, therefore, a policy was granted at the duly registered office of an incorporated assurance company, and was executed by the required number of persons styling themselves directors and qualified as such, and counter-signed by a person styling himself secretary, and with the common seal of the company affixed thereto, in such manner as the articles of association required, the sum assured by the policy was admitted as a debt due to the policy holder, notwithstanding that the directors legitimately appointed had refused to act and repudiated all connection with the company, had made no appointment of new directors or a secretary, and had allotted no shares, and that the persons professing to be directors were self-constituted, and had from that time exclusively conducted business ostensibly on behalf of the company.

Beyond all doubt, the real directors might at any moment have got an injunction, and put an end to the company; and as they did not do so, it was assumed against them that they knew that the company had some office and was carrying on some business.

This was an appeal by the official liquidator of the above-mentioned company, which is now being wound-up in the chambers of the Master of the Rolls, against an order whereby his Lordship allowed a claim in respect of a policy of assurance for 250*l.*, which had been carried in by the Briton Medical and General Life Association, under the following circumstances:—

The company was incorporated on the 9th Jan. 1863, on which day memorandum and articles of association were registered. The former was signed by nine persons, among whom were five persons named Smith, Keating, Bolton, Munro, and Ambler, and their signatures were attested by Mr. William Howell Preston, who was the promoter of the company. Each of these five gentlemen subscribed for 100 shares, and in all 825 were subscribed for by the nine.

By the articles it was provided that the registered office of the company should be in London, or else-

where in England, as the directors should from time to time determine; that all shares should be allotted exclusively by the directors; that until the holding of the first general meeting the number of directors should be such as the directors for the time being should deem expedient, but not less than four nor more than twenty; and that until such meeting the directors for the time being should have full power to nominate and appoint duly qualified persons to be directors, but that each director should hold not less than 100 shares; that the first directors should be Messrs. Ambler, Bolton, Keating, and Munro, and a Mr. Prowett; that one-third of the whole number of directors, if that number was divisible by three, should constitute a quorum, but if not then that such number, not being below three, as should amount to one-third, should constitute a quorum; that the directors should cause a seal to be engraved, to be used as the common seal of the company, with the name of the company engraved thereon, and it was to be under the charge of the manager or secretary; that the said William Howell Preston should be the first manager, managing director, and actuary, and should be appointed for life; that the directors, or a committee of them, or such persons as they might appoint, should have the right to accept or refuse proposals for assurance; that every policy, &c., should be signed by three at least of the directors, and counter-signed by the managing director, secretary, or manager, and should be sealed with the common seal.

Mr. Prowett never took any shares in the company, and he refused to become a director, and from this refusal and other causes the remaining persons nominated by the articles became dissatisfied, and a meeting of the subscribers of the memorandum of association was held in June 1863, when three of the directors, Ambler, Munro, and Bolton, resolved that the objects of the company could not be successfully carried out, that no shares should be allotted, and no further steps taken towards establishing the company. Notice of this resolution was sent to all the subscribers who had not attended the meeting, and also to Mr. W. H. Preston, and no objection was made to it by any person.

Mr. Preston resolved, however, to proceed, and on the 11th Dec. 1863, he gave notice in writing to the four directors that the company was about to commence business, and requested them to inform him if they would act as directors. They all refused and repudiated all further connection with the company.

On the 7th March 1864, a Mr. William Badock, signing himself secretary, wrote from 36, Cannon-street, which was then the registered office of the company, to all the subscribers, announcing that the company had commenced operations, and requesting payment of the sums payable on allotment of shares.

Mr. Smith and Mr. Preston then elected other directors, and allotted shares to several persons; the names of such alleged shareholders were by them returned to the registrar of joint stock companies, as were the various addresses at which from time to time the company's chief office was situated; a common seal was also made and used. In Jan. 1864, Mr. Rymer was elected a director by Smith and Preston, and in June 1864, a meeting was held at which three persons were elected directors, and these afterwards elected others, and appointed a secretary; business was thus carried on ostensibly by the company until Jan. 1866, by which time it had issued no less than 350 policies. It was then amalgamated with the National Standard Life Insurance Company, and it ceased to have a separate existence.

Among the policies which the company had issued was the one above referred to, on the life of Sir Doughty Tichborne; it was issued to the respondents' company, at the then registered place of

CHAN.] *Re* COUNTY LIFE ASSURANCE CO.; THE BRITON ASSURANCE SOCIETY'S CASE. [CHAN.]

business, and it was signed by three persons styling themselves directors (one of whom was Mr. Preston), countersigned by Mr. Charles Rutherford, styling himself secretary, and sealed with the pretended common seal of the company.

Three of the original directors, Messrs. Ambler, Keating, and Munro, presented a petition to have the company wound-up by the court, and an order was accordingly made on the ground that it had not commenced its business within a year of its incorporation: (Companies Act 1862, sect. 79, cl. 2.) In the winding-up the respondents carried in their claim, inasmuch as Sir Doughty Tichborne had died before the amalgamation, and the Standard had therefore not undertaken the liability upon that policy.

His Lordship, the Master of the Rolls, in delivering judgment, said: "If a company and the shareholders of a company are desirous to carry on the company, the fact that all the first registered directors think fit to say, 'We will have nothing to do with it, we will not attend,' will not prevent the company being carried on. The managing director is then compelled to resort to such measures as he can for the purpose of carrying it on. If they do not think fit to have recourse to legal measures to stop him, can they afterwards come forward at their own pleasure and say, 'It is no company at all; you are a mere set of forgers, and have used a name and a seal to which you have no title?' I confess I am astonished at the case being brought before me; I do not believe that these gentlemen really intended to do anything wrong, but I am satisfied that I should be doing what would be very wrong, if I were to allow a thing of this kind to take place, and to say that where strangers have been dealing with a company, and have been allowed to deal with it, and have found a deed, articles, and the memorandum of association duly registered and executed, they are not to be at liberty to proceed because certain persons have retired from it altogether." His Lordship allowed the proof with costs to the claimant out of the assets of the company, and the official liquidator now appealed.

Sir Roundell Palmer, Q. C., Jessel, Q. C., and Ince, supported the appeal, and contended that the company could not be liable; for the persons signing the policy were only pretended directors, and the seal was a pretended seal.

Southgate, Q. C., Eddis, Q. C., and Francis Webb, for the respondents, contended that the company had actually gone on with the full knowledge of the *de jure* directors, who had done nothing to stop it.

The authorities cited were:—

The Royal British Bank v. Turquand, 6 E. & B. 237;

Agar v. The Official Manager of the Athenæum Office Society, 27 L. J. 95, C. P.; 30 L. T. Rep. 219;

The Prince of Wales Assurance Society v. The Athenæum Assurance Society, 3 C. B., N. S., 756;

Re The Athenæum Life Assurance Society, 4 K. & J. 549;

The How Beach Coal Company v. Teague, 2 L. T. Rep. N. S. 187.

Ince having been heard in reply,

Jan. 28.—Lord Justice GIFFARD said: It certainly is marvellous that a company such as this should have been able to carry on business to the extent of having 350 policies and upwards effected with it. However, the evidence on both sides appears to admit that this is the fact, and what I really have to decide is whether or not a person who holds, or

rather a company who holds, one of those policies has a right to prove against this company—the company, and no one else, being, on this occasion, the appellants.

As far as the material facts go, they lie in a very small compass. [His Lordship here stated the facts.] Before I go further I may say beyond doubt that the directors of this company might at any moment they chose have got an injunction; might at any moment they chose have put an end to this company. They did not choose to do so, and it is not too much to assume against them, at all events, that they knew that the company had at least some place of business or other, and that Mr. Preston had told them he intended to commence operations.

In that state of things the company, who make this claim, effected a policy, duly and properly in the usual course of business. They knew nothing about the internal arrangements of the company, they were not aware that anything irregular had taken place, they were not aware that the directors refused to act, or of any one of those circumstances which are detailed in this evidence. If we look at the policy (and that is material to observe), the policy on the face of it is effected in accordance with the articles; no one looking at the articles, and reading this policy, could know or suspect or believe otherwise than that the policy was as duly effected as any policy you might have from the Equitable, or any of the other large companies in London. I take the law to be perfectly plain, and it is well that there should be no mistake about it, because if it was not perfectly plain, and was such as it would necessarily be held to be if I disagreed with the decision of the Master of the Rolls, it would follow, I think, that the operations of these companies could not by possibility go on; because if it were not so, every person who went to deal with these companies would be bound to inquire and ascertain whether directors were duly appointed, whether resolutions were duly passed, and to inquire into all these matters of internal arrangement, the truth of which it would be morally impossible for him to ascertain.

I take the law to be plainly this, and to be deducible from the authorities on the subject: First of all, no doubt, a stranger must be taken to have read the Acts of Parliament, that is the Companies' Acts, and also to have read the articles of association, but he need not be taken to have read anything more. Of course if the policy-holder had a knowledge of all these facts, the case would have stood on an entirely different footing; but if he knows nothing to the contrary, he has a right to assume as against the company, that all measures of internal arrangement have been duly complied with. If you take the argument which has been addressed to me, it really amounts to this, that measures of internal arrangement have not been complied with. The whole argument is that the directors have not been duly appointed, and that the shares have not been duly allotted. I am not dealing at all with a case where strangers have assumed to take up a company's name. It must always be remembered that on the face of these very articles Mr. Preston was the managing director, and upon the face of this memorandum of association Mr. Smith was a shareholder for 100 shares.

Then there is this next step, which to my mind is quite conclusive upon this subject, namely, that the company is bound by what takes place in the usual course of business with a third party, provided that it takes place in conformity with what I have said, that the third party deals fairly and *bona fide* in the usual course of business, deals with persons who may be termed *de facto* directors (as the directors in this case certainly might be), that is to say, persons

V.C. S.]

COULTWAS v. SWAN.

[V.C. S.]

who might very possibly have been *de jure* directors. And really all that the third party does is to go to the office. First of all the ordinary correspondence takes place; the whole transaction is done in the usual way; he goes to the office, and he gets from the office that thing which appears on the face of it to be a document executed according to the terms of the articles, and which has to it a seal purporting to be the seal of the company, that seal being put by three persons who represent themselves to be directors, and who *de facto* (I do not say *de jure* at all, but *de facto*) were directors, and that document is countersigned by the person who was *de facto* secretary. I do not hesitate to say that the business of companies of this description could not possibly go on if that was not held to be the law.

That being so, I must dismiss this application with costs.

Some discussion then took place as to the costs, and it appearing that the notice of motion was given on behalf of the company and the liquidator,

Lord Justice GIFFARD said:—Then you will get the order against both. I am always very much surprised to see the liquidator's name in anything of this kind; it need not be there, and I should have thought it would have been prudent to have kept it out.

Solicitor for the appellant, *Donnithorne*.

Solicitors for the Briton Company, the respondents, *Bell and Steward*.

V. C. STUART'S COURT.

Reported by EDWARD WINSLOW, Esq., Barrister-at-Law.

April 25 and 26.

COULTWAS v. SWAN.

Conveyance to delay creditors—Subsequent payment of debts—Alleged gift—Resulting trust.

A testator, with a view of placing certain property out of the control of liquidators, conveyed it to his step-daughter absolutely, and, as she alleged, by way of gift. The conveyance purported to be for valuable consideration, but was in fact voluntary. Subsequently the claims of the liquidators were satisfied out of other property belonging to the testator:

Held, that there was a resulting trust in favour of the testator, and that the property must be reconveyed for the benefit of his estate.

This bill was filed for the purpose (*inter alia*) of recovering, as assets of the testator James Pitcher, certain property which he had conveyed to the defendant Caroline Tooley, under these circumstances:

The testator was formerly a boatman and fisherman, but about thirty years before his death he became a partner with the defendant, William Diver Swan, in a fishery business, and in this way acquired a considerable fortune. In 1860, being then about sixty years of age, he married the defendant Elizabeth Tooley, the mother of the defendant Caroline Tooley.

Upon his marriage he made his will, whereby he devised to the defendants, William Diver Swan and William Dent Tooley, all his messuages and other hereditaments upon certain trusts, under which the plaintiffs were beneficially interested; and subsequently, by a codicil dated the 25th March 1862, he devised the property in question, namely, a house situate in Apsley-road, Denes, Great Yarmouth, to his wife for life, and after her death upon the trusts of his will.

The testator was a holder of forty-five shares in the East of England Banking Company, which

stopped payment on the 20th July 1864, and on the 27th of the same month the testator conveyed the house in question to Caroline Tooley, in consideration of 500*l.*, purporting to be paid by her.

Subsequently the company was wound-up, and the testator was called upon to pay 2850*l.*, being the total amount of his loss for calls and costs. He died in Dec. 1866.

The plaintiffs alleged that at the time of the stoppage of the bank the testator, who was then worth about 14,000*l.*, became apprehensive that he would lose the whole of his property, and that his wife, taking advantage of his condition, induced him to make the above conveyance to her daughter. They further alleged that the testator was at the time ill and incapable of managing his affairs; that the 500*l.* was his own money, and that the pretended payment was merely made with a view of concealing the true nature of the transaction, in the event of the liquidators of the bank attempting to impeach the conveyance.

In support of this latter statement, the plaintiff adduced evidence to the effect that on the occasion of the execution of the deed, the testator handed the 500*l.* to his wife, who handed it just before the transaction to Caroline Tooley, who handed it to the testator's solicitor, who handed it back again to the testator.

Under these circumstances the plaintiffs charged that the testator never intended to make any gift of the 500*l.* to Caroline Tooley, and that he only placed it in her hands because he was told that it was necessary that money should appear to pass on the execution of the conveyance; that the pretended sale and conveyance were wholly void in equity, and that the defendant, Caroline Tooley, was a trustee of the house for the benefit of the testator's estate, and that she ought, subject to the life interest of her mother, to be decreed to reconvey the same upon the trusts of the will and codicil, and they prayed for relief accordingly.

The defendant, Caroline Tooley, by her answer, gave the following version of the transaction: "She stated that at about the time mentioned by the plaintiffs the testator, who was perfectly able to manage his own affairs, told her that he would make her a present of the house in question, on the condition that she promised to allow him and his wife to live in it during their lives without paying rent. To this she agreed, and on the following day she went with the testator to the office of his solicitor, where he executed the conveyance, which, together with the other deeds relating to the property, was afterwards handed to her and kept by her in her possession. She admitted that there was no real sale, and that the payment of the 500*l.* was merely made with the view of preventing the liquidators of the bank from impeaching the conveyance, but she insisted that the property was given freely to her by the testator, and she produced evidence to the effect that the testator, after the execution of the conveyance, had spoken, in the hearing of several witnesses, of having made her a gift of it.

Dickinson, Q. C. and *Chitty*, for the plaintiffs, submitted that there was a resulting trust in favour of the testator, and that the property, therefore, passed under his will to the plaintiffs, subject to the widow's life interest. They were stopped by the court.

Karslake, Q. C. and *Lindley*, for the defendant Caroline Tooley, contended that the property was intended by the testator as a provision for the defendant. They admitted that the 500*l.* was merely paid with a view of concealing the nature of the transaction from the testator's creditors in the event

V.C. S.]

SCOTT v. DUNCOMBE.

[V.C. J.]

of his becoming embarrassed; but they urged that the question must be decided as if the settlor himself were living; and if the conveyance was made for the purpose of putting the property out of the reach of his creditors, the purpose was an improper one, and the court would allow no resulting trust for the benefit of his estate. They cited

Harrison v. Guest, 8 H. of L. Cas. 481;
George v. Bank of England, 7 Price, 646;
Curran v. Jago, 1 Col. 261.

Greene, Q.C. and *North*, *Bristowe*, Q.C. and *Humphrey*, appeared for other defendants.

The VICE-CHANCELLOR.—The real question raised in this suit is whether the property which is conveyed by the deed in dispute, is to be considered as having passed to the defendant Miss Tooley, as a trustee, or according to the claim put forth by her as property to which she is entitled by gift from the testator. Her title to that which she says she got as a gift is expressed to be a title by contract. I do not say that there might not have been a valid gift, but in order to make it so there must be the clearest evidence of an intention to give by way of a voluntary gift, and that must be perfected by a conveyance or delivery of the subject-matter of the gift. It was evidently intended that the deed should appear to be a conveyance for valuable consideration; and, in order to give it that character, the money was made to pass from the purchaser to the vendor and a receipt was taken. It is certain, however, that no money passed, and that the payment by Miss Tooley was a mere juggle. The question is whether that gift which is said to have been made, was in reality made by the testator. There is no evidence entitled to any weight as to the conveyance being intended as a deed of gift; but, on the contrary, the evidence shows that the deed was executed for the purpose of placing the property out of the reach of the liquidators of the bank in which the testator was a shareholder. No doubt it is possible that a case might have been made out of a subsidiary purpose, and the testator might have intended to give the beneficial interest in this property to Miss Tooley, but it is impossible to contend that it was intended by the deed to give an interest in any other character than as a purchaser. There is certainly evidence that Miss Tooley was a probable object of bounty, but neither a declaration by a donor that he has made a gift, nor the evidence of the circumstances showing an intention to make one, is a proof of a gift. It is said, however, that if this property was conveyed for the purpose of putting it out of the reach of the liquidators, that was an improper purpose, and that the court therefore cannot allow any resulting trust to take effect. I do not know of any authority to support such a proposition. It is stated by Mr. Lewin in his work on trusts that no resulting trust can come upon a conveyance made *mala fide*, but that statement must be taken as subject to some qualification. Lord Cottonham was of opinion, in *Skarf v. Souby*, 1 M. & G. 364, that the mere fact of a man's being indebted at the date of a settlement is not sufficient to invalidate it. This court never presumes fraud, and where it finds a man prefers to pay his creditors out of one part of his property, and withdraw other parts from their reach, it will not impeach the transaction. It seems to me impossible to say that this conveyance was made for the purpose of passing any beneficial interest to Miss Tooley. The circumstances under which she has endeavoured to take possession of the property are very different from those which were contemplated when the deed was executed, the ordinary purpose of which was to make it appear that Miss Tooley was a purchaser, which she was not. If

there was no gift of the property there must clearly be a resulting trust, and as there is no evidence to support a gift, I am of opinion that this property is part of the assets of the testator, and that Miss Tooley has no right to it. There must, therefore, be a reconveyance of the property for the benefit of the testator's estate.

Solicitors for the plaintiffs, *Rickards* and *Walker*, for *Jeremiah Barnes*, Great Yarmouth.

Solicitor for the defendants, *Andrew Storey*, for *C. H. Chamberlin*, Great Yarmouth; *Morris* and *Allen*, for *W. Worship*, Great Yarmouth; and *Torr*, *Janeway*, and *Tagart*, for *Henry Palmer*, Great Yarmouth.

V. C. JAMES'S COURT.

Reported by the Hon. ROBERT BUTLER, Barrister-at-Law.

Thursday, March 24.

SCOTT v. DUNCOMBE.

Practice—Infants—Proceedings since birth of—Supplemental order—15 & 16 Vict. c. 86, s. 52.

Where proceedings had been taken in a suit after it had become defective by the birth of children:

Held (following Auster v. Haines, L. Rep. 4 Ch. 445; 20 L. T. Rep. N. S. 152), that the court would not make a supplemental order under the 15 & 16 Vict. c. 86, s. 52, to bring the infants before the court, and to direct that they should be bound by the proceedings.

Walker v. Walker, 22 L. T. Rep. N. S. 201, overruled.

This was an administration suit in which a decree had been made directing the usual accounts and inquiries to be taken and made.

On the 10th March a supplemental order was obtained to allow two infants who had been born since the decree, and who were members of the class interested in remainder, to be added as parties to the suit. While the proceedings were defective in consequence of the birth of these infants, two orders had been made in the suit. The above supplemental order was made on the authority of *Grunwell v. Gardner*, L. Rep. 8 Eq. 355; 20 L. T. Rep. N. S. 693, and *Walker v. Walker*, L. Rep. 8, Eq. 663; 22 L. T. Rep. N. S. 201.

Renshaw now mentioned to the court that difficulties had occurred in obtaining the order, owing to the decisions in *Auster v. Haines*, L. Rep. 4 Ch. 445; 20 L. T. Rep. N. S. 152; and *Capps v. Capps*, L. Rep. 4 Ch. 1, in the former of which cases the Lord Chancellor held that when a suit had become defective by the birth of children, the court had no jurisdiction to make a supplemental order under the 15 & 16 Vict. c. 86 s. 52, to bring the infants before the court and direct that they should be bound by the proceedings.

The VICE-CHANCELLOR said that he must stop the supplemental order which had been obtained on the authority of *Grunwell v. Gardner*, as he was bound by the decision of the Lord Chancellor in the case of *Auster v. Haines*, to which his attention had not previously been called.

Solicitor, *W. Day*.

V.C. J.]

KETTLEWELL v. BARSTOW. STYRING v. WATERS.

[C. P.]

Thursday, June 2.

KETTLEWELL v. BARSTOW.

Practice—Motion to discharge order for amendment of bill—Previous application to dismiss bill for want of prosecution—Waiver.

After defendants had obtained the usual conditional order that the bill be dismissed as against them for want of prosecution, and the plaintiff, within the time limited by such order, had filed a replication, it was

Held that, under the circumstances, the defendants were estopped from afterwards moving to have a previous order to amend the bill discharged, on the ground of irregularity.

This was a motion on behalf of the defendants, Thomas and William Fawcett, that an order dated the 5th March 1869, obtained by the plaintiff for the amendment of his bill should be discharged.

The bill was filed on the 25th Nov. 1858, against Benson Barstow, John Michael Barstow, William Fawcett (since deceased), Thomas Fawcett, and others.

On the 3rd Feb. 1869, a plea to the relief and discovery was filed and notice thereof duly given.

On the 18th Feb. an order of course to amend the bill was served upon the defendants' solicitors.

On the 5th March another order to amend was obtained by the plaintiff, but was not served upon the defendants or their solicitors. The bill as amended in pursuance of the last order, was served on the late defendant, William Fawcett, who duly appeared thereto on the 10th March. William Fawcett died in June 1868.

The next step taken by the plaintiff in this cause was the obtaining of an order to revive dated 11th Jan. 1870, a copy of which was served upon the defendants' solicitors. The order to revive was obtained in consequence of an application by the two Barstows that the bill be dismissed for want of prosecution.

The defendants, Thomas and William Fawcett, appeared in the revived suit on the 4th Feb. 1870. On the 12th May 1870, a motion was made on behalf of Thomas and William Fawcett, that the bill as against them be dismissed for want of prosecution. The usual order was thereupon made that the plaintiffs should within fourteen days file replication or that the bill should stand dismissed as against Thomas and William Fawcett. Replication was accordingly filed on the 13th May. The defendants now moved to discharge the order to amend of the 5th March 1869, on the ground that the same was irregular by reason of the plaintiff not having served the defendants therewith, and not having undertaken to reply to the plea within three weeks of its having been filed, under the Consolidated Orders 14, rule 17, Morgan 449.

Russell Roberts appeared in support of the motion, and cited

Taylor v. Shaw, 2 Sim. & Stewart 12.

Cottrell appeared for the plaintiff, and submitted that the defendants, upon their motion to dismiss the bill for want of prosecution, had acquiesced in the former order to amend. Upon that motion the Vice-Chancellor had intimated it was a step which might prejudice the defendants' position.

The VICE-CHANCELLOR said the motion would not do. Before the motion to dismiss the bill for want of prosecution the defendants ought to have considered whether or not to take the bill off the file. Now that they had obtained an order on that motion, with costs, against the plaintiff, they were

not in a position to make this motion, which must be refused with costs.

Solicitors for the defendants, R. and W. B. Smith, agents for Payne, Ford, and Eddison, of Leeds.

Solicitor for the plaintiff, W. Hicks.

Common Law Courts.

COURT OF COMMON PLEAS.

Reported by M. W. McKELLAR, and H. H. HOCKING,
Esqrs., Barristers-at-Law.

Thursday, May 26.

STYRING v. WATERS.

Assents to a letter of licence—Deed under Bankruptcy Act 1861.

A deed contained a licence for three years to a debtor to attend to his affairs without hindrance by his creditors, and an assignment of part of his property to a trustee for the benefit of his creditors; and it was declared to be a deed within the 192nd section of the Bankruptcy Act 1861. Some of the creditors necessary to make up the statutory majority had assented to a letter of licence granting the debtor the period of three years for payment of 20s. in the pound to his creditors:

Held, that this was a substantial difference between the deed and the assents, and that the deed was therefore no answer to an action by a non-assenting creditor.

The declaration was upon a promissory note for 46l. 14s., and money counts for the consideration.

The only plea to the action set out an indenture made the 1st Feb. 1867 between the defendant, therein called the debtor, of the one part, and the several other persons mentioned and described in the schedule thereto, being respectively creditors, either in their own right or in co-partnership, or attorneys or agents of creditors of the defendant, and all other the persons who would have been entitled to prove in bankruptcy against the estate of the defendant if he had been adjudicated bankrupt on the day of the date thereof, and all and every the creditors of the defendant, whether executing the said deed or not, all which said creditors and persons are thereafter referred to as "the said creditors," of the other part. After reciting that the said debtor was then justly and truly indebted to the said several creditors in divers sums of money, which he was unable to pay and satisfy without respite and time to be given him for payment thereof. And reciting an indenture bearing date the 18th Oct. 1866, and made between the same parties as those of the deed of the 1st Feb. 1867, whereby, in consideration of the said debtor agreeing to pay to his said creditors the sum of 20s. in the pound at the expiration of three years from the day of the date thereof, in full discharge of their respective debts, the said creditors agreed to accept the said proposition, and covenanted not to sue or molest the said debtor during the said period for or concerning any of their respective debts then owing to them by the said debtor. And reciting that the said indenture had been duly stamped and registered; and that certain questions had arisen as to the validity of certain portions of the said deed of the 18th Oct. 1866, and the said deed itself had been destroyed by fire, which wholly consumed the offices and papers of the said debtor's solicitor, who attested the execution of the said deed by the said debtor, and had the custody thereof; and that a majority of the creditors in number, and representing more than three-fourths in value of the debts owing by the said debtor, had assented to the proposition of the said debtor that a new deed should be

C. P.]

STYRING v. WATERS.

[C. P.]

executed by him, whereby it should be agreed that he, the said debtor, should pay to all and every his said creditors, whether executing the said deed or not, within the period of three years from the 18th Oct. 1866, the sum of 20s. in the pound, in full satisfaction of their respective debts, and also that by way of partly securing such payment, he, the said debtor, should forthwith convey to a trustee his respective equities of redemption in certain freehold and copyhold hereditaments at Isleworth, in Middlesex, and also in certain freehold and leasehold hereditaments at Crickmoor, in Dorsetshire, for the equal benefit of all and every the said creditors. And reciting that in pursuance of such agreement the said debtor had by indenture dated the 31st Jan. 1867, and made between himself of the one part, and a certain L. D. Lewis of the other part, duly conveyed to the said L. D. Lewis, all and singular his equities of redemption in the said hereditaments at Isleworth and Crickmoor respectively: Upon trust to make sale of the same with all convenient speed, and after payment of mortgage moneys respectively secured thereon, and of the costs and expenses incident to such sale, to distribute the surplus money equally and rateably amongst all the creditors of the said debtor. And reciting that the property, credits, estate and effects comprised in and to be collected and distributed under the present deed were the same as those comprised in and to be collected and distributed under the deed of the 18th Oct. 1866. It was witnessed by the deed set out in the plea that in pursuance of the said agreement, and for the considerations aforesaid, they, the said several creditors, and each and every of them, at the request of the said debtor, had given and granted, and by their present letters did give and grant unto the said debtor full free liberty and licence to follow and attend to any affairs, business matters, or things whatsoever, in any part of the United Kingdom of Great Britain and Ireland, or elsewhere, without any let, suit, trouble, arrest, attachment, or any other impediment whatsoever, by them or any of them, or by their, or any or either of their heirs, executors, administrators, partners, and assigns, or any of them, or by their, or any, or either of their means or procurement, for and during three years next and immediately ensuing the 18th Oct. 1866. And further the said creditors, and each of them, did covenant and grant, for themselves, their heirs, executors, and administrators respectively, and not jointly, or one for another, or for their heirs, executors, or administrators of each other, to and with the said debtor, that they, or any of them, their heirs, executors, and administrators, should not nor would, during the time aforesaid, sue, arrest, attach, seize, molest, impede, or trouble the said debtor, his heirs, executors, or administrators, or his or their bodies, goods, or estates, for or concerning any debt, or sum or sums of money which he then owed, or was indebted to the said creditors, by himself, solely, or jointly, with or for any other person or persons, by bond, bill, covenant, or otherwise howsoever, or for any other matter, cause, or thing whatsoever, wherewith he or they now was, were, should, or might be charged or chargeable within the aforesaid term of three years next ensuing the 18th Oct. 1866, by them or any of them, the said creditors, or by any other person or persons, by or through the procurement or consent of them, or any of them, contrary to the true intent and meaning of the said presents. And that in the event of any creditors during the term of three years commencing any action, suit, or other proceeding, for the recovery of any of the said debts then due to the said creditors, it should be lawful for the said debtor to plead these presents in bar and as an answer to such action, suit, or other proceeding, and the same

should operate and be a bar and answer to such proceeding. And it was thereby declared that these presents were intended to operate as a composition-deed executed by a creditor, within the 192nd section of the Bankruptcy Act 1861, and questions relating to the same, or any of the premises, should be decided according to the provisions of that Act with respect to composition-deeds executed by the said debtor in conformity with that section; and so far as the same provisions would allow, these presents should accrue for the benefit of, and be effectual for, and binding in all respects upon, all creditors of the debtor. And if there was anything therein contained not authorised by the said provisions of the Bankruptcy Act 1861 to be introduced into a composition-deed executed by a debtor in conformity with the 192nd section thereof, such unauthorised thing should be obligatory upon those persons only who should have in writing assented to or approved of these presents. The plea went on to aver the fulfilment of all conditions required by the 192nd section of the Bankruptcy Act 1861, and that the plaintiff was a creditor of the defendant for the debt sued upon, or when the said deed was made, and as such creditor the plaintiff did in writing assent to and approve of the said deed, and was and is bound by the said deed as if he had duly executed the same. And the defendant said that the said term of three years next ensuing the 18th Oct. 1866 had not expired before the commencement of the action, and the defendant was therefore entitled to plead the said deed in bar of this action.

At the trial before Keating, J. at Middlesex the defendant failed to produce any assent by the plaintiff, but assents were proved sufficient to render the deed of the 1st Feb. 1867, valid under the 192nd section of the Bankruptcy Act 1861 provided that certain assents made before the date of the first deed, the 18th Oct. 1866, in the following form, could properly be included in the number:

I hereby assent to a letter of licence granting to R. E. Chester Waters, Esq., the period of three years from the 18th Oct. 1866, for the payment of 20s. in the pound to his creditors, on the distinct understanding that the securities I hold are not prejudiced.

A rule *nisi* had been obtained calling upon the defendant to show cause why the verdict found for him on the trial should not be set aside, and instead thereof a verdict be entered for the plaintiff for 54*l.* 13*s.* 10*d.*, pursuant to leave reserved, on the grounds amongst others that the plea was not proved, the assent of the requisite majority of creditors not having been given to the deed set up by the plea, or on the ground that the deed set up by the plea was not such as to be, within sect. 192 of the Bankruptcy Act 1861, binding on non-assenting creditors, and that there was no evidence of the plaintiff's assent; or why judgment should not be entered for the plaintiff notwithstanding the verdict on the last-mentioned grounds.

Harington showed cause.—This deed is not like that in *Latham v. Lafone*, L. Rep. 2 Ex. 115; 15 L. T. Rep. N. S. 627, which was held to be not within the Bankruptcy Act 1861. That deed was a bare letter of licence without any schedule of creditors or debts; it provided no composition and made no assignment of the debtor's property. Here there is a schedule, and an assignment for the benefit of creditors; and it is expressly declared that the deed is intended to be within the Act. Certainly it was held in *Rutty v. Benthall*, L. Rep. 2 C. P. 488; 16 L. T. Rep. N.S. 287, 297, that a deed should substantially correspond with the terms of a previously given assent, but no objection can be raised here to the difference between the two because the further provision in the deed, viz., the assignment of property, was entirely in favour of the creditors,

C. P.]

BURNETT v. PROOIS; *Re* AN ATTORNEY.

[C. P.]

and not at all to the advantage of the debtor. In *Waddington v. Roberts*, L. Rep. 3 Q. B. 579; 18 L. T. Rep. N. S. 855, a deed containing a release was held valid, although some of the assets related to a composition only. With regard to the reservation of securities in the assets, it was held in *Johnson v. Barratt*, L. Rep. 1 Ex. 65; 13 L. T. Rep. N. S. 597, that where it does not appear that debts are secured there need be no reservation: the words at the end of the assents are superfluous.

Herschell supported the rule. — The assents are to a letter of licence, and if the deed carries out the arrangement which the creditors contemplated, it cannot bind the plaintiff who was a non-assenting creditor. But there is a substantial difference between the assents and the deed; even if the assignment were for the benefit of creditors they never assented to its being made to a trustee, who was chosen without any authority from them. It was held lately by the Court of Exchequer that certain assents were invalid because they did not state how or when some instalments were to be paid: *Birks v. Clarke*, Weekly Notes, 21st May, p. 138.

BOVILL, C. J.—It is not necessary to trouble Mr. *Herschell* any further. The question is, whether a sufficient number of creditors assented to this particular deed or instrument. I think the ordinary meaning of the form of assent employed is that the creditor agreed to what is generally understood by a letter of licence, by which the debtor is to be left in the control and possession of his property, and he is to get in the amounts due to him and pay off his debts at his own discretion, without disturbance by his creditors, until the expiration of the time allowed him. This is the general nature of such an arrangement, and we must assume it is what the creditors meant by their assents. The deed which was subsequently executed was not a mere letter of licence, but it also contained an assignment to a trustee of the debtor's property for the benefit of his creditors. That arrangement is distinctly recited in the deed set out in the plea; the words are, "a majority of the creditors in number and representing more than three-fourths in value of debts owing by the said debtor, had assented to the proposition of the said debtor that a new deed should be executed by him, whereby it should be agreed that he, the said debtor, should pay to all and every his said creditors, whether executing the said deed or not, within the period of three years from the 18th Oct. 1866, the sum of 20s. in the pound, in full satisfaction of their respective debts, and also that by way of partly securing such payment, he, the said debtor, should forthwith convey to a trustee his respective equities of redemption in certain hereditaments for the equal benefit of all and every the said creditors." It is then recited that in pursuance of such agreement the said debtor had by indenture of the previous day (the 31st Jan.) conveyed these hereditaments to L. D. Lewis upon trust to sell and distribute the surplus moneys after payment of certain mortgages equally and rateably amongst all the creditors of the said debtor. The deed then proceeds to witness that the creditors gave and granted to the debtor full and free liberty and licence to follow and attend to his affairs for three years from the 18th Oct. 1866. The deed subsequently declares that it was intended it should operate as a composition-deed within the 192nd section of the Bankruptcy Act 1861. The substance therefore of the arrangement as recited and carried out by the two deeds of the 31st Jan. and the 1st Feb. was that the debtor should assign his property to a trustee for the benefit of his creditors, and in consideration of that assignment

the creditors granted him a letter of licence. This, however, was not the substance of the arrangement mentioned in the assents at all; nothing was there said about assignment of property, on the contrary it appeared that the creditors desired that the debtor himself should manage his affairs. At all events, if they had intended to assent to an assignment of the property they might reasonably have reserved to themselves the choice of a trustee; although they were willing that the debtor himself should manage and distribute his estate, the creditors might not agree to a trustee whom the debtor perhaps would choose for some fraudulent purpose. On this ground, that the deed carries out a totally different arrangement from that intended by the assents, I think the rule should be made absolute.

WILLES, J., having heard only part of the arguments, expressed no opinion.

KEATING, J.—I am quite of the same opinion. The creditor assented merely to a letter of licence, the effect of which is well known. It has been argued that the arrangement effected by the deed was equally beneficial to the creditors, but even if that were so, it is a conclusive answer to the argument that in every substantial departure from, or extension of, any arrangement assented to by the creditors, they ought to have an opportunity of considering whether the change is likely to be for their benefit or not. The short ground, therefore, on which this rule should be made absolute, is that this particular deed pleaded to the declaration did not receive a sufficient number of assents.

M. SMITH, J.—I am of the same opinion. The assents may be given in writing by the creditors before the execution of the deed, but the deed must carry out substantially the agreement to which the creditors assented. Here the assents and the deed differ in their essential nature and character. The letter of licence to which the creditors assented would have left the debtor at liberty to deal with the whole of his property, but the deed deprived him of a great portion of that property, and substituted for him in the management of it a trustee not chosen by the creditors.

Rule absolute.

Attorney for plaintiff, *J. Elliott Fox*, for *Kemp-Welch and Aldridge*, Poole.

Attorneys for defendant, *Skilbeck and Griffiths*.

June 3 and 4.

BURNETT v. PROOIS; *Re* AN ATTORNEY.

Undertaking to withdraw pleas—Liability of defendant's attorney for debt and costs.

An undertaking by a defendant's attorney to withdraw pleas is binding on the defendant, even without any formal consent by plaintiff or his attorney, and ought to be enforced upon an application at chambers.

But if such an undertaking be not carried out, and the plaintiff in consequence loses the benefit of a subsequent judgment, the defendant's attorney is not necessarily liable for the plaintiff's debt and costs.

In this matter a rule nisi had been obtained on behalf of the plaintiff calling upon the defendant's attorney to show cause why he should not pay the amount of the debt and costs recovered in the action to the plaintiff. The rule was granted upon an affidavit, from which it appeared that the plaintiff claimed from the defendant in June 1869, 60l. 12s. 6d., which sum the defendant had promised to pay. An action was brought, and on the 28th July the plaintiff's attorney sent the record to his Preston agents to enter the cause provisionally for

C. P.]

BURNETT v. PROOIS; *Re AN ATTORNEY.*

[C. P.]

trial at Manchester. On the 28th July defendant's attorney wrote to plaintiff's attorney—"Proois ats. Burnett,—I have directed my agents to withdraw plea herein."

On the 29th July plaintiff's attorney wrote to defendant's attorney—"Burnett v. Proois. This cause was entered at Preston yesterday. I think the best way is for you to agree to a judgment when the court is open to-morrow with a fixed amount of costs, say 25*l.*, to be paid at once."

On the 30th July, the Manchester Commission day, defendant's attorney wrote to plaintiff's attorney—"I have directed my agents to withdraw plea unconditionally on the usual terms. Please give consent."

No formal consent was given, but the cause was not entered for trial.

On the 12th Aug., at a meeting of the agents for the attorneys of the parties for taxation of costs, it was stated for the defendant that the plea had never been withdrawn, and therefore judgment could not be signed, nor the costs taxed.

A summons was then taken out to make defendant withdraw plea and to sign judgment, and also to make defendant pay a sum for costs; the summons was however dismissed, although the master expressed his opinion that except as to the costs the order ought to be made.

Afterwards a trader-debtor summons was taken out against the defendant, and he made an affidavit in which he stated that he had a good defence to the action on the ground that the agreed credit had not expired when the writ was issued.

At the Manchester winter assizes the cause was entered and came on for trial; the letters above mentioned from the defendant's attorney were read in court, and Martin, B., stopped the case, and said, when he heard that the summons at chambers had been dismissed, that the undertaking to withdraw the plea ought to have been acted upon, and the defendant's attorney ought to have been forced to withdraw it.

Before the winter assizes came on, the defendant had left the country.

It is provided by No. 8 of the Practice Rules, Hilary Term 1853, that the defendant shall not be at liberty to waive his plea, or enter a *relicta verificatione* after a demurrer, without leave of the court or a judge, unless by consent of the plaintiff or his attorney.

Quain, Q. C. showed cause.

Milward, Q. C., and F. O. Crump, supported the rule.

BOVILL, C. J.—There is no doubt that the defendant's attorney, in accordance with his letters, was bound to withdraw plea in this case, and there can be no doubt that a learned judge at chambers would have compelled him to carry out what he had undertaken to do, and ordered the plea to be withdrawn, especially where the trial was lost in consequence of those letters. The plea was not withdrawn. There seems to have been some impression that there ought to have been some consent, and that, consent not having been given, the defendant's attorney was relieved from the necessity of withdrawing plea. In that I think he was entirely wrong. But the plea not having been withdrawn, what was the proper course for the plaintiff's attorney to adopt? It seems to me the proper course was to do that which eventually he did—to apply to a judge at chambers on summons for an order that the plea should be withdrawn, and that plaintiff should be at liberty to sign judgment. That is the ordinary and proper course for compelling performance of an undertaking or duty

which an officer of the court has undertaken to perform. Upon the application coming on at chambers, the master came to the conclusion that the undertaking must be performed, that the plea must be withdrawn, and that the plaintiff was entitled to judgment, and expressed an opinion to that effect. Then came the question of the costs to which the plaintiff was to be entitled. That was a matter peculiarly within the jurisdiction and discretion of the master of the court. Having heard the parties as to what had taken place between the 29th July and the day on which the application came before the master, the master came to the conclusion that the plaintiff was entitled to judgment and to have the plea withdrawn, but was not entitled to any costs subsequent to the 29th July. There are many reasons which might have influenced the master in coming to that conclusion—that the undertaking having been given to withdraw plea, the plaintiff ought not to have taken any other course but that of endeavouring to enforce the undertaking; or he may have thought that plaintiff's attorney desired to proceed to take judgment in the ordinary course. But whatever the reasons, there was a suggestion by the master that the plea should be withdrawn, and that the plaintiff was entitled to judgment, and his opinion was expressed with reference to the costs. The plaintiff's attorney might have accepted the suggestion of the master. If he had done so, the plaintiff would have been entitled to his debt, and the attorney would have had his costs to such a period as the master thought he was entitled to them. The plaintiff's attorney, however, thought fit not to accept the order on those terms. What course then did he adopt? At that time the defendant was in this country. As far as appears from the affidavits there was no probability that he would go abroad. The plaintiff's attorney, for the sake of getting costs from the 29th July to the 13th Aug., determined not to take judgment, but to proceed. What would have been the ordinary course? He might have gone by immediate appeal at judges' chambers from the master to the judge in attendance. But if he did not think fit to go by appeal at chambers, he had ample opportunity of coming before the court the following term. It is said that in the mean time there was an affidavit of merits. But whatever affidavit of merits there might have been, that would not have relieved the attorney from performing an engagement into which he had entered, and on the faith of which the plaintiff had been prejudiced. He would have been compelled to perform the engagement, and any consequences which might have resulted would be borne by him as between himself and his client. But not taking this, which would have been the ordinary and proper course, the plaintiff's attorney knowing that the defendant was at this time resident in England, instead of relying upon the undertaking, abandoned the order which the master was willing to make, and proceeded to trial and judgment at the next assizes, simply for the purpose of obtaining the costs between the 30th July and the 13th Aug. I cannot see any other object. From that time the plaintiff's attorney seems to me to have made his election to proceed in the ordinary course rather than to act upon the undertaking, and he did so as far as I can see for the purpose of obtaining those costs. The defendant was here, but probably at that time the plaintiff's attorney thought it more convenient for himself to proceed as he did. He goes on. The defendant goes abroad in the month of November; the trial comes on in December, and plaintiff obtains his verdict. Then, the defendant being abroad, judgment is fruitless. As to the debt and costs having been lost in consequence of the non-observance of the undertaking, that is not made out on the affidavits. I should

C. P.] WHITTAKER v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. [C. P.]

attribute the loss rather to the plaintiff's attorney having refused to accept the order of the master. If the money had been lost by the non-observance of the undertaking the remedy might have been against the attorney. As regards the liability of the defendant's attorney on his undertaking, I do not think that the plaintiff's attorney has taken the proper course. The proper application was that made to the master. The master disposed of it. The plaintiff's attorney thought fit to accept the decision, and did not appeal to the judge or the court. He has taken his own course; and because that course happens to turn out unfortunately, I do not think he can take advantage of it. As to the debt and costs, I do not think it was at all established that they were lost in consequence of the defendant's attorney's undertaking. If the plaintiff's attorney had accepted the decision of the master, he would have been in the same position as to the debt as if the undertaking had been complied with at the earlier period. If the costs are lost, they are lost in consequence of the acts of the plaintiff's attorney in refusing the master's order, and going on, not on the footing that the undertaking ought to be performed, but electing to proceed to heap up other costs. I am of opinion, therefore, that this rule ought to be discharged.

WILLES, J.—A complete misconception has been presented on the part of the application when it is suggested that the proper result of a breach of the undertaking to withdraw plea is that the attorney should become answerable for the debt and costs in the action. The distinction in the case of an undertaking to withdraw plea and an undertaking to pay debt and costs is obvious. The amount here is small, but assuming it were an amount of thousands, it would be absurd to suppose that the attorney intended to render himself liable for the debt and costs in case the proceedings against his client upon his undertaking should miscarry. There may be a case—I am not aware of any having occurred, and none has been produced to the court—in which an attorney, having given an undertaking to withdraw plea, and wilfully refused to act upon that undertaking, and so delayed the plaintiff, and that during the delay and in consequence of it he loses an opportunity of recording judgment against the defendant, should render himself liable to pay the debt and costs of the action. There might be such a case but it would be an extreme one. I can understand a case in which an attorney has given an undertaking to withdraw plea, and in which he may properly refuse to act in accordance with that undertaking by reason of the discovery of a fact affecting the liability in the action which was within the plaintiff's knowledge, and not in the knowledge of the attorney signing the undertaking. The bare statement that an undertaking necessarily requires an application to the court in order to enforce it, shows that there must be some occasion upon which it would be the duty of the attorney to hold his hand until the court should order him to comply with the undertaking. The undertaking of an attorney stands upon the same footing as the assent of an attorney to give judgment. Upon this everyone is aware of the case of *Wade v. Simeon*, 13 M. & W. 647, where the defence of gambling was set up. It would have been hopeless to rely upon the fact that the defendant's attorney gave consent to judgment. The facts were that before the time for final judgment the defendant's attorney discovered ample evidence which, without any negligence on his part, he was in ignorance of, and therefore the court refused to allow the plaintiff to proceed upon the consent, and allowed the defendant to try the question upon the evidence newly

discovered. But they took care in that case to secure the plaintiff by ordering payment of the amount into court to abide the event of the action. The result in that case was this: the action was brought upon a cheque, and the answer was that it was part of a gambling transaction; and the claim to sign judgment on the consent was held sufficiently answered by showing that the plaintiff knew of this defence to the action, and the defendant did not. The court has a control over undertakings of this description, and the plaintiff would be entitled to rely upon the enforcement of any such undertaking by the equitable discretion of the court. In this case the equitable discretion is not called into exercise, there being no such case as in *Wade v. Simeon*. The defence of credit not expired was known to the defendant's attorney at the time of giving the undertaking. The judge would not have allowed him to go back to his defence. The plaintiff, therefore, had nothing to do. I think the master was right in his decision on the summons—at least upon the affidavits he is not made out to be wrong. The plaintiff's attorney unnecessarily proceeded to increase his bill by subsequent costs. If the debt and costs have been lost, they have been lost by the delay of the plaintiff's attorney in availing himself of his remedy. Certainly, no legal liability is imposed on the defendant's attorney to pay the debt and costs, and I think, therefore, that the rule ought to be discharged.

KEATING, J. concurred.

Rule discharged accordingly, without costs.

Attorney for plaintiff, J. Cooper for C. Pinnell, Manchester.

Attorneys for defendant, N. C. and C. Milne for J. Richardson, Manchester.

Tuesday, June 7.

WHITTAKER v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

Negligence—Railway accident—Invitation to alight—Evidence for jury.

A long train of the defendants was stopped at a platform so that part of it was alongside the parapet of a bridge; in the dark the plaintiff, after the train had stopped, and the defendants' servants had called out the name of the station, stepped upon the parapet believing it was the platform, and fell over:

Held, in an action to recover damages for the injuries he sustained by his fall, that the judge was right in leaving the jury to determine whether the circumstances amounted to an invitation to the plaintiff to alight; and that there was evidence of negligence on the defendants' part to justify the verdict which the jury found for the plaintiff.

This action to recover damages in consequence of the alleged negligence of the defendants was tried at Manchester during the last spring assizes before Willes, J. and a special jury. A verdict of 1000*l.* was found for the plaintiff.

The plaintiff, who was a drysalter living at Hyde, in Cheshire, was travelling home from Yorkshire in a third-class carriage by the defendants' line on the evening of the 20th Oct.; when the train reached Newton, the station for Hyde, the servants of the company called out the name of the station, and when the train, which consisted of ten or twelve carriages, stopped, the plaintiff opened the door and stepped out upon what he thought was the platform. It was a very dark misty night, and part of the train had overshot the platform; the platform was about the length of seven carriages only. The carriage in which the plaintiff was travelling stopped alongside

C. P.] WHITTAKER v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY CO. [C. P.]

of the parapet of a bridge over a street beyond the platform. The plaintiff stepped upon this parapet and fell into the street below, a height of about twenty feet. On the other parapet of this bridge, which was on the opposite side of the line, iron rails had been put up, but there was nothing of the kind where the plaintiff went over. One witness, who was in the next carriage to the plaintiff, stepped out upon what he also expected to find to be the platform, but fell between the parapet and the train. The distance between the floor of the compartment in which the plaintiff was and the parapet, was just three feet; the parapet was about eight inches lower than the carriage floor, and about fourteen inches higher than the platform. There were some lights on the platform, and a lamp in the street below, but they were not sufficient, or were not so placed as to make the distinction between the platform and parapet clear to people in the carriage. The train was not backed after it stopped, but when the passengers had got out, proceeded on its way.

At the conclusion of the summing up, the questions for the jury were put by his Lordship in the following words: "First, I ask you whether you believe the plaintiff's account of the matter, and that he did really think he was stepping out on to the platform? If so, do you think that he was under the circumstances invited by the company's servants, or that what they did amounted to an invitation to get out when he did? Was it an improper or dangerous place for a passenger to be invited to alight at? Was there any opportunity given him of alighting elsewhere? Did he reasonably suppose that he was stepping out on the platform? Were the railway company by their servants guilty of negligence which caused the injury? Did the plaintiff conduct himself reasonably and carefully, and without negligently contributing to the accident? And then to sum it up, really it seems to me that this is the form in which the question might be put, if one were talking it over as a matter of common sense, Was what was done, apart from design (because there is no pretence that it was done from design), a trap set by the negligence of the company's servants, into which the plaintiff fell without contributive negligence on his part. These questions seem to present the sort of considerations, as well as I am able to frame them, upon which your minds must be expressed. If you answer any of these questions against the plaintiff, there ought to be a verdict for the defendants; but if you think they ought to be answered in favour of the plaintiff, there ought to be a verdict for the plaintiff. I do not trouble you to answer them precisely, I only present them as elements for your consideration to determine the question of verdict for the plaintiff or verdict for the defendant."

The learned judge declined to reserve leave, but stayed execution in order to give defendants time to move upon payment of 1200*l.* into court to abide the event.

The injuries sustained by the plaintiff were very severe, and no objection was taken by the defendants to the amount of the damages, but a rule *nisi* was obtained, calling upon the plaintiff to show cause why the verdict should not be set aside and a new trial had on the ground of misdirection, in that the judge told the jury that it was a question of fact for them to determine whether the calling out the name of the station was not an invitation to alight, and in that the judge directed the jury that there was evidence of negligence for them to consider; and on the ground that the verdict was against the weight of the evidence.

Holker, Q. C., and Crompton, showed cause against the rule, and referred to the case of *Cockle v. The South-Eastern Railway Company*, 22 L. T. Rep. N. S.

513, in which the judges of this court were divided in opinion. Several cases were there considered which have not yet been reported. The case of *Bowhell v. London and North-Western Railway Company*, a short notice of which appeared in the *Times* report of the proceedings of the Queen's Bench on the 27th April last, was also cited; and also *Siner v. The Great-Western Railway Company*, L. Rep. 4 Ex. 117; 20 L. T. Rep. N. S. 114.

Davison, Q. C., and Channell, supported the rule, and contended that there was clearly contributory negligence on the plaintiff's part, that if he had got down the steps no harm would have happened to him, and that, having passed through the lighted station and found himself in darkness beyond, he ought not to have moved until a light was brought or the train had put back; there was no evidence of any application by the plaintiff to the defendants' servants for the adoption of these courses.

BOVILL, C. J.—This seems to me to be a clear case in favour of the plaintiff. In the case of *Cockle v. London and South-Eastern Railway Company* there was a difference of opinion on this bench, but there was in that case an absence of express invitation by the defendants to get out of the train, and that point was especially referred to by my brother Brett and myself, and we concluded it was especially a matter for the jury to determine whether an invitation was implied by the circumstances. My brother Smith, who was of opinion that the case ought not to have been left to the jury, said "The station and the platform were not of improper construction, and the train was not drawn up in such a way as to invite the plaintiff to alight, but, on the contrary, there was an absence of the usual intimation." My brother Keating also referred to the same point. "There was no cry of the name of the station, and there was an absence of anything that I can see in the shape of an invitation beyond the mere fact of the train stopping. It has been held that even the stopping of the train, coupled with the cry of the name, is not an invitation to descend, and it therefore seems to me that the absence of the latter fact in this case conclusively negatives the idea of an invitation." In the case now before us, the train drew up at the station where it ought to stop; the name of the station, "Newton for Hyde," was called out before and after the stoppage took place, and a passenger might expect reasonable accommodation for the purpose of alighting. Even upon the grounds relied on by those members of this court, who considered that the rule in *Cockle v. London and South-Eastern Railway Company* ought to be made absolute, it seems to me to be impossible to say here that there was no evidence of invitation. The case of *Bridge v. North London Railway Company*, decided in the Queen's Bench, and mentioned by my brother Brett in the judgment I have referred to, is the nearest to this; but, as I understand the circumstances of it, the train had stopped in a tunnel where there was no appearance of a platform, and nothing took place to induce the plaintiff to want to get out. Here the facts reasonably led the plaintiff to believe this was the platform; instead of drawing up at the platform, this carriage was at a place which in the dark appeared like the platform, and which was dangerous. The plaintiff did alight at a place which the jury found to be dangerous. The company provided a proper platform, but their servants neglected to avail themselves of it, and set a trap for the plaintiff. It is not desirable to lay down too definite a rule, the circumstances of each case must be considered, and I think it should be left to the jury to say whether there was any invitation by the defendants

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PAICE v. WALKER AND OTHERS.

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or not. It is difficult as a matter of law to say what should always be done by a judge in cases like this; it must depend upon circumstances; but I desire to repeat now what I said in *Cockle v. London and South-Eastern Railway Company*, that the question of invitation should generally be decided by the constituted tribunal for such questions, viz, a jury. This case is far stronger than that, and the case of *Petty v. The London and North-Western Railway Company*, in the Exchequer, alluded to by my brother Brett, was also in favour of the plaintiff here. I think the rule should be discharged, and in saying that there was evidence for the jury, I desire to add that I think the facts justified the finding, and there was nothing in the case to induce the jury to find the other way.

WILLES, J.—I am of the same opinion. The substance of the case was this; the defendants had undertaken to carry the plaintiff safely, and to give him an opportunity to alight in a secure manner; he was induced by the defendants' servants to believe that the carriage was standing at a safe landing place at the platform, and acting upon that belief he stepped upon a trap, and certainly suffered most serious injuries. As to the law, if I thought this case had been the same as *Bridge v. The North London*, I should have reserved leave to the defendants to move, but I consider this quite a different case. At present from what I know of that case, I am rather inclined to agree with the Lord Chief Justice, who, it appears, expressed doubt whether it would not have been better to take the opinion of the jury instead of nonsuiting. I frankly own I cannot see how the court can take it upon them, where there is negligence on the defendants' part, to say without reference to a jury that there was contributory negligence in the plaintiff. That case, however, in my opinion, is not in point, and, without reference to it, this rule ought to be discharged.

Rule discharged.

Attorney for plaintiff, *E. K. Randall*, for *Cobbett, Wheeler, and Cobbett*, Manchester.

Attorneys for defendants, *Cunliffe and Beaumont*, for *J. R. and R. Lingard*, Manchester.

COURT OF EXCHEQUER.

Reported by H. LEIGH and E. LUMLEY, Esqrs., Barristers-at-Law.

Friday, April 29.

PAICE v. WALKER AND OTHERS.

Principal and agents — Foreign principal — Contract signed by agent in his own name — Words "as agent for A. B." in body of contract — Effect of — Personal liability of agent.

The defendants W. and S., corn merchants of London, contracted with P., the plaintiff, a corn factor of the same place, to sell and deliver to him a quantity of wheat, the contract, which was signed by the defendants in their own names, being in the following terms: "Sold to A. J. P., Esq., of London, about 200 quarters of wheat (as agents for John Schmidt and Co., of Dantzic), similar to sample at time of shipment, at 50s. per 486lb., free on board at Dantzic, including freight and insurance to London. . . . Payment by buyer's acceptance of seller's draft for invoice amount at two months . . . (Signed) W. and S." The plaintiff duly accepted and paid at maturity the defendant's draft for the amount accordingly. In an action by the plaintiff against the defendants for breach of contract in delivering wheat inferior to sample, it was

Held, by the Court of Exchequer (Kelly, C.B., and

Martin, Pigott, and Cleasby, BB.), adopting the rule stated in 2 Sm. L. C., 6th edit., p. 344, and following the case of Tanner v. Christian, in the Q. B. 4 E. & B. 591; 24 L. J. 91, Q. B., that as the defendants had signed the contract in their own names, without qualifying their signature by the addition of words indicative of their having signed it as agents merely, and, as there was nothing on the face of the contract itself, either expressly or impliedly, showing a contrary intention, the defendants must be held to be contracting parties, and as such liable as principals in the present action.

Seem, that the words, "as agents for J. S. and Co., of D.," in the body of the contract, were not per se sufficient evidence of such "contrary intention."

This was an action by the plaintiff to recover damages from the defendants by reason of the latter's breach of contract in having failed to ship and deliver to the plaintiff a certain quantity of wheat equal to sample; and by his declaration the plaintiff charged that, by an agreement between him and the defendants, it was amongst other things agreed, that the defendants should sell and deliver to the plaintiff, and the plaintiff should buy and accept from the defendants, about 200 quarters of wheat, similar to a certain sample at the time of shipment, due allowance being made for size, handling, and time out of bulk, at the price of 50s. per 486lb., free on board at *Dantzic*, and including freight and insurance (exclusive of war risk) to London, and that the said wheat should be shipped by the defendants per steamer as soon as suitable room could be obtained, and that the defendants should guarantee full out-turn (sea accidents excepted, in which case of sea accidents the defendants' invoice should be final) excess or deficiency to be paid for reciprocally, and that payment should be made for the said wheat by the plaintiff accepting the defendants' drafts for invoice account at two months from the date of and against the bill of lading (less interest of one month), or by cash less the interest for the unexpired term of three months, which interest should in both cases be at the rate of 5 per cent. per annum. Averment that all conditions were fulfilled, &c., and the defendants did ship and deliver certain wheat as and for the aforesaid wheat, and the plaintiff paid for the same by accepting such bill as aforesaid, yet the defendants did not ship or deliver to the plaintiff such wheat as they agreed to do as aforesaid, and the wheat which they shipped and delivered as aforesaid was not at the time of the shipment thereof, similar to the sample aforesaid, but of an inferior quality, whereby, &c. (allegation of damage to the plaintiff), and claim of 500l.

The defendants by their first plea denied the agreement as alleged, and by their second plea stated that they shipped and delivered to the plaintiff such wheat as they agreed to do, and the wheat which they shipped and delivered was, at the time of the shipment thereof, similar to the sample at time of shipment, due allowance being made for size, handling, and time out of bulk, and on those pleas issue was joined.

At the trial at Guildhall, in December last, before the Lord Chief Baron and a common jury, the following appeared to be the facts of the case:—

The plaintiff was a corn factor, carrying on business at the corn market, Mark-lane, in the city, and the defendants were corn merchants, also carrying on business at the same place. On the 18th June 1869, the plaintiff entered into a contract with the defendants to purchase 200 quarters of wheat, the contract being contained in the following document, which was unstamped:—

1, Muscovy-court, Trinity-square, London, E. C.,
June 18, 1869.

Sold to A. J. Paice, Esq., London, about 200 quarters of wheat (as agents for John Schmidt and Co., of Dantzic), similar

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PAICE v. WALKER AND OTHERS.

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to sample 94 at time of shipping, due allowance being made for size, handling, and time out of bulk, at the price of 50s. per 496lb., free on board at Dantzic, and including freight and insurance (exclusive of war risk), to London. Shipment per steamer as soon as suitable room can be obtained. Sellers not to be responsible for the solvency of the underwriters. Full out turn guaranteed (sea accidents excepted, in which case seller's invoice is final), excess or deficiency to be paid for reciprocally. Payment by buyer's acceptance of sellers' drafts for invoice amount at two months from date of and against bill of lading, less interest of one month, or cash less interest for the unexpired term of three months, at five per cent. per annum.

(Signed)

WALKERS AND STRANGE.

There was a bought note in precisely similar terms (*mutatis mutandis*), which was signed by the plaintiff.

A sample was delivered to the plaintiff at the time of signing the contract. The plaintiff duly accepted the defendant's draft or bill for the invoice price of the 200 quarters of wheat, and paid the same when due. On delivery, the wheat, as alleged by the plaintiff, proved to be inferior to the sample, and thereupon the defendants, having declined to make to the plaintiff the compensation required by him in that behalf, the plaintiff brought the present action, in which a verdict was found for the plaintiff for 46s. 15s., and leave was reserved by the learned Lord Chief Baron to the defendants to move to enter a non-suit, on the ground that the defendants contracted as agents only, and not as principals, and so were not liable. A rule having accordingly been obtained to that effect by *Dowdeswell*, Q. C., for the defendants,

Murphy (with him was *Pollock*, Q. C.) now showed cause against it on the part of the plaintiff. The verdict was quite right, and the defendants are liable as principals on this contract for the breach of it. It is manifest, on the face of the document itself, that the defendants intended to be themselves personally liable, although they had principals residing abroad. In a recent case in this court (*Fairlie v. Fenton and others*, ante, p. 373), where the plaintiff, a cotton broker, contracted on behalf of his principal for the sale of goods to the defendant in the following words:—"I have this day sold you (the defendant), on account of T., 100 bales of cotton, &c. (Signed) E. T., broker," it was held he could not maintain an action for a breach of contract as he had acted as a broker merely, and was not a party to the contract. The case, however, of a broker differs essentially from that of an agent or factor; and in the present case there is nothing to exclude the liability of the defendants except the words introduced in the body of the contract, "as agents for Schmidt and Co., of Dantzic." [MARTIN, B. refers to *Lennard v. Robinson and another*, 5 E. & B. 125; 24 L. J. 275, Q. B., and PIGOTT, B. refers to *Tanner v. Christian*, 4 E. & B. 591; 24 L. J. 91, Q. B.] It is a material circumstance to be considered in the present case, as was pointed out, and some stress laid upon the fact, by Coleridge, J., in his judgment in *Lennard v. Robinson* (*ubi sup.*), that the principals here are foreigners resident abroad. "It seems to me," said Coleridge, J. in that case, "reasonable that a contracting party should require to have a party to whom he may look, and upon whom he may call for performance." *Primâ facie*, a person making a contract without any words limiting his liability, must be taken to be the principal. There are no such words here. The words, "as agents, &c.," in the early part of this contract, are descriptive merely, and the simple fact of the defendants being agents for another is not of itself sufficient to free them from liability as principals. Again, by the terms of the contract, payment was to be made by the buyer's acceptance of the seller's drafts, and the plaintiff did accept the defendants' bill for the amount, and paid it when due, showing that both parties considered the defendants as principals. In *Tanner v. Christian*

(*ubi sup.*), the words in the body of the contract, following the defendant's name were, "for and on the part of," the named principal, and they are equivalent to the words, "as agent for" in the present case, and yet it was there held by the Court of Queen's Bench that the defendant was a principal, and liable on the contract, he having signed it in his own name without any qualification. Now, in the present case, the defendants sign in their own name with no words of qualification or agency appended or prefixed to their signature, and as was pointed out by Lord Campbell, C. J., in *Tanner v. Christian*, it was easy enough for the defendants, by the use of the words "perprocuration for Schmidt and Co.," when signing the document, to have excluded their personal liability. But they have not done so. The case of *Lennard v. Robinson and another*, is an *a fortiori* case in favour of the plaintiff here, for there the charter party was signed by the defendants, "by authority of and as agents of Mr. M. S., of Memel," a qualification of their signature, which is wanting here, and yet they were held liable as having personally contracted. [PIGOTT, B., refers to *Cooke v. Wilson and another*, 1 C. B., N. S., 153; 26 L. J. 15, C. P.] In Mr. Smith's notes to *Thompson v. Davenport*, 9 B. & C. 78; 1 M. & R. 110; 2 Sm. L. C. p. 344, 6th edit., that learned writer says, "In all these cases the question whether the person actually signing the contract is to be deemed to be contracting personally, or as agent only, depends upon the intention of the parties as discoverable from the contract itself, and it may be laid down as a general rule that, where a person signs a contract in his own name, without qualification, he is *primâ facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching it must be apparent from the other portions of the document, that he did not intend to bind himself as principal," and *Cooke v. Wilson* (*ubi sup.*); *Green v. Kopké*, 18 C. B. 549; 25 L. J. 227, C. P., and other cases are there cited. That passage applies here. He cited also

Parker v. Winlow, 7 E. & B. 942; 27 L. J. 49, Q. B.

Dowdeswell, Q. C., with *Day*, for the defendants, supported their rule.—In the operative part of the contract here the defendants expressly say, "We enter into this contract not as principals, but as agents," and it would be rendering entirely nugatory that part of the contract if the view and construction contended for by the plaintiff should be upheld. The drawing of the bill must be put out of consideration. The correspondence that passed between the plaintiff and the defendants, subsequently to the signing of the contract, clearly shows the agency of the defendants, and refers to their principals. Why, if they were not intended to be made responsible, were the principals mentioned at all? The principle of the law is *respondeat superior*. It is laid down in Sm. Merc. Law, 163, 7th edit., that "an agent contracting as such for a known principal, incurs no personal liability to third parties. If the individual with whom he contracted knew him to be an agent, knew his principal, and knew that he intended to bind that principal, he will be taken to have trusted to the credit of the principal, and the agent will not be bound." As was said by Littleale, J., in *Thomson v. Davenport* (see notes, 2 Sm. L. Cas. *ubi sup.*), it is more advantageous for the party generally to enforce the contract against the responsible principal than against the temporary agent. The cases cited on the other side are distinguishable. In *Tanner v. Christian* the defendant was throughout (as Lord Campbell pointed out), the acting party, having to perform the acts constituting the consideration. So also in *Lennard v. Robinson*, and *Parker v. Winlow* (both of which, by

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PRICE v. WALKER AND OTHERS.

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the by, were cases of charter-parties), the defendants were to do the acts, and it was on those special circumstances that the court founded their judgments in each of those cases. But here the defendants are to do nothing; the corn is to be shipped at Dantzic direct to the plaintiff. The defendants are merely the hand by which payment is to be made to the sellers, and they have not even an insurable interest in the goods. The case of *Downman v. Williams*, in error, 7 Q. B. 103; s. c. nom. *Downman v. Jones*, 14 L. J., N.S., 227, Q. B., is decisive of the present case. [MARTIN, B.—In Mr. Smith's book that case is cited, and treated as an authority for a very different principle from that for which you are citing it. [The learned Baron here reads the note on that case, 2 Sm. Lead. Cas. 345, 6th edit., and refers to *Jenkins v. Hutchinson*, 13 Q. B. 744, also there commented on by Mr. Smith.] There are many cases in which words of much weaker import have been held sufficient to discharge the party, and the principal has been held liable:

Lewis v. Nicholson, 18 Q. B. 503; 21 L. J. 311, Q. B.;

Green v. Kopke, 18 C. B. 549; 25 L. J. 297, C. P.;

Spittel v. Lavender, 2 Brod. & Bing. 452.

[*Per CURIAM*.—The case of *Spittel v. Lavender* is as different from the present case as possible. The defendant there, an auctioneer, entered into the contract "as agent for and on the part of B.," and B., shortly afterwards, signed a note at its foot. "I sanction this agreement, and approve of the defendants having made it on my behalf," and all the four judges there put their decision upon that, and said that the principal's signature and sanction of the agent's act was conclusive to show that the personal liability of the agent was expressly excluded.]

Green v. Kopke, is a strong authority in the defendant's favour. Jervis, C. J., in his judgment there says, "It is ridiculous to suppose that an agent for a mere commission of $\frac{1}{2}$ per cent. would guarantee the performance of a contract for the sale of 1000 barrels of tar," or, as may be said in the present case, of 200 quarters of wheat. And it is clearly shown, by the judgments of all the judges in that case, that in the case of an agent in this country, acting for a foreign principal, it is not a rule of law that the agent is to be treated as the principal, but that, though there may be a presumption to that effect it is, nevertheless, a question of fact, and not of law, whether the defendant contracted as agent or not. In the present case it is submitted that it is clear that the defendants contracted as agents only, and had no intention, and were not understood by the plaintiff at the time, to render themselves personally responsible. This case is governed by the principle on which *Fairlie v. Fenton*, ante, p. 373, was decided.

KELLY, C.B.—This was a contract for the sale of a quantity of wheat by sample, and the question at issue in the present action between these parties is whether or not the defendants are personally liable to the plaintiffs upon that contract for a breach of it. I am of opinion that they are. There may be a difficulty in reconciling the various authorities, but the principle which governs such cases as the present is well established, and is very clearly laid down by Mr. Smith, in his notes to the case of *Thomson v. Davenport*, 9 B. & C. 90, in 2 Sm. Lead. Cas., 6th edit., p. 344, where it is said that the question in these cases, whether the party signing the contract is to be taken as a principal, or as having acted as an agent only, is one of intention, to be discovered from the document itself; but that, as a general rule, where he signs his own name without words of qualification, *prima facie* he is to be looked upon as a principal and personally

responsible—a conclusion which may be rebutted by a reference to other portions of the contract. Now, to apply that principle to the present case, we find that the contract in question here is in two parts—one part being signed by the plaintiff, and the other by the defendants, "Walkers and Strange," in their own names, without anything more, no words of qualification or limitation of any sort or kind being affixed or added to their signatures. That at once distinguishes this case from many cases, several of which have been cited at the bar, in which the party sought to be charged as a principal had signed the contract "per procuration" or "as agent" of or for a named principal. As is said by Mr. Smith in his notes to *Thomson v. Davenport* (p. 344, 6th edit.), in commenting on *Tanner v. Christian and Lennard v. Robinson*, "The fact, however, that the signature is expressed to be made 'as agent' is strong to show that the person signing does not mean to bind himself personally, if the terms of the contract itself do not show a contrary intention." Here then the defendants did not sign "as agents," and the question is, is there anything in the contract between the parties which, on the face of it, shows that they did not intend to make themselves personally responsible? We find in the contract these words:—"Sold to A. J. Paice, Esq." (the plaintiff) "200 quarters of wheat," and then between brackets in a parenthesis there come these words ("as agents for John Schmidt and Co., of Dantzic") which are relied on by the defendants as a proof that they did not contract as principals, and then they sign the document in their own names simply "Walkers and Strange," and nothing more. Now there are cases without number in which these words, "as agents for," &c., have been introduced in the body of the contract, and yet the parties who have signed the contract in their own names simply and unqualifiedly have been held to be principals. I will only refer to one case of the many that have been cited, and that are to be found in the books—I mean the case of *Tanner v. Christian*, in the Queen's Bench (*ubi sup.*) decided by Lord Campbell and the other learned judges of that court. There the defendant contracted in the body of the contract "for and on the part of" another person expressly named; he but signed the contract in his own name without the addition of any words of qualification or limitation, and it was held that, having signed the contract, the defendant was a principal and liable as such thereunder. Upon this authority we may take it that where a contract is signed by a person in his own name, as in the present case, without any words of qualification or limitation attached to such signature, such person is liable as a principal, unless there is something on the face of the contract itself to show, either expressly or by necessary implication, a contrary intention. In the present case there is nothing of that sort, and I think that this contract, for the breach of which the plaintiff sues, binds the defendants as principals. I do not attach much or any importance to the fact of the defendants being agents for a foreign firm, nor to the conduct and correspondence which took place subsequently to the contract to which Mr. Dowdeswell has referred. Without attempting to reconcile all the conflicting decisions upon the subject, I am clearly of opinion, looking at the signature and the body of this contract, that the defendants are liable. The rule, therefore, will be discharged.

MARTIN, B.—I am of the same opinion entirely. I adopt as a rule the principle laid down by Mr. Smith in his notes to the case of *Thomson v. Davenport*, where he says "It may be laid down as a general rule that where a person signs a contract in his own name, without qualification, he is *prima*

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PAICE v. WALKER AND OTHERS.

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facie to be deemed to be a person contracting personally, and, in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal:” (2 Sm. L. C. 6th edit. p. 344.) The document in the present case is signed by “Walkers and Strange” in their own names “without qualification,” and according to the above rule they are *prima facie*, liable upon it as principals. The present documents are not in reality “bought and sold notes” at all. Bought and sold notes, properly speaking, are instruments signed by brokers, who are a kind of middlemen between the contracting parties; but this is not the case of a document signed by a broker. That, therefore, distinguishes the case from *Fairlie v. Fenton*. The question here is whether, in the body of this contract, the defendants Walkers and Strange are or not intended to be principals. I think they were. The words “as agents for Schmidt and Co., of Dantzic,” are, in my opinion, merely a sort of ear mark of the contract, intimating to the plaintiff, the purchaser, that the owners of the corn were Schmidt and Co., of Dantzic, to show, in fact, what wheat was referred to. The defendants’ rule should, I think, be discharged.

PIGOTT, B.—I concur with my Lord and my brother Martin in all that they have said, and in thinking with them that this rule must be discharged. I adopt the principles of construction which they have propounded and acted on. The case is distinguishable from *Fairlie v. Fenton*. The principle will be found well laid down in the case of *Tanner v. Christian (ubi sup.)*, where it is shown, first, that the intention of the parties must be ascertained, and the document construed in accordance therewith; and, secondly, that when a man signs a document in his own name, he is *prima facie*, and in the absence of anything showing a contrary intention, to be taken as the party responsible and liable thereon as principal. Here the defendants sign their own names to this contract, not qualifying their signature by adding the words “as agents,” or “per procuration,” or anything of that sort. It is true that in the body of the contract they describe themselves “as agents for Schmidt and Co., of Dantzic;” and, referring to the case of *Lennard v. Robinson (ubi sup.)*, it has been said, and said truly, I think, by Mr. Murphy, that the fact of the real owners or sellers, on whose behalf the contract was made, being foreigners, is a material circumstance to be taken into consideration. I think it is so, and that in the present case it makes against the defendants, who are Englishmen resident in this country, whilst Schmidt and Co., their principals, are foreigners, living at Dantzic; and, naturally and reasonably enough, therefore, the plaintiff would prefer to look to parties living in London, and probably personally known to him, than to strangers living so far away as at Dantzic. This is not like the case of a document signed by a broker, as it was in *Fairlie v. Fenton*, in which there is a well recognised principle of law and practice, nor are these documents bought and sold notes. Mr. Dowdeswell referred to an “I O U,” to illustrate or enforce his argument, but not, I think, very accurately, for an “I O U” is not exactly, what he called it, a “mercantile document.” The defendants might easily have guarded themselves from personal responsibility by signing the document, with the addition of the words “by procuration,” or “as agents,” &c., as pointed out by Cresswell, J., in *Cooke v. Wilson (ubi sup.)*

CLEASBY, B.—I am of the same opinion. I do not dissent at all from the judgments which have just

been pronounced by my Lord and my brothers Martin and Pigott, BB., though I form my opinion on not exactly the same grounds. This is a case of a contract for the sale of goods evidently on the face of it made by the defendants as agents for a principal living beyond the sea, and that, I think, is a matter of some importance. Now I find it thus laid down in Buller’s Law of Nisi Prius (at p. 130, 2nd edit.), “Where a factor to one beyond sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last the promise will be presumed to be made to him, and the rather so, as it is so made for the benefit of trade.” And Buller, J. then goes on to say by way of qualification, “However, a factor’s sale does, by the general rule of law, create a contract between the owner and buyer, and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him and not the factor, the buyer could not be justified in afterwards paying the factor; yet, perhaps, under some particular circumstances this rule may not take place.” And in an old case, of *De Gaillon v. L’Aigle*, 1 Bos. & Pul. 369, Eyre, C.J. says, “I am not aware that I have ever concurred in any decision in which it has been held that if a person, describing himself as agent for another *residing abroad*, enters into a contract here, he is not personally liable on the contract.” The principle, I think, will be found in all the books treating of the law of principal and agent, that, as a general rule, persons acting for merchants in a foreign country are personally liable on contracts made by them for their employers, unless they expressly exclude such liability on the face of the contract itself, on the presumption that the credit is rather given to the agent or factor at home than to the principal resident abroad: (See Story on Agency, sects. 268, 269, 400, 401; Paley’s Principal and Agent, 3rd edit., by Lloyd, pp. 248, 285, 334, 373, 382; and Smith’s Mercantile Law, 7th edit., p. 164.) Now let us apply the principle to the present case. Here we have a contract in these words: “Sold to A. J. Paico,” the plaintiff, “200 quarters of wheat, as agent for Schmidt and Co., of Dantzic,” and it is signed by the defendants in their own names. We have it then on the face of the document itself, that the defendants are acting, as between themselves and the plaintiff, as agents for merchants living at Dantzic, a fact which is mentioned probably in case it should happen to be necessary to have to refer to those persons. No doubt the foreign principals are named in the contract, but still the fact remains that the contract is made by the defendants, and is signed by them in their own names, without any qualifying words attached to their signatures, and they are bound by it. Had they by a contract in like form agreed to buy could it be said they would not be entitled to sue the seller in their own names for non-delivery? The fact of other persons being named in the contract has, in my judgment, little or no effect upon the present question, because they are persons residing beyond sea.

Rule discharged.

Attorneys for the plaintiff, *Hillearys and Tunstall*, 5, Fenchurch-buildings, E.C.

Attorneys for the defendants, *Denton, Hall, and Barker*, 15, Gray’s-inn-square, W.C.

NISI PRIUS.] POLLARD v. LONDON AND SOUTH-WESTERN RAILWAY COMPANY. [NISI PRIUS.]

NISI PRIUS.

Reported by M. W. MCKELLAR, Esq., Barrister-at-Law.

COURT OF QUEEN'S BENCH.

(Before HANNEN, J. and a Common Jury.)

Friday, June 3.

POLLARD v. LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

Carriers' liability—Carman's authority to substitute one place of delivery for another—Fresh contract of carriage.

Plaintiff directed the defendants to deliver goods at his house. When the defendants' carman came to the house with the goods in a waggon, plaintiff wrote him an acknowledgment of the safe receipt of the goods, and a request to deliver at a stable occupied by him about 1000 yards off; the goods were not unloaded at the plaintiff's house, but through the carman's negligence at the stable they were destroyed:

Held, that the defendants could be liable for the value of the goods only if this substitution of one place of delivery for another was within the scope of the carman's duty, or if the carman had authority to enter into a fresh contract of carriage on behalf of his employers; and these were questions for a jury.

The declaration stated the defendants were carriers of goods for hire from Southampton to London, and the plaintiff delivered to the defendants, and the defendants received as such carriers, certain goods, viz., a cask of wine of the plaintiff to be by the defendants safely carried from Southampton to London aforesaid, and there delivered for the plaintiff for reward to the defendants; and all conditions were performed, &c., necessary to entitle the plaintiff to have the said goods safely carried and delivered as aforesaid, yet the defendants did not safely carry and deliver the said goods as aforesaid, but so negligently carried and delivered the same that they were broken, damaged, and spoiled.

There were also money counts for the amount paid by the plaintiff for the duty and carriage of the cask of wine.

The defendants pleaded, first, not guilty; secondly, denial of the receipt and delivery of the goods; thirdly, that after the said goods were delivered to and received by the defendants, and before any breach of duty by the defendants, the plaintiff exonerated and discharged the defendants from all obligation to deliver the goods and from delivering the same, and the defendants then did what is complained of by the plaintiff's leave; and fourthly, to the money counts, never indebted.

In answer to a letter from the defendants, asking for instructions as to forwarding his cask of wine, which had arrived at Southampton, the plaintiff wrote:

1, Brompton-square, Nov. 27, 1869.

Messrs. Cooke and Lee.

Gentlemen,—Be pleased to forward the cask of wine, E. G. 1421, from Havre, to the above address, at your earliest opportunity.—I remain, Gentlemen, yours most obediently,

E. W. POLLARD.

On the 30th Nov., about noon, a carman of the defendants brought the cask in one of the defendants' waggons to the garden-gate of the plaintiff's house. The plaintiff's wife, the plaintiff not being at home, requested the carman to deliver the wine at a stable occupied by the plaintiff, which was situated about a thousand yards from the house. The cask was not then taken out of the waggon, but whilst the waggon with the cask in it was standing at the plaintiff's gate, the plaintiff's wife wrote and gave to the carman, at his request, a receipt, of which the following is a copy:

1, Brompton-square, Nov. 30.

Mr. Pollard has received the wine safely, and requests it may be delivered at the Mews, Turkish Baths, Alfred-place.

At the same time the plaintiff's wife paid to the carman 3*l.* 13*s.* 7*d.*, the amount then demanded by him for carriage and duty, and he signed and gave to the plaintiff's wife a receipt for this sum upon one of the printed forms generally used by the defendants. The following sentences, amongst others, were printed on the face and back of it:

Any servant of the company taking more than is stated on this ticket, will be dismissed.

It is requested that the amount demanded on this ticket be paid, as the carman has strict orders not to leave the goods without payment.

All goods will be considered as delivered (if not carted out by the company) on notice of arrival to the consignee, and if carted out by the company, when unloaded at the door of the consignee's abode or place of business as the case may be.

After these two documents were exchanged between the plaintiff's wife and the carman, and before the latter and the waggon left the plaintiff's gate, the plaintiff's wife gave to the carman 4*d.* as a gratuity. It was the usual custom of the plaintiff to give beer or money for beer to persons delivering parcels at his house.

The cask of wine was not unloaded from the defendant's waggon at the plaintiff's gate, but the carman, according to the request of the plaintiff's wife, went with the waggon and cask to the plaintiff's stables. There was with the waggon no ladder for unloading heavy goods, and the carman attached a rope to the cask and fastened it to the wheel. The rope got fast, and the carman, being in a rage, as a witness said, in consequence of the smallness of the gratuity he had received, gave the cask a kick, the rope gave way, and the cask fell on the ground and burst.

Denman, Q. C. and Mangles, for the defendants' cited *Shepherd v. Bristol and Exeter Railway Company*, L. Rep. 3 Ex. 189; 18 L. T. Rep. N. S. 528, and contended that the liability of the company terminated on the delivery of the receipt by the plaintiff's wife to the carman. Afterwards the carman was the plaintiff's agent at least as much as he was the defendants'.

H. James, Q. C. and McKellar, for the plaintiff, submitted that this substitution of one place of delivery for another was within the scope of the carman's authority from the defendants, and therefore the defendants were liable for the value, carriage, and duty of the cask. The scope of authority was left to be decided by a jury in the case of

Scothorn v. The South Staffordshire Railway Company, 8 Ex. 341.

HANNEN, J., in summing up, desired the jury to treat the case as they would if they had to consider the liability of any common carrier, and not to make the defendants exceptionally responsible because they were a railway company. The contract between the parties was admitted to be an undertaking on the defendants' part to carry to and deliver at No. 1, Brompton-square; if, as it had been alleged, the cask of wine could not have been taken into the house, two courses were open to the carman; he might either have deposited it there at the gate, or he might have taken it back to the company's station and have asked for further instructions from some responsible officer. The carman adopted neither of these courses; Mrs. Pollard, who was acting on her husband's behalf, gave a receipt for the goods as if they had been delivered; she in fact waived delivery at the place to which the plaintiff had ordered the consignment, and she added a written request that the cask should be carried to another destination.

Div.]

NEWMAN v. NEWMAN. STERBINI v. STERBINI.

[Div.]

It was to be taken elsewhere for Mrs. Pollard's convenience, and in no way had it been suggested that the company was to have been benefited by the alteration in the place of delivery. Now, for the accident which afterwards occurred the company could only be made liable in one of two ways; either it must have been within the scope of a carman's duty to substitute another place of delivery for that agreed upon by his employers, or it must have been within the scope of his authority to enter into a fresh contract of carriage on behalf of his employers. It was for the jury to judge as to the terms upon which a carman was usually employed, and the extent of the powers intrusted to him. It had been suggested that the absence of appliances would have been the cause of a similar mishap if the unloading had taken place at Brompton-square, but the carman's ill-temper, to which a witness alluded, was supposed to have arisen only after leaving the plaintiff's house, and unless what the carman undertook to do was within the scope of the authority given him by the company, it may be inferred that there would have been no accident for which the defendants could be liable. The distance of the altered destination from the plaintiff's house was about a thousand yards; if this substitution of a place of delivery were within the scope of a carman's authority, it would be difficult to say to what distance he should be limited. Although he left the matter to the jury, his Lordship said he could see no evidence of any authority to the carman either to substitute a place of delivery, or to enter into a fresh contract of carriage.

The jury found a verdict for the defendants.

Attorneys for plaintiff, *Dickson and Lucas*.

Attorney for defendants, *L. Crombie*.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

March 17 and 22.

(Before Lord PENZANCE, J.O.)

NEWMAN v. NEWMAN.

Dissolution suit—Incestuous adultery—Unreasonable delay.

A wife petitioned for a dissolution of marriage on the ground of her husband's adultery with her own sister. The adultery took place twenty years before the petition was presented, and the wife alleged as the reason for the delay that she had yielded to her mother's entreaties not to make public a family scandal. The mother died in 1869, and the parties had not lived together since 1850.

The court held that this was "unreasonable delay," but under the circumstances thought it a fit case for the exercise of the discretion vested in it, and granted a decree.

This was a wife's petition for dissolution on the ground of incestuous adultery. The husband did not enter an appearance. The marriage was in 1844, and the adultery complained of (with the wife's sister) occurred in 1848 and 1849. The husband deserted his wife in 1860. The case was heard before the Judge Ordinary on March 17, and the adultery was fully proved. The petitioner was examined as to the cause of the delay in presenting the petition. She stated that her reason was that her mother was reluctant to expose the scandal, and that on her mother's entreaties she had refrained from presenting her petition until after her mother's death in 1868.

Kemp and Keeble for the petitioner.

The court held the adultery proved, but took time to consider whether there had been unreasonable delay in presenting the petition.

Mar. 22.—Lord PENZANCE, J.O.—In this case the petitioner proved, to the satisfaction of the court, that many years ago her husband was guilty of incestuous adultery with her sister. That was followed by a separation between the husband and the wife. The wife no longer lived with him, and, according to the statement of the wife, the intimacy between him and his sister-in-law was continued afterwards, and they appeared to have lived together. But a long time has elapsed. The events to which she speaks occurred near twenty years ago, and she admitted fairly at the time of the hearing that the reason why she had not applied to this court before was that her mother was very averse to having the matter disclosed, and that she had yielded to her mother's wishes. At the time of the hearing I expressed an opinion that it was "unreasonable delay," because it amounted to this, that a party having a good cause did not come into court on account of the pain which the disclosure would cause to the feelings of the family. I adhere to the opinion that that is "unreasonable delay." But the Act does not say that in all cases where there is unreasonable delay the decree shall be refused. Although there may have been unreasonable delay, still the court may grant a decree. Therefore, the question really is, whether, assuming unreasonable delay, the court, under all the circumstances of the case, ought to withhold a decree? There was, no doubt, before the passing of the Divorce Act, a class of cases which did invite criticism in respect of unreasonable delay, cases where the husband's honour had been wounded, and he had put up with his own disgrace. In such cases the House of Lords acted on the principle "*Vigilantibus non dormientibus jura subveniunt*." That is a class of cases to which no doubt the discretionary bar would not apply; but, looking at all the circumstances of this case, I don't think it right to withhold the decree, and I shall therefore make the decree *nisi* with costs.

Attorney for petitioner, *E. Moss*.

STERBINI v. STERBINI.

Dissolution suit—Agreement to stay proceedings enforced.

A wife agreed to withdraw her petition for a dissolution of her marriage on condition that her only child who was abroad, and who was represented to be seriously ill, was brought back to England and given into her care. The husband carried out his portion of the agreement, but the wife refused to stay proceedings on the ground that the representations as to the illness of her child had been exaggerated, and that she had made the agreement without legal assistance.

The court held that as neither fraud nor duress had been used to procure the agreement it was to be enforced, and dismissed the petition.

This was a suit promoted by the wife for a dissolution of her marriage on the ground of her husband's adultery, coupled with cruelty. The parties were married Aug. 15, 1855, and lived together until March 1869, and there was issue one son aged eight years at the time of separation. The case now came before the court on a motion of the respondent to dismiss the petition on the ground that the petitioner had agreed not to proceed further with her suit on condition that her son was brought back to England and delivered into her custody. Lengthy affidavits were filed on both sides, and

Div.]

In the Goods of Hicks.

[Prob.]

from them it appeared that after the institution of the suit, the respondent, who was an agent for the purchase of foreign grain, went abroad, taking his son with him. The affidavit of Nathaniel Victor Rix, a mutual friend of the parties, by whom the arrangement was effected, stated that on Nov. 23, 1869 he received a message from the petitioner, desiring him to call upon her, and on seeing her she informed him that she had received news that her son was dangerously ill, and at the point of death. This information was contained in a letter from the respondent to the petitioner's sister, and it was to the effect that the illness of the child was a serious one, but that the doctor had refused to pronounce any definite opinion as to the result. The petitioner's mother was present at the interview with Mr. Rix, and she expressed her great dislike to the proceedings in the Divorce Court, and her strong desire that they should be discontinued. After some further conversation the petitioner said: "I will give you my word of honour the suit shall be withdrawn." Mr. Rix then communicated by telegraph with the respondent, and on Nov. 26, 1869 the petitioner signed and delivered to Mr. Rix the following paper:

9, Stock Orchard Villas, 21st Nov. 1869.

Mr. Arthur Marius Sterbini.

Sir,—For the sake of my dear child, and upon the understanding that you bring him to England as soon as his health permits, and that I be at liberty to live apart from yourself, and to reside in this country, your absence notwithstanding, I hereby undertake to withdraw from the suit commenced against you for divorce, and also that I will not institute any other proceedings in the Divorce Court in respect of your misconduct charged in my petition or otherwise prior to this date, or take any steps to deprive you of the legal custody of our child; but I reserve to myself, without prejudice from this undertaking, full power to continue my suit on all points next Hilary Term, or such after time as I may think fit, should you not fulfil the aforesaid condition binding on you by this undertaking.

Witness, SARAH ANN COX. (Signed) EMMA STERBINI.

On the 24th Dec. 1869 the respondent arrived in England with his son, whom he delivered next day to the petitioner's sister. He has ever since remained under the petitioner's care, but the suit was not withdrawn, but stood in the list of causes for hearing this term. In her affidavit the petitioner stated that on hearing of the illness of her child she was in great distress of mind, and hardly knew what she was doing; that she believed her child was dying; and that she should never see him again; that she had no advice from any professional person; and that she signed the paper contrary to her inclination, and solely because she believed that her child was dying. She also alleged that from inquiries made subsequently from her son she had reason to believe that the account of his illness given by the respondent was greatly exaggerated, and that he had represented the child to be in that dangerous state solely for the purpose of imposing on her, and obtaining this undertaking from her.

Searle, on behalf of the respondent, moved to dismiss the petition, and cited

Rowley v. Rowley, 3 S. & T. 347; 9 L. T. Rep. N. S. 846;

Hooper v. Hooper, 1 S. & T. 602; and L. Rep. 1 H. of L. 220; 1 L. T. Rep. N. S. 522.

Inderwick, for the petitioner, opposed.—The bargain was a one-sided one, and obtained from the petitioner by a gross exaggeration, and by the fear that unless she withdrew from the suit she would never see her child again. In *Rowley v. Rowley*, and *Hooper v. Hooper*, the wife was advised by her attorney and counsel, but the petitioner here was totally unassisted by legal advice, and was not in a position to make a fair bargain.

Lord PENZANCE, J.O.—The agreement is one which has been made without fraud, and without duress;

but it must be for one or other of these causes that the court would invalidate an agreement of this kind. There was no fraud in the matter, because what is suggested about the illness of the child not being genuine is not proved. The husband says the child is ill, he does not say it is dying—it may be serious or it may not be—and there is no proof that what he says is not word for word true. No deception at all seems to have been practised. As to duress, after reading the affidavit of Mr. Rix, I cannot see anything like duress in the matter, and I do not think the wife's account makes it out at all. Mr. Rix is, comparatively speaking, a disinterested person, and the court is more inclined to rely on what he says, than on what Mrs. Sterbini says. It seems to me that there was no duress, on the contrary, she voluntarily offered to drop the proceedings. The reason why the agreement was put into writing was, that Mr. Rix was not satisfied with a mere verbal promise. He told Mrs. Sterbini that the child was out of danger, before she signed the agreement, and it is idle to say that she was forced into signing the agreement. Then it is said that the bargain is one-sided, and that Mrs. Sterbini had no legal advice in making it. I do not think the court can go into that. Mrs. Sterbini contracted to surrender this litigation, on the promise that her child was brought back. That has been done. The child has been handed over to her, and it is conceded by her husband that it shall remain with her. I shall dismiss the petition, and shall make an order that the child remain in the wife's custody until further order.

Solicitor for respondent, *Wm Miller*.

COURT OF PROBATE.

Reported by W. LEYCESTER, Esq., Barrister-at-Law.

Tuesday, Feb. 15.

•(Before Lord PENZANCE.)

In the goods of Hicks.

Administration—Grant de bonis non.

A grant de bonis non was applied for by the representatives of the next of kin of a deceased testator, who was also entitled to three-fourths of the estate. Two legatees originally entitled in distribution were still living, but they were abroad and difficult to be found. Under the circumstances the court dispensed with the usual rule requiring the persons entitled in distribution to be cited, and granted administration to the representative of the next of kin on security being given for the remaining fourth of the estate.

William Hicks died 8th Feb. 1854, having duly executed on 12th Feb. 1842, a will, by which he devised all his estate and effects to Robert Hicks, his brother, and Mary Ann Ewen, his sister, and appointed them his executor and executrix. Mary Ann Ewen died in the testator's lifetime, leaving two daughters, Frances and Catherine. Robert Hicks thus became entitled to three-fourths of the estate: one-half as legatee and a quarter as next of kin; and on 12th May 1854, he took out probate and died intestate 7th Jan. 1869. His son, R. A. Hicks, took out letters of administration to his estate in Dec. 1869.

A further sum having become distributable on account of the estate of William Hicks, Robert A. Hicks applied for a grant *de bonis non*. It was objected in the registry that Catherine and Frances, daughters of Mrs. Ewen, being parties originally entitled in distribution had a claim to representation prior to that of the administrator of the next of kin. Catherine Ewen had married a

C. CAS. R.]

REG. v. JESSE SMITH.

[C. CAS. R.]

Mr. Hill, and was now supposed to be living apart from him in Uruguay, and the other daughter, Frances, had married a Mr. Morris in Cleveland, Ohio, U.S., and was now supposed to be dead. Under these circumstances,

C. A. Middleton moved that a grant *de bonis non* of the estate of Wm. Hicks, be made to R. A. Hicks, and submitted that under the special circumstances the court might dispense with the ordinary rule giving priority to the persons entitled in distribution, and make the grant without citing the parties having the priority. He cited

Savage v. Blyth, 2 Hagg. Ecc. App. 150.

Lord PENZANCE.—I think the grant ought to go as prayed. Where the court is bound by the statute I believe the law is correctly stated in Williams on Executors, that the court requires that the party having the prior right to administration should be cited. But as the learned writer observes, in cases where the court has discretion and where the party entitled to priority is not cited by statute, but by the practice of the court, the court has sometimes dispensed with the necessity of that citation. In applying that principle to this case, there is to be considered that the person in whose favour the grant is asked represents three-quarters of the estate—one half as legatee, the other quarter as next of kin. There is also the obvious convenience of giving the grant *de bonis non* to the administrator of the next of kin, and the fact that those entitled in distribution are difficult to be found, and are perhaps dead. Taking all these things into consideration, I think the court ought to make the grant as prayed, but security ought to be given for the remaining one-fourth.

Attorney: *Smallpiece*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

April 30, and May 4.

(Before BOVILL, C.J., WILLES, BYLES, and HANNEN, JJ., and CLEASBY, B.)

REG. v. JESSE SMITH.

Feloniously receiving—Partners—24 & 25 Vict. c. 96, s. 91, and 31 & 32 Vict. c. 116, s. 1.

A partner stole goods belonging to the firm, and rendered himself liable to be dealt with as a felon under the 31 & 32 Vict. c. 116, s. 1, and sold the same to the prisoner who knew of their having been stolen.

Held, that the prisoner could not be convicted on an indictment for feloniously receiving under the 24 & 25 Vict. c. 96, s. 91, but might have been convicted as an accessory after the fact under the 24 & 25 Vict. c. 94, s. 3, on an indictment properly framed.

Case reserved for the opinion of this court by Arthur R. Adams, Esq., sitting as Commissioner at the Spring Assizes, 1870, on the Midland Circuit.

Jesse Smith was indicted for receiving certain goods, the property of George Morton and another, knowing the same to have been feloniously stolen, and was tried before me at the last assizes for the West Riding of Yorkshire, at Leeds.

The facts of the case were as follows: George Morton was in partnership with one R. F. Martin, at Leeds, and carried on business in that town as ironmongers, under the firm of R. F. Martin and Co. The goods sold there were principally supplied by William Morton, of Birmingham, trading under the firm of Haines and Morton. In consequence of certain rumours as to the solvency of his firm,

George Morton came to Leeds on the 18th Dec. 1869, and made arrangements with his partner, R. F. Martin, to secure the debt due to Haines and Morton, by giving a bill of sale of the goods then in the shop, and whilst this document was being prepared, George Morton left Leeds and went to Sheffield.

During his absence his partner R. F. Martin had interviews with the prisoner, and before the return of George Morton, shut (14th Dec.) up the shop, and in the evening of following day (15th Dec.), he hired drays, and in the presence of the prisoner conveyed the whole of the goods to the house of the prisoner, who apparently paid 100*l.* for them to R. F. Martin. The goods were proved to be worth considerably more than 300*l.*

From conversations with William Morton, the father of George Morton, it was evident that the prisoner was aware of the intended bill of sale, and that R. F. Martin was disposing of these goods in fraud of his partner, and to prevent the operation of the bill of sale.

It was objected on the part of the prisoner, that even if it were proved that R. F. Martin had committed an act of felony against his partner under the provisions of 31 & 32 Vict. c. 116, s. 1, and that he had been guilty of larceny of the partnership goods, yet that the prisoner could not be indicted for receiving such goods, knowing them to be stolen, as that statute had not made such receiving a felony, and that under the provisions of the Larceny Consolidation Act (24 & 25 Vict. c. 96, s. 91), only persons who received goods, the stealing of which amounted to a felony either at common law or under the provisions of that Act, could be indicted as receivers; and as the stealing by a partner was not a larceny at common law, nor under the provisions of the Consolidated Act, no receiver of such goods could be indicted for a felony.

As this was the first case that had occurred since the passing of the Act 31 & 32 Vict. c. 116, and thinking it more prudent that a point of such importance should be decided by a court of appeal, I declined to stop the case.

The jury finally found the prisoner guilty of receiving the goods, knowing them to be stolen, and I released the prisoner on good bail to appear at the next Assizes if necessary.

I have now to request the opinion of the Justices of either Bench and the Barons of the Exchequer, whether this prisoner has been properly convicted.

ARTHUR R. ADAMS,

A Commissioner of Assize on the Midland Circuit.

Waddy for the prisoner.—It is submitted that this conviction cannot be sustained. The point arises on the construction of the statutes 24 & 25 Vict. c. 96, s. 91, and the 31 & 32 Vict. c. 116, s. 1. The former statute enacts that whosoever shall receive any chattel, money, &c., or other property, the stealing, taking, or embezzling whereof shall amount to a felony, either at common law or by virtue of that Act, knowing the same to have been feloniously stolen, taken, or embezzled, shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and shall be liable, on conviction, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three, or to be imprisoned for any term not exceeding two years. The prisoner could not have been indicted under that statute *per se* for feloniously receiving, for the taking of the goods by Martin, the partner of Morton, was not a felony. But then came the 31 & 32 Vict. c. 116, s. 1, which enacted that if any one, being a member of any co-partnership, or being one of two or more beneficial owners of any money

C. CAS. R.]

REG. v. JESSE SMITH.

[C. CAS. R.]

goods, &c., or other property, shall steal or embezzle any such money, goods, &c., or other property, he shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been, or was not, a member of such co-partnership or one of such beneficial owners. In *Reg. v. Talbot*, LAW TIMES, vol. xlviii., p. 494, there is a dictum of Martin, B. reported, which bears upon this point. The prisoner was indicted for stealing a horse, which was alleged to belong to A. and B., and, according to the case for the prosecution, the prisoner was entrusted with the horse to take to P.'s, but instead of taking it to P.'s, he sold it, and appropriated the proceeds to his own use. The prisoner's defence was that he was a partner with A. and B., in the ownership of the horse; and Martin, B. said: "If the prisoner's defence is true, he must be acquitted. The case does not come within the 31 & 32 Vict. c. 116. That statute applies to the case of a large trading co-partnership or society, and not to the joint ownership of two or three persons of a particular chattel." The offence of feloniously receiving goods is not a common law offence, but a statutable one. [BYLES, J.—Is not a receiver an accessory after the fact at common law?] In the case now before the court, Martin, the principal, was not guilty of any offence at common law; his offence is created by the recent statute. The 31 & 32 Vict. c. 116, s. 1, does not say that the fraudulent partner shall be guilty of felony, but that he shall be liable to be tried, convicted, and punished as if he had not been, or was not, a member of such co-partnership or one of such beneficial owners. The 31 & 32 Vict. c. 116, is not incorporated into the 24 & 25 Vict. c. 96.

Hawkins, P. C. bk. 1, c. 7, ss. 6, 6.

Campbell Foster for the prosecution.—The conviction was right. The prisoner was an accessory after the fact to the stealing by Martin, and by the 24 & 25 Vict. c. 94, s. 3, it is enacted that whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall, or shall not, be amenable to justice. In the present case the prisoner was indicted for the substantive felony of receiving. The object of the 31 & 32 Vict. c. 116 was to take away the immunity of partners from punishment for fraudulently disposing of partnership property previously existing. Now a partner may be dealt with in this respect as a stranger. Moreover, Martin, the principal, was a fraudulent bailee, within the meaning of sect. 3 of 24 & 25 Vict. c. 96 of his partner's share. Although the 31 & 32 Vict. c. 116 created a new felony, still the 24 & 25 Vict. c. 96 being *in pari materia* applies to it: Dwarris on Statutes, 634—5.

Waddy, in reply, cited
Rea v. Hardy, 6 T. R. 286.

Cur. adv. vult.

May 4.—WILLES, J. now delivered the judgment of the court.—The prisoner was convicted for feloniously receiving stolen goods knowing them to have been stolen *contra formam statuti*, &c. There was no count charging the prisoner as accessory before or after the fact. The statement of facts shows evidence of a receipt of goods, stolen by one partner of the firm, with knowledge of their being so stolen. It further states facts, which might perhaps have been relied upon to sustain a charge of being simply accessory to the felony, if the indictment had con-

tained a count to that effect. We must, however, deal with the only question raised, viz., whether the conviction upon the special charge of feloniously receiving stolen goods can be sustained. The 91st section of 24 & 25 Vict. c. 96, creates the felony charged in these terms, "whosoever shall receive any chattel, &c., the stealing, &c., whereof shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, &c., shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and shall be liable at the discretion of the court" to a maximum sentence of fourteen years' penal servitude. At the time that Act (24 & 25 Vict. c. 96), was passed, theft by a partner of the goods of the firm did not fall within the criminal law either common or statute. This defect was supplied by 31 & 32 Vict. c. 116, which after reciting that it is "expedient to provide for the better security of the property of co-partnerships and other joint beneficial owners against offences by part owners thereof, and further to amend the law as to embezzlement," proceeds to enact by the 1st section, that if a partner or one of two or more beneficial owners shall steal, &c., any property of such co-partnership or such joint beneficial owners, "every such person shall be liable to be dealt with, tried, convicted, and punished for the same, as if such person had not been or was not a member of such co-partnership or one of such beneficial owners." This enactment is therefore limited in words to the fraudulent partner, and does not directly extend to third persons who deal with the property though in collusion with such partner. In order to reach such persons either the law as to accessories must be resorted to, or it must be shown that the 24 & 25 Vict. c. 96, s. 91, is extended by implication to and to be read as incorporated in the 31 & 32 Vict. c. 116. As to the law of accessories, we do not suggest any doubt that if a statute creates a felony or a misdemeanor it by implication forbids counselling, aiding, or abetting the offence. This is now provided for in language strongly contrasting with that of 24 & 25 Vict. c. 96, s. 91, as to felony, by 24 & 25 Vict. c. 94, s. 1, that "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed, or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon. The case of accessories after the fact is provided for in like prospective terms by sect. 3. Also as to misdemeanors by sect. 8, "whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by any Act passed or to be passed, shall be liable to be tried, &c., as a principal offender." And apart from these enactments, the common law would have supplied a remedy, though without the statutory facilities of procedure. As already pointed out, however, the conviction of the prisoner is not as of a simple accessory, whether before or after the fact, and it cannot be sustained upon that footing. The question, therefore, depends upon whether the 24 & 25 Vict. c. 96, s. 91, is extended by inference or implication to the present case. If not, the conviction was wrong, because at common law receivers of stolen goods, unless they likewise received and harboured the thief, were guilty of a bare misdemeanor, for which they were liable to fine and imprisonment (*Foster's Crown Law*, 373), and there could not be a conviction for a misdemeanor upon the present indictment for felony. The subject of extending statutes by inference to include cases not originally contemplated, is one which has given rise to several decisions, the leading characteristic of which is that the earlier statute deals with a genus, within which a

C. CAS. R.]

REG. v. CHUGG.

[C. CAS. R.]

new species is brought by a subsequent Act. Thus choses in action were not originally within the 13 Eliz. c. 5, against fraudulent conveyances, that statute being applicable only to property which could be taken in execution (*Sims v. Thomas*, 12 A. & E. 530); but, as to choses in action made subject to execution by 1 & 2 Vict. c. 110, there can be no doubt that by the conjoint operation of that Act and the 13 Eliz. c. 5, such choses in action having become, by new enactments, a species of the genus property subject to execution, and without any express enactment to that effect in the later statute, become subject to the operation of the former Act (*Norcutt v. Dodd*, C. & P. 100; *Barrach v. McCullough*, 26 L. J. 100, Ch.), so that if the 24 & 25 Vict. c. 96, s. 91, is to be read as a general enactment, that for the future any person receiving goods stolen with a guilty knowledge that they were stolen should be liable to be indicted for felony as a receiver, the subsequent statute having introduced a new species of larceny, it might have been contended that the general provision as to receiving in the former statute was by inference extended to the new species of larceny. There are, however, several difficulties in the way of arriving at that result upon the construction of 24 & 25 Vict. c. 96. First, the express words of sect. 91, "either at common law or by virtue of this Act;" secondly, the fact that the statute as to simple accessories does expressly refer to acts *pari materia* to be passed; thirdly, the character of the extending enactment 31 & 32 Vict. c. 116, which deals not so much with property of a particular species as with a class of persons whom it specifies, and against whom only it is in terms directed, viz., partners and part owners, so that the effect is to create a new class of offenders; fourthly, the rule peculiarly applicable to the elaborate criminal legislation of which the statutes under consideration form a part, against extending penal enactments by construction. This latter rule may be illustrated by reference to the statute of 31 Eliz. c. 12, s. 5, which took away the benefit of clergy from an accessory in horse stealing, upon which it was held that the enactment extended only to such persons as were in judgment of law accessories at the time the Act was made, namely, accessories at common law, and not to such as are made accessories by subsequent statutes; and therefore a person knowingly receiving a stolen horse, though made an accessory by subsequent statutes, was held not to be ousted of the benefit of clergy by the statute of Elizabeth (*Foster* 372). Upon these grounds we think the statute (24 & 25 Vict. c. 96, s. 91), cannot be extended by construction so as to include a receiver of property stolen by a partner, so as to make such receiver liable in the discretion of the court to the graver punishment of fourteen years' penal servitude thereby imposed, as the prisoner would be if this conviction was sustained, a circumstance which makes the authority cited from *Foster* especially applicable. The conviction must therefore be quashed.

Conviction quashed.

Saturday, May 7.

(Before BOVILL, C. J., WILLES, BYLES, and HANNEN, JJ., and CLEASBY, B.)

REG. v. CHUGG.

Perjury—Affiliation summons—Jurisdiction of justices—7 & 8 Vict. c. 101, s. 2.

The mother of a bastard child, born on the 20th March 1868, applied to a justice, on the 18th April 1868, for a summons against the defendant, the putative father, under 7 & 8 Vict. c. 101, s. 2. A summons

was issued on the same day, but never served, as the defendant could not be found by the process-server to whom the summons was given. On the 14th Jan. 1870, about a fortnight after the mother had found out the defendant's address, she applied for and obtained another summons, which was served on the defendant, and he appeared thereto, and, being examined on oath, committed the perjury assigned:

Held, that the justices had jurisdiction to hear the complaints, although at the time of service of the summons more than twelve months had elapsed from the birth of the child.

Case reserved for the opinion of this court by Hannen, J.

The prisoner was tried before me at the Devon Spring Assizes, on an indictment charging him with perjury in his evidence on the hearing of an information and complaint in bastardy at a petty sessions of the justices for the peace acting for the division of Braunton, in the county of Devon, wherein one Betsy Hill was the complainant and the prisoner was the defendant.

It was proved that Betsy Hill was delivered of a bastard child on the 20th March 1868, and that on the 18th April 1868, she duly laid an information before a justice of the petty sessional division in which she resided that the prisoner was the father of such child, and made application for a summons to be served upon the prisoner to appear and answer her complaint.

On this information a summons was, on the 18th April 1868, issued by the said justice requiring the prisoner to appear on the 6th May 1868, to answer the complaint of the said Betsy Hill.

It was proved by the police constable to whom the said summons was given for the purpose of serving it on the prisoner, that he inquired for the prisoner at his house, but that he was not there, and that he made search for him, but could not find him.

Betsy Hill stated that the prisoner was away from his home at the time the summons was issued, and that she did not see the prisoner or know where he was until about a fortnight before the 14th Jan. 1870, on which day she applied for and obtained a summons, calling on the prisoner to appear on the 2nd Feb. 1870, to answer her complaint.

The following is a copy of this summons:

To William Chugg, of the parish of Chittleham-holt, in the said county, farmer's son.

Devon to wit. Whereas, application was, on the 18th April 1868, made to me, the undersigned, one of Her Majesty's justices of the peace for the said county, by Betsy Hill, single woman, residing at Tawstock, in the petty sessional division of Braunton, in the said county, for which I act, who had then been delivered of a bastard child, since the passing of the Act of the eighth year of Her present Majesty, intituled "An Act for the further Amendment of the Laws relating to the Poor in England," within twelve calendar months from the said 18th April 1868, and of which bastard child she alleges you to be the father, for a summons to be served upon you to appear at a petty session of the peace, according to the form of the statute in such case made and provided. These are, therefore, to require you to appear at the petty session of the justices, to be holden at the Guildhall, Barnstaple, in the said county, being the petty session for the division of Braunton, in which I usually act, on Wednesday the 2nd Feb. next, at twelve o'clock at noon, to answer any complaint which she shall then and there make against you touching the premises. Herein fail you not.

Given under my hand, at Barnstaple, in the county aforesaid, this 14th Jan. 1870.

JAMES J. HIERN.

This summons was served on the prisoner, and he appeared in obedience to it on the day named thereon, when he stated, on oath, that he did not know the said Betsy Hill, and had never seen her before.

It was objected, on behalf of the prisoner, that the justices had no jurisdiction to hear the complaint, more than twelve months' having elapsed between the birth of the child and the application

C. CAS. R.]

REG. v. WILLIAM KAY.

[C. CAS. R.]

of Betsy Hill for the summons to which the prisoner appeared.

I reserved the point.

The jury found the prisoner guilty, and I sentenced him.

JAMES HANNEN.

Carter, for the prisoner: The justices had no jurisdiction to hear the complaint. The first summons was not proved in evidence. The summons of the 14th Jan. 1870, which was proved and is set out contains a false recital. [WILLES, J.—If the putative father appears before the magistrates, that is sufficient to give them jurisdiction so as to support a conviction for perjury against him: (*Reg. v. Smith*, L. Rep. C. C. R. 110; 11 Cox C. C. 10.)] If it was a mere question of process, that would be so. By the 7 & 8 Vict. c. 101 s. 2 the mother of a bastard child may apply within twelve months from the birth for a summons to be served on the putative father, and the magistrates are thereupon to issue their summons to him to appear at the petty sessions. The summons must be issued and served within the twelve months. [BOVILL, C. J.—Why so? Suppose the application made on the last day of the twelve months, and summons then issued but not served until the next day, would not that be good?] Then the proceedings would be all so continuous that it might be good. In this case a service of the first summons might have been made; it might have been left at the last place of abode of the putative father: (*Reg. v. Damarell*, 8 B. & S. 659.) The application must be made within twelve months from the birth to give jurisdiction: (*Potts v. Cambridge*, 27 L. J. 62, M. C.) The following cases were also cited:

Reg. v. Scotton, 59 B. 493;
Reg. v. Brown, 1 L. T. Rep. N. S. 29;
Reg. v. Davis, 22 L. J. 143, M. C.;
Reg. v. Derry, 28 L. J. 86, M. C.;
Reg. v. Pickford, 30 L. J. 133, M. C.;
Reg. v. Lightfoot, 25 L. J. 115, M. C.;
Reg. v. Thomas, 8 L. T. Rep. N. S. 460.

Murch, for the prosecution, was not called upon.

BOVILL, C. J.—When the clauses of the Acts upon which this question depends are looked at it will appear that the decision of the learned judge at the trial was right, and that this conviction was proper. In this case the jurisdiction of the magistrates depends on this, whether the application of the mother of the bastard child for the summons against the putative father was made within twelve months after the birth of the child. Upon the facts it appears that the application was made within the twelve months, and that a summons thereupon issued, but was not served. The statute makes a marked distinction between the application and the summons. The application must necessarily be made within the twelve months, and the magistrates are required thereupon to issue a summons (7 & 8 Vict. c. 101 s. 2), but the summons need not be served within the twelve months. Indeed, there is no enactment which requires the summons to be served within any particular time. If there were, the parties sought to be charged would absent themselves to avoid service, as was the case in *Potts v. Cambridge*. The subsequent statute, 8 & 9 Vict. c. 10, leaves this question where it was before. The forms given by that Act are such as it shall be sufficient to use to free the proceedings from technical objections. The question reserved for our opinion is concluded by *Potts v. Cambridge*, where it was held that the summons need not be served until twelve months after the birth of the child. The conviction must therefore be affirmed.

The rest of the court concurred.

Conviction affirmed.

Saturday, June 4.

(Before BOVILL, C. J., WILLES, BYLES, AND HANNEN, JJ., and CLEASBY, B.)

REG. v. WILLIAM KAY.

Forgery Act (24 & 25 Vict. c. 98), s. 24—*Making a written request to pay money without authority* (a.)

A. deposited with a building society 460*l.* for two years at interest through the prisoner, who was an agent of the society. Having obtained the deposit note from A., who gave it up on receiving an accountable receipt for 500*l.*, being made up by the 460*l.* and interest, the prisoner wrote, without authority, the following document: "Received of the S. L. Building Society the sum of 417*l.* 13*s.* on account of my share, No. 8071, pp. Susey A., Wm. Kay," and obtained 417*l.* 13*s.* by means thereof, and giving up the deposit note. The jury having found that by the custom of the society such documents were treated as an "authority to pay," and as a "warrant to pay," and as a "request to pay," money, the prisoner was convicted under the 24 & 25 Vict. c. 98, s. 24.

Held that the conviction was right.

Case reserved for the opinion of this court by Arthur R. Adams, Esq., sitting as a commissioner at the Spring Assizes 1870, on the Midland Circuit!

William Kay was indicted for feloniously making by procuration in the name of one Susey Ambler, a security for money, to wit 417*l.* 13*s.*, without lawful authority or excuse with intent to defraud.

In the second count he was charged as in the first count, except that it was stated that he made the security without the lawful authority of the said Susey Ambler.

The third and fourth counts were as the first and second, except that the document was described as a "warrant."

The fifth and sixth counts were as the first and second, but the document was described as an "order."

The seventh and eighth counts were also as the first and second, but the document was described as an "authority for the payment of money."

The ninth and tenth counts were also as the first and second, but the document was described as a "request for the payment of money."

In ten other counts the prisoner was charged with feloniously signing by procuration like documents as in the other counts *mutatis mutandis*, and was tried before me at the last assizes for the West Riding of Yorkshire, at Leeds.

The document forming the subject of the indictment, was in the following form:

Thornton, Oct. 1867.

Received of the South Lancashire Building Society the sum of 417*l.* 13*s.* on account of my share, No. 8071.
 PP. SUSEY AMBLER.
 417*l.* 13*s.* WM. KAY.

The prisoner was the local agent at Thornton, of a

(a) The 24 & 25 Vict. c. 98 (The Forgery Act), s. 24, enacts that whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange or promissory note, or any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority, or request so drawn, made, signed, accepted, or indorsed by procuration or otherwise, without lawful authority or excuse, as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.